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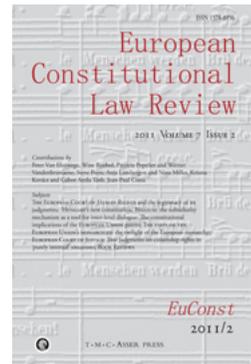
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Court of Justice of the European Union

European Citizenship Rights in Internal Situations: An Ambiguous Revolution?

Decision of 8 March 2011, Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM)*

Anja Lansbergen & Nina Miller*

On 8 March 2011 the Grand Chamber of the European Court of Justice delivered a landmark ruling granting a right of residence under European Union law to the third country national parent of a European citizen child who had yet to exercise his right of free movement within the Union. The decision in *Ruiz Zambrano*¹ opens the door for the acquisition of European citizenship rights (and, consequently, secondary rights derived by third country nationals) in what have previously been considered 'internal situations' outwith the scope of Union law. Member states are thus prohibited from applying national immigration laws to a significant group of third country nationals; a group comprised at the minimum of parent care-givers of minor nationals and potentially extending by analogy to family members of all nationals.

Though the implications of the judgment are potentially enormous, and despite condemnation of existing legal uncertainty in the application of the internal principle to European citizenship provisions by Advocate-General Sharpston,² the scope of the judgment and reasoning of the Court are frustratingly opaque. The following note will explore some of the questions arising out of the cursory judgment in an attempt to probe the scope of the decision and its ramifications for the evolution of European citizenship.

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¹ ECJ 8 March 2011, Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM)*.

² Opinion of Advocate-General Sharpston 30 Sept. 2010, *supra* n. 1, para. 141.

THE FACTS

Mr Ruiz Zambrano and his wife are both Columbian nationals. They entered Belgium in 1999 along with their first child on a visitor's visa from Columbia. Shortly after their arrival Mr Ruiz Zambrano made an unsuccessful application for asylum, resulting in the issue of an order requiring him to leave the country. The order contained a *non-refoulement* clause stipulating that he was not to be repatriated to Columbia.

Mr Ruiz Zambrano continued to reside with his family in Belgium, where he was registered with the relevant municipal authority. He made several unsuccessful applications for a residency permit in an attempt to regularize his status in Belgium, and in 2001 commenced full time employment despite being ineligible under national law to receive a work permit. In 2003, whilst irregularly resident in Belgium, Mrs Ruiz Zambrano gave birth to the couple's second child, followed by the birth of their third child in 2005. In accordance with Belgian national law both of these children acquired Belgian nationality at birth.³

The dispute in the proceedings before the referring tribunal concerns a claim made by Mr Ruiz Zambrano to receive unemployment benefit in respect of two periods of time during which his employment was suspended. His success turns under national law upon whether he had a right of residence in Belgium during the period of time over which he was in employment and had made the necessary social security contributions. The main issue referred for determination by the European Court of Justice was whether Mr Ruiz Zambrano derived a right of residency in Belgium under Union law following the birth of his EU citizen children in 2003 and 2005, notwithstanding that they had yet to exercise their right of free movement within the Union.

³At the time at which the children were born, Art. 10(1) of the Belgian Nationality Code granted Belgian nationality to 'any 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.' Mr Ruiz Zambrano's children fell within the scope of this provision by operation of the relevant Colombian legislation, which provided that children born outside the territory of Colombia do not acquire Colombian nationality unless an express declaration is made to that effect with the appropriate consular officials. No such declaration was made in respect of Mr Ruiz Zambrano's children (Sharpston, *supra* n. 2, n. 8). The Belgian Nationality Code has since been amended such that a child born in Belgium to non-Belgian nationals will not acquire Belgian nationality 'if, by appropriate administrative action instituted with the diplomatic or consular authorities of the country of nationality of the child's parent(s), the child's legal representative(s) can obtain a different nationality for it' (Sharpston, *supra* n. 2, paras. 16-17).

OPINION OF ADVOCATE-GENERAL SHARPSTON

Advocate-General Sharpston identified from the questions referred for preliminary reference three principal issues that fell to be determined by the Court: whether Article 20 and Article 21 TFEU could be invoked by Mr Ruiz Zambrano's children notwithstanding that they had yet to exercise their right to free movement within the Union; whether Article 18 TFEU can be applied so as to resolve instances of 'reverse discrimination'; and whether EU fundamental rights can be relied upon independently of the exercise of a 'classic' Union right.⁴

By way of a 'prologue', Advocate-General Sharpston first determined that refusal of a residence permit to Mr Ruiz Zambrano would constitute a breach of the EU fundamental right to family life, should subsequent consideration of any of the three alternative mechanisms succeed in establishing that Mr Ruiz Zambrano fell within the scope of European Union law.⁵ Turning then to consider the scope of application of Article 20 and 21 TFEU, Sharpston argued that the right of residence contained within Article 21 TFEU is a free-standing right that can be exercised in the absence of movement.⁶ This right, she considered, would be infringed by a refusal of residency to the parent due to the inevitable consequence that the EU citizen children would be forced to leave the territory of the member state along with the parent. Moreover, Sharpston considered that even if the Court should fail to accept that the right of residence is a freestanding right, infringement of the child's right to 'move and reside' within the territory of the Union nevertheless occurs by excluding from them the potential to exercise that right in the future, by analogy with the reasoning in *Rottmann*.⁷ Such a situation is not 'purely internal', but falls within the scope of EU law 'by reason of its nature and its consequences'; namely that it will for all intent and purpose cause the citizen to lose those rights conferred on them by the Treaties.

Turning to the second issue, Sharpston invited the Court to 'deal openly with the issue of reverse discrimination'⁸ in order to resolve the legal uncertainty created by the Court's 'generous interpretation' of cross border movement and the 'random' results that application of the requirement creates. In suggesting how the Court might clarify such uncertainty, Sharpston advocated three conditions that she considered would cumulatively establish clear boundaries regarding those circumstances in which 'reverse discrimination' would be prohibited under Article 18 TFEU: that the situation of the static citizen is comparable in all other mate-

⁴ Sharpston, *supra* n. 2, paras. 50-52.

⁵ Sharpston, *supra* n. 2, para. 62.

⁶ Sharpston, *supra* n. 2, paras. 84-88 and 100-101.

⁷ ECJ 2 March 2010, Case C-135/08, *Rottmann v. Freistaat Bayern*; Sharpston, *supra* n. 2, paras. 95-96.

⁸ Sharpston, *supra* n. 2, para. 139.

rial respects to migrant citizens capable of invoking rights; the resulting reverse discrimination would entail violation of a fundamental right (defined in reference to case-law of the European Court of Human Rights); and the national law fails to provide adequate protection of that right.

Sharpston proceeded to consider the role of fundamental rights in the Union legal order, arguing that the availability of such protection should be 'dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on the existence and scope of a material EU competence.'⁹ European fundamental rights should, she contended, protect the European citizen in all areas of Union competence (whether exclusive or shared), irrespective of whether that competence had yet to be exercised. Sharpston however conceded that such a step could not be taken unilaterally by the Court, and that the fundamental right to family life under EU law could not currently be invoked as a free-standing right independently of any other link with EU law.¹⁰

JUDGMENT OF THE GRAND CHAMBER

In contrast to the detailed and comprehensive analysis of issues presented by Advocate-General Sharpston, the judgment of the Court is, to say the least, brief. Its operative part consists of ten short paragraphs.

The Court first made the preliminary observation that Directive 2004/38/EC applies only to those citizens 'who move to or reside in a member state other than that of which they are a national' and therefore does not apply to a situation such as that at issue.¹¹

In turning to the substance of claim, the Court asserted 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.'¹² Refusal of a residency permit to the parent of EU citizen children would, the Court considered, lead to a situation where the 'those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents.'¹³ Furthermore, refusal of a work permit to the parent would risk the parent 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.'¹⁴

⁹ Sharpston, *supra* n. 2, para. 163.

¹⁰ Sharpston, *supra* n. 2, paras. 171-173.

¹¹ ECJ, *supra* n. 1, para. 39.

¹² ECJ, *supra* n. 1, paras. 42-44.

¹³ ECJ, *supra* n. 1, para. 44.

¹⁴ ECJ, *supra* n. 1, para. 44.

The Court on these grounds concluded that Article 20 TFEU

precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.¹⁵

SCOPE OF THE JUDGMENT

Unfortunately, the cursory judgment delivered by the Court raises many more questions than it answers. In effecting an apparently seismic shift in both the scope and content of citizenship rights without any exploration of the underlying principles, any exposition of the specific grounds upon which it made the decision, or any other indications as to the reach of its implications, the value of the Court's 'clarification' is dubious at best. Whilst one commentator has noted that the brevity of the judgment means, '[o]n the positive side, [that] the case is very clear and there is no space for ambiguity',¹⁶ others may feel that, by leaving unanswered many of those identified by Advocate-General Sharpston, it simply muddies the waters. Some of the main questions arising from the Court's decision will be explored below in order to explore the potential scope and effects of the ruling in *Ruiz Zambrano*.

Substance of rights attaching to European citizenship

The potential scope of the decision in *Ruiz Zambrano* is defined essentially by those circumstances in which an individual is deprived of the 'genuine enjoyment of the substance of the rights attaching to the status of European Union citizen' and thereby falls within Union law. Traditionally, application of the 'internal situation' principle means that European citizenship rights are derived only upon cross-border movement throughout the Union. The decision in *Ruiz Zambrano* would seem to alter this position, suggesting that such rights can now be enforced against the home member state in the absence of movement. Whether *Ruiz Zambrano* will achieve this legacy turns upon an interpretation of the Court's finding of deprivation of the substance of European citizenship; namely, what the Court

¹⁵ ECJ, *supra* n. 1, para. 45.

¹⁶ E. Guild, 'The Court of Justice of the European Union and Citizens of the Union: A Revolution Underway? The Zambrano judgment of 8 March 2011', <eudo-citizenship.eu/citizenship-news/453-the-court-of-justice-of-the-european-union-and-citizens-of-the-union-a-revolution-underway-the-zambrano-judgment-of-8-march-2011>, visited 22 March 2011.

considered the nature of those substantive rights to be. Two alternative lines of reasoning presented by Advocate-General Sharpston point to differing interpretations of the Court's decision in *Ruiz Zambrano*.

First, the substantive right possessed by Mr Ruiz Zambrano's children, of which they would have been deprived by the refusal of residence to him, may have been a right to reside in the member state of which they are nationals. The right to reside under Article 20 and Article 21 TFEU is under this interpretation derived in the absence of a requirement for cross-border movement and is enforceable directly against the home member state. This seemed to be the favourable position adopted by Sharpston, who suggested that the right to reside 'is a free-standing right, rather than a right that is linked by some legal umbilical cord to the right to move.'¹⁷

In arriving at this conclusion Sharpston drew reference to the importance of fundamental rights within the Union legal order, emphasising the degree of subtlety between existing case-law affording protection to fundamental rights in the absence of physical movement (specifically *Garcia Avello*), and the potential recognition of such rights simply by reason of residence in a member state.¹⁸ The 'paradoxical' outcomes that result from such untenable distinctions led Sharpston to conclude that

[if] one insists on the premiss that physical movement to a Member State other than the Member State of nationality is required before residence rights as a citizen of the Union can be invoked, the result risks being both strange and illogical ... Lottery rather than logic would seem to be governing the exercise of EU citizenship rights.¹⁹

Recognition by the Court in *Ruiz Zambrano* of a free-standing right of residence under Article 21 TFEU on the basis of the approach adopted by Sharpston would dictate that other citizenship rights could be equally invoked against the home member state in the absence of movement.²⁰ The requisite link with Union law is under this analysis provided by the citizenship right itself, such that European citizenship provisions by their very nature fall outside the 'purely internal' situation. This analysis of the Court's decision in *Ruiz Zambrano* directly contradicts the oft-cited statement in *Uecker and Jacquet* that 'citizenship of the Union, established by Article 8 of the EC Treaty, is not intended to extend the scope ratione

¹⁷ Sharpston, *supra* n. 2, para. 84.

¹⁸ Sharpston, *supra* n. 2, paras. 77-78 and 84.

¹⁹ Sharpston, *supra* n. 2, paras. 86-88.

²⁰ The internal application of Art. 20(2)(b) was argued before the Court of Session in Scotland in an attempt to secure enfranchisement in respect of Scottish Parliamentary elections for a British national prisoner ([2011] CSOH 65, Opinion of Lord Tyre in the cause of George McGeogh <scotcourts.gov.uk/opinions/2011CSOH65.html> visited 8 April 2011)

materiae of the Treaty also to internal situations which have no link with Community law.²¹ Arguably, however, the continued veracity of this statement had already been called into question by the Court's decision in *Rottmann*.

The ECJ in *Rottmann* was required to determine whether withdrawal of member state nationality fell within the scope of Union law by reason of the relationship between member state nationality and European citizenship. In determining that such issues did fall within the jurisdiction of the Court, the requisite link with Union law was established by virtue of the fact that loss of the nationality of a member state would in put the claimant 'in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.'²²

Arguably, then, it was in *Rottmann* that the Court had taken the determinative step of recognising the unique 'nature' of European citizenship rights as giving rise to the requisite link with Union law. *Ruiz Zambrano* simply applied to Article 21 TFEU the principle that the Court had already established in the context of the right to hold the status of European citizenship contained within the former Article 17 EC. That this was the necessary consequence of the decision in *Rottmann* is however open to debate.²³ If the Court in *Ruiz Zambrano* did intend to confirm this principle, its significance in effecting this change should not therefore be overlooked.

Should future decisions of the Court confirm that the effect of *Ruiz Zambrano* was to enable European citizenship rights to be relied upon in otherwise 'purely internal situations' the feasibility of retaining that principle in other areas of Union law is likely to be called into question. Though the extension of Union competence into traditionally purely internal situations is likely to be limited by the unique character and function of citizenship rights, the legitimacy of retaining the principle in areas that could equally point to a pressing need for wider inclusion under Union law is far from certain. The effect of the decision in extending the

²¹ ECJ 2 March 2101, Joined Cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen*, para. 42.

²² ECJ, *supra* n. 7, para. 42. Commentators have debated the significance attaching to Dr Rottman's prior exercise of Treaty rights and his former nationality of a second member state in determining that the situation was not 'purely internal'. Despite this having been the argument presented to the Court by Advocate-General Maduro, the judgment suggests that it was the threatened loss of citizenship rather than the original nationality that brought the case within the scope of Union law (H.U. Jessurun d'Oliveira, 'Decoupling Nationality and Union Citizenship?', 7 *European Constitutional Law Review* (2011) p. 138 at p. 141; G. René de Groot and A. Seling, 'The Consequences of the *Rottmann* Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters', 7 *European Constitutional Law Review* (2011) p. 150 at p. 153; Sharpston, *supra* n. 2, para. 78).

²³ For an alternative interpretation *see* text below between n. 25 and n. 27.

scope of Union law also reignites the well-rehearsed ‘kompetenz-kompetenz’ debate, calling into question the desirability of substantially re-defining the jurisdictional limits of Union law through unilateral action by the Court, particularly in the absence of any reasoned justification for doing so.

The second possible interpretation of the Court’s decision in *Ruiz Zambrano* is more limited in its consequences. The substantive right of which Mr Ruiz Zambrano’s children were in danger of being deprived may have been the right to ‘move and reside’ throughout the Union in the future, rather than a self-standing right to reside in their home member state in the present. This interpretation draws support from arguments explored by Sharpston, and the narrow interpretation of the decision in *Rottmann* that she presents.²⁴

In outlining the issue of whether Mr Zambrano’s children can rely on their citizenship rights in an otherwise purely internal situation, Sharpston acknowledges that the issue necessitates consideration of ‘whether Article 21 TFEU encompasses two independent rights – a right to move *and* a free-standing right to reside – or whether it merely confers a right to move (and *then* reside).’²⁵ Though apparently preferring the former, Sharpston proceeds to offer an alternative argument that establishes the link with Union law even in the event that the scope of Article 21 TFEU is limited to the latter.

This argument, which she constructs around a particular interpretation of *Rottmann*, is built upon looking to the future effects of deprivation of the rights attaching to European citizenship. In considering the grounds upon which the Court in *Rottmann* established the requisite link with EU law, Sharpston emphasises that ‘the judgment ... looks exclusively to the *future* effects that withdrawal of German citizenship would have by rendering Dr Rottmann stateless.’²⁶ Sharpston thus presents an analysis of *Rottmann* in which the determinative link with Union law is not necessarily the nature of a self-standing citizenship right in the present (i.e., the right to possess the status of European citizenship), but may equally be supplied through the possibility of future deprivation of citizenship rights consequential upon losing this status. In doing so she subordinates the relevance of the Court’s reference in *Rottmann* of the ‘nature’ of citizenship to that of the ‘consequences’ of its deprivation, and subordinates the importance of the ‘status’ of citizenship to the ‘rights attaching thereto.’

Sharpston invites the Court to apply this interpretation of *Rottmann* to the future exercise of the right to ‘move and reside’ throughout the Union in *Ruiz Zambrano*. Denial of a residency permit to Mr Zambrano would result in the children being forced to leave the territory of the Union, which Sharpston argues

²⁴ ECJ, *supra* n. 7; Sharpston, *supra* n. 2, paras. 78 and 93-97.

²⁵ Sharpston, *supra* n. 2, para. 50 (emphasis in original).

²⁶ Sharpston, *supra* n. 2, para. 78 (emphasis in original).

‘would, in practical terms, place [them] in a ‘position capable of causing them to lose the status conferred [by their citizenship of the Union] and the rights attaching thereto.’²⁷ The ‘substance’ of the childrens’ right as European citizens in *Ruiz Zambrano* is under this analysis not a right of residence in the home member state, but rather the right of residency in a second member state upon movement throughout the Union. The children would be deprived of the potential to exercise this right were they forced to leave the territory of the Union along with their parent: a European citizen cannot move throughout the territory of the Union and reside in a second member state, if unable initially to reside within his home member state.

This interpretation of *Ruiz Zambrano* (and that of *Rottmann*, upon which it relies) leaves open the possibility that the internal situation principle remains intact in its application to citizenship rights. The requisite link with Union law is established not by the invocation of a citizenship right *per se*, but rather by the nature of the national measure in question as a *conditional parameter* for the future exercise of citizenship rights. This interpretation need not affect the traditional position that the acquisition of European citizenship rights under Union law is preconditioned by the requirement of movement. *Rottmann* and *Ruiz Zambrano* arguably align to carve out a unique protection of the *potential* to exercise citizenship rights, such that the two sole and necessary conditions required for the future exercise of citizenship rights are brought within the scope of EU law: status and residency. *Ruiz Zambrano* under this analysis therefore both applies but also exhausts the reasoning in *Rottmann*.

The Court gives little indication in its judgment as to the grounds on which its decision is based. The formulation of the operative part of the judgment in terms of deprivation of the ‘genuine enjoyment of the substance of the rights attaching to the status of European Union citizen’ mirrors closely that set out in *Rottmann*. Whilst both suggested interpretations of *Ruiz Zambrano* essentially draw legitimacy from diverging interpretations of *Rottmann*, Sharpston in her submissions to the Court made explicit reference to that case solely in relation to the children’s right to ‘move-and-reside’ in the future. In the absence of any other indications by the Court, it would thus be plausible to assume that in formulating the principle so as to mirror that in *Rottmann* it was the Court’s intention to adopt and apply the reasoning suggested by Sharpston in that regard. Such intention of the Court would preclude its recognition of self-standing citizenship rights: the ‘future exercise’ reasoning would be redundant if Sharpston’s argument that citizenship rights by their very nature fall within the scope of Union law had been accepted.

²⁷ Sharpston, *supra* n. 2, para. 95.

That the Court frames its decision with reference to Article 20 TFEU rather than Article 21 TFEU may also be explained by this intended analogy, the former being the post-Lisbon transposition of Article 17 EC and the provision under consideration in *Rottmann*. The Court's reference in *Ruiz Zambrano* to Article 20 TFEU therefore not only signifies its reliance upon the reasoning in *Rottmann* (arguably reinforcing the analysis of that case presented by Sharpston), but moreover highlights that its decision is limited in application to the status and potential of European citizenship and does not extend so as to enable substantive citizenship rights to be invoked in the absence of movement.

In so far as both of the suggested interpretations secure residency for the family member concerned the distinction is purely conceptual. The latter analysis however limits the scope of the judgment in respect of the protection of other citizenship rights in internal situations, and makes its decision easier to reconcile with persistence of the internal principle in other areas of Union law.

Defining 'deprivation': residency for all non-EU national family members?

A second question left unanswered by the decision in *Ruiz Zambrano* concerns the scope of those family members to whom denial of residence would constitute a deprivation of the European citizen's genuine enjoyment of the substance of his rights. Given the primacy that the Court has previously accorded to the right to family life in determining infringements of the right to move and reside,²⁸ it would appear unlikely that future application of the principle in *Ruiz Zambrano* can legitimately be confined to the parent/child relationship on the grounds of physical dependency. It therefore seems probable that static EU citizens would, by reference to their fundamental right to a family life, be considered 'unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union' were their nuclear family members²⁹ unable to derive a right of residence under Union law.

Unfortunately, the question of whether a spouse can benefit from a right of residence under EU law in otherwise internal situations was not definitively an-

²⁸ Thus *Carpenter* highlighted 'the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms' (ECJ 11 July 2002, Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, paras. 38-39), whilst the Court in *Metock* observed that 'if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed' (ECJ 25 July 2008, Case C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform* para. 63)

²⁹ Case-law of the European Court of Justice suggests that definition of a family member is mostly limited to nuclear family members; see Sharpston, *supra* n. 2, para. 54.

swered by the subsequent case of *McCarthy*,³⁰ which called upon the Court to determine whether a European citizen had a right to be issued with a residence card by the member state of which she was a national notwithstanding that she had never exercised her right of free movement within the Union.

The established motivation behind the European citizen's application for a residency card in *McCarthy* was to derive a secondary right of residence under Union law for her spouse. Despite acknowledgment of this intention the Court was able, due to the national measure under consideration pertaining to the refusal of a residency permit to the European citizen rather than to the third country national family member, to side-step the issue of family unification by pointing to the European citizen's unconditional right to reside in her home member state under general principles of Union law. The European citizen was, the Court held, consequently not 'deprived of the genuine enjoyment of the substance' of the rights attaching to Union citizenship by the decision to refuse her a residency card.³¹

The immediate effect of the decision in *McCarthy* is that the spouse is ineligible to receive a residence permit. However, in re-iterating the formulation in *Ruiz Zambrano*, the judgment leaves open the possibility that a decision to deport the spouse would nevertheless deprive the claimant of the substance of her rights as a European citizen. Given the fact that the Court chose not to engage with this issue when it could feasibly have done so, and that in this context it appears to be retreating from the somewhat controversial position in *Ruiz Zambrano*, it is possible that if called upon to determine definitely whether deportation of a spouse would constitute a deprivation of citizenship rights the answer (contrary to all indicative prior reasoning by the Court) may well be 'no'.³²

McCarthy in this sense provides an important indication of the way in which *Ruiz Zambrano* may be applied in the future. By finding that there is no 'deprivation of genuine enjoyment' of the rights attaching to Union citizenship, the Court in *McCarthy* arguably strips the principle elaborated in *Ruiz Zambrano* of all content. An unconditional right to reside in one's home member state under general principles of EU law was of course equally applicable to the European citizen children in *Ruiz Zambrano*, whose 'deprivation' stemmed not from insufficient protection of their own residency status but that of their family member. Indeed, the same is true of any claim to residency applying against one's home member state. By omitting in *McCarthy* to give consideration to the right to a

³⁰ ECJ 5 May 2011, Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*; see P. van Elswege, 'European Union Citizenship and the Purely Internal Rule Revisited', 7 *EuConst* (2011) p. 308-324.

³¹ ECJ, *supra* n. 21, para. 49.

³² It should be noted here that the judgment in *McCarthy* was delivered by the Third Chamber of the European Court of Justice, whilst *Ruiz Zambrano* was decided by the Grand Chamber.

family life in determining an infringement (despite acknowledging the intention of the litigation in this regard), the Court has therefore effectively hollowed out from within the principle in so far as it applies to residency.³³ Given that there are strong indications to suggest that *Ruiz Zambrano* does not extend beyond establishing a claim to residency,³⁴ the result of the decision in *McCarthy* arguably both simultaneously purports to affirm the principle in *Ruiz Zambrano* and yet in essence completely undermines it.

Defining 'deprivation': a right of access to labour market?

A third question concerning the scope of the judgment relates to the apparent statement by the Court that not only residence, but also an access to the labour market for the third country national family member is necessary for European citizen to be able to enjoy substance of her rights. Is a claim to residency still preconditioned by an, albeit reconceptualised, requirement of sufficient resources? Or is the effect of *Ruiz Zambrano* to secure an unconditional right of access to the labour market for family members of static European citizens?

Treatment of this issue throughout the case is ambiguous. The referring court implicitly accepts the application of the self-sufficiency requirement to a family member in Mr Ruiz Zambrano's situation by asking whether Union law requires an exemption from holding a work permit to a non-EU national family member who otherwise 'fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment.'³⁵ Discussion of the requirement of sufficient resources is notable in its absence from Sharpston's otherwise comprehensive Opinion, and the Court refers to the issue solely in terms of whether Mr Ruiz Zambrano should be exempt from the requirement of a work permit, without clarifying the grounds on which this is relevant.

There are two possible interpretations of the Court's decision that withholding a work permit to Mr Ruiz Zambrano would deprive his children of the enjoyment of the substance of their rights as European citizens. First, the decision could mean that the unique nature of the right invoked the European citizen as against their own member state (whether it be a free-standing right of residence in the member state of which they are a national or the future right to 'move and reside') means that a family member in Mr Ruiz Zambrano's situation is free from the requirement of sufficient resources before being eligible for residency. Moreover, denial of an opportunity to acquire such resources in itself constitutes an infringement of an anterior and independent claim to residence possessed by the family member.

³³ For further comment on the limited interpretation in *McCarthy* of the 'genuine enjoyment' test established in *Ruiz Zambrano* see van Elsuwege, *supra* n. 30.

³⁴ See text *supra* between n. 23 and n. 27.

³⁵ ECJ, *supra* n. 1, para. 35.

Under this interpretation sufficient resources are not a legal condition to be fulfilled before the right is acquired, but rather constitute a practical requirement necessary for the right to be enjoyed.

Such an interpretation differentiates family members of static EU citizens from those of migrant EU citizens, to whom the requirements in Directive 2004/38/EC apply. It also is distinct from prior case-law in which, where the Directive has been inapplicable, a requirement of sufficient resources had nevertheless applied either by application of other legislation (*Teixeira*³⁶) or as constitutive of the primary right on which the family member depends (*Chen*³⁷). The extent to which such differentiation is a 'paradoxical outcome'³⁸ is limited by the unique nature of the primary right of the EU citizen as against their home member state, which does not substantiate the same need for a resource requirement. However, the preferential rights possessed by static citizens over migrant citizens may under this interpretation nevertheless be subject to challenge by way of a claim based in reversed 'reverse discrimination' under Article 18 TFEU.

Alternatively, the Court's reference to 'sufficient resources' may be considered to apply as a requirement through analogy to Directive 2004/38/EC and prior case-law, as was assumed by the referring tribunal. If the Court did indeed intend to maintain the existence of this requirement, their judgment redefines it in such a way as to ensure that its application cannot preclude the acquisition of such resources through denial of a work permit. This interpretation of the Court's treatment of sufficient resources maintains consistency between the requirements imposed on family members of both migrant and static EU citizens, but for that very reason calls into question the current interpretation of the Directive as allowing for the restriction of work permits to family members of EU citizens.

It seems unlikely, however, that the intended effect of the decision in *Ruiz Zambrano* was to change the established definition of legislation not applicable to the facts at hand. Moreover, the Court's statement that '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'³⁹ strongly suggests that it intended to recognise a claim to the opportunity to acquire sufficient resources through acquisition of a work permit, which in the face of existing principles of Union law could be justified

³⁶ ECJ 23 Feb. 2010, Case C-480/08, *Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department*.

³⁷ ECJ 19 Oct. 2004, Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*.

³⁸ A. Wiesbrock, 'The Zambrano Case: Relying on Union Citizenship Rights in "Internal Situations"', <eudo-citizenship.eu/citizenship-news/449-the-zambrano-case-relying-on-union-citizenship-rights-in-internal-situations>, visited 22 March 2011

³⁹ ECJ, *supra* n. 1, para. 44.

only through reference to the exceptional nature of a claim against one's own member state.

Although the unique nature of the claim against a home member state goes some way towards explaining this decision, when juxtaposed with the very recent expiry of transitory regimes applicable to A8 nationals it seems remarkable that the Court guaranteed access to the labour market to such a potentially large class of third country nationals in the absence of any justifications for or ramifications of their decision. Furthermore, that such restrictions remain in place in a majority of member states as regards Bulgarian and Romanian nationals raises the question of whether the *Ruiz Zambrano* principle will provide a means by which those transitory restrictions may be circumvented. Logic would require it to be so: the reasoning of both Advocate-General Sharpston and the Court applies equally to a European citizen parent in Mr Ruiz Zambrano's position. Any future attempts to constrain the application of *Ruiz Zambrano* to non European national parents of European citizen children would be at risk of appearing somewhat contrived.

THE INTERDEPENDENCE OF EUROPEAN AND NATIONAL CITIZENSHIP: TEMPERING THE EFFECT OF *RUIZ ZAMBRANO*?

The consequence of the decision in *Ruiz Zambrano* is that parent care-givers (and potentially other nuclear family members) of static European citizens derive a right of residency under Union law irrespective of their eligibility under national immigration rules. *Ruiz Zambrano* thus seemingly extends to static European citizens that right secured for migrant European citizens by *Metock*, with the result that family members of static European citizens are equally subject to the disaplication of national immigration laws at their point of entry into the Union.⁴⁰

In *Ruiz Zambrano*, as in *Metock*, member states had raised objections before the Court pertaining to the feasibility of managing a vast increase in the number of people eligible to a right of residence under Union law.⁴¹ The problem faced by national governments was not however simply one of volume, but rather also one of reduced competence in the highly politically sensitive area of immigration control. Though a member state's authority over the control of its own borders

⁴⁰ ECJ 25 July 2008, Case C-127/08, *Blaise Babeten Metock and Others v. Minister for Justice, Equality and Law Reform* (see C. Costello, 'Metock: Free Movement and "Normal Family Life" in the Union', 46 *Common Market Law Review* (2009) p. 587; S. Currie, 'Accelerated Justice or a Step too Far? Residence Rights of Non-EU Family Members and the Court's Ruling in Metock', 34 *European Law Review* (2009) p. 310; A. Lansbergen, 'Metock, Implementation of the Citizens' Rights Directive and Lessons for EU Citizenship', 31(3) *Journal of Social Welfare and Family Law* (2009) p. 285.

⁴¹ Sharpston, *supra* n. 2, paras. 105 and 114.

was preceding *Ruiz Zambrano* by no means exclusive,⁴² the decision to grant Mr Zambrano a right of residency under Union law constitutes a highly significant encroachment into an area previously outwith the scope of Union regulation.

The disapplication of national immigration law in any instance is, in a climate of financial instability and increased euro-scepticism, likely to be met with a degree of hostility within national fora. Such hostility invariably increases when the recipient of rights under Union law is (as in the case of Mr Zambrano) already irregularly resident in the member state at the time at which those rights are derived. A perceived culpability attaching to the status of irregular migrant is seen by some to diminish the entitlement of an individual to rely on Union rights, reliance that is characterised by those of this opinion as a means by which to defeat the ends of the national legal order. In the wake of both *Metock* and *Ruiz Zambrano* such concerns have been expressed in political discourse in the language of ‘abuse’ of rights; a charge that is levelled against those perceived to be unmeritoriously taking advantage of European citizenship provisions in order to circumvent national immigration laws.⁴³ Such perception within the domestic context is however at odds with the Court’s established approach that the motivation of an applicant in relying on his Union rights is not determinative of ‘abuse’, so long there exists ‘effective and genuine’ fulfilment of the relevant criteria.⁴⁴

In this regard it is unsurprising that member states may attempt to limit the instances of perceived ‘abuse’ through control of those factors determinative of the acquisition of Union rights. As Sharpston highlights, it is within the discretion of member states to define their rules on *jus soli* such as to ensure that a child born to irregular migrant parents does not acquire the national citizenship giving rise

⁴² Whilst member states surrendered individual control over immigration policy through membership of the European Union, they have historically always held *collective* sovereignty over immigration in that third-country nationals would be subject to the immigration legislation of one of the member states. This position changed following *Metock*, though the consequences of this decision were limited in scale by its relevance only to family members of migrant European citizens.

⁴³ See, e.g., questions posed by Dutch MP Van Nieuwenhuizen [*Volkspartij voor Vrijheid en Democratie*] (VVD) to G.B.M. Leers, Minister for Immigration and Asylum (unofficial translation): ‘Do you share my opinion that the automatic grant of a residency permit to a foreigner on the basis that his or her minor child is born in a Member State can lead to the enormous growth in the number of residency permits that need to be issued and may lead to abuse of the system? ... Do you intend to take action to prevent the possible abuse of the decision [in *Ruiz Zambrano*]? If so, which? If not, why not?’, <www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2011/03/09/uitspraak-van-het-europees-hof-van-justitie-dat-een-in-europageboren-kind-de-ouders-een-verblijfsrecht-geeft/uitspraak-van-het-europees-hof-van-justitie-dat-een-in-europageboren-kind-de-ouders-een-verblijfsrecht-geeft-24833.pdf>, visited 3 June 2011.

⁴⁴ ECJ 23 Sept. 2003, Case C-109/01, *Secretary of State for the Home Department v. Hacene Akrich* at paras. 55-57; see also S. Peers, ‘Free Movement, Immigration Control and Constitutional Conflict’, 5 *EuConst* (2011) p. 173 at p. 178.

to a right of residency under Union law for the parent.⁴⁵ Indirect control by member states over the acquisition of Union rights had already been evidenced in the wake of *Chen*, with amendment of the Irish Nationality and Citizenship Act 1956 so as to preclude the acquisition of Irish nationality at birth to a child whose parents had not satisfied a minimum period of residency in Ireland.⁴⁶ *Ruiz Zambrano* is likely to instigate a similar review of citizenship laws within member states, as evidenced by the amendment of the Belgian Nationality Code before the judgment in *Ruiz Zambrano* was delivered.⁴⁷

Member states' control over national citizenship policy is not, however, absolute. First, the extent to which member states are able to restrict laws on *jus soli* is subject to their obligations both under international and European law regarding prevention against statelessness. Moreover, uncertainty persists following *Rottmann* as to the constraints imposed by Union law upon the acquisition and loss of member state nationality. Whether *Rottmann* requires all decisions pertaining to nationality to be considered in light of the ramifications for European citizenship remains unclear. Specifically, it is uncertain whether that decision encompasses acquisition of nationality in the event that the individual had not previously held the status of European citizen. Though the Court in *Rottmann* appears to preclude this possibility when distinguishing *Kaur*,⁴⁸ Jessurun d'Oliveira notes that '[i]f one follows the Court's line of thought to its logical conclusion, then every member state has to take EU law into account at the time of acquisition or loss of its nationality, because Union citizenship systematically depends on it.'⁴⁹ One consequence of the decision in *Ruiz Zambrano* is that this issue is likely to receive renewed attention with regard to any action taken by member states to restrict access to European citizenship.

⁴⁵ Sharpston, *supra* n. 2, para. 114.

⁴⁶ Section 4 of the Irish Nationality and Citizenship Act 2004 provided that 'a person born in the island of Ireland to Irish shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years.' The amendments further provide that one of the child's parents must be either an Irish or British citizen, or entitled to reside in Ireland or Northern Ireland without any restriction on the period of their residency (s. 3(d)).

⁴⁷ *Supra* n. 3.

⁴⁸ ECJ, *supra* n. 7, para. 49.

⁴⁹ H.U. Jessurun d'Oliveira, 'Decoupling Nationality and Union Citizenship?', 7 *European Constitutional Law Review* (2011) p. 138 at p. 147; see also G. René de Groot and A. Selinger, 'The Consequences of the *Rottmann* Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters', 7 *European Constitutional Law Review* (2011) p. 150 at p. 154: 'Even though the Court differentiated between the situation in *Rottmann* and that in *Kaur* ... it appears rather ill-founded to assume that situations in which the granting of Union citizenship is at stake do not fall within the scope of Union law.'

Sharpston implicitly acknowledges the possibility that *Ruiz Zambrano* will encourage restrictive nationality policies, issuing a likely prescient warning against the 'retrograde and reprehensible step' of turning the European Union into 'fortress Europe'.⁵⁰ The irony of *Ruiz Zambrano* may be that, in extending the scope of citizenship rights through judicial activism and in the absence of member state support, the pioneering decision of the Court will undermine rather than enhance the development of European citizenship.

THE ELUSIVE IMPORTANCE OF FUNDAMENTAL RIGHTS

The Court in its decision in *Ruiz Zambrano* appears to be starting to realise its mantra that 'European citizenship is destined to be the fundamental status of Member States' nationals',⁵¹ having imbued European citizenship with real meaning for 'static' European citizens. Whilst enhanced rights for European citizens are promoted by Union institutions and on the whole are accepted and supported by member states, rights derived by third country nationals are often less palatable to many. The Court's decision in *Ruiz Zambrano*, although ambiguous in its justification, greatly widens the access of third-country national family members to rights under Union law.

The Court in *Ruiz Zambrano* restricts its discussion entirely to citizenship and, despite the right of Mr Ruiz Zambrano's children to a family life being integral to the case, does not explain the role of fundamental rights in this respect. Advocate-General Sharpston contrasts settled case-law on the application of fundamental rights against the ideal of consistent protection of fundamental rights wherever there is the 'existence and scope of a material EU competence.' Sharpston however neither expects nor advises the Court to effect such a change in this case, before the member states demonstrate the political intent to do so, but instead suggests that it reflect on the evolution of the role of fundamental rights in the future.⁵² The context that Sharpston describes is of the coming into force of the Charter of Fundamental Rights and the future accession of the European Union to the European Convention of Human Rights, developments with regard to which it is fitting that the Court demonstrate a more rigorous scrutiny of fundamental rights. The recent *Test-Achats* case⁵³ is perhaps an illustration of this beginning to happen.

⁵⁰ Sharpston, *supra* n. 2, para. 115.

⁵¹ European Commission Justice, 'EU Citizenship Report 2010 Dismantling the obstacles to EU citizens' rights', <www.ec.europa.eu/justice/policies/citizenship/docs/com_2010_603_en.pdf>, visited 30 April 2011.

⁵² Sharpston, *supra* n. 2, para. 177.

⁵³ ECJ 1 March 2011, Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres*.

The European Court of Justice has historically adopted a diverging approach to family unification from that of the European Court of Human Rights, the jurisprudence of which allows for the right to a family life to be restricted to the extent that would be in accordance with law and necessary in a democratic society. The scope of this restriction means that a balance is struck between the member states' right to control its borders and the individuals' right to family life, the result of which is that the right to family life may be preserved if the family can unite in another country.⁵⁴ The Court of Justice on the other hand has, over a number of cases (most notably *Metock*⁵⁵ and *Eind*⁵⁶), widened the scope of family unification for European citizens by granting secondary rights to third country national family members where one of the fundamental freedoms are engaged.⁵⁷ Union law thus offers a European citizen a potentially more promising route to family unification than under Article 8 ECHR.

In *Ruiz Zambrano* the Court recognised a right of residence of the family member of a European citizen by reason of the very nature of that status, thereby expanding the group of European citizens who may benefit from family reunification rights from those who have 'moved' to, in principle at least, all European citizens irrespective of cross-border movement. Invoking a citizenship right offers strong and concrete rights and avoids the need to engage in the more nebulous acts of weighing and balancing that is required when coming to a human rights decision, inherently on a case by case basis.

Reverse discrimination: an opportunity missed?

The Court in *Ruiz Zambrano* could equally have chosen to slice the Gordian knot of 'reverse discrimination', perceived by some to be a source of friction that inhibits the full and smooth absorption of European Union free movement rights into domestic systems.⁵⁸ Reverse discrimination occurs when a 'mobile' EU citizen benefits from more favourable rules under European Union law than a 'static' EU citizen does in his own member state. For example, a European citizen who moves to another member state with a third country family member will benefit from European Union free movement rules under the Citizens' Rights Directive, which lay down the conditions under which third country national family members are

⁵⁴ C. Costello, 'Metock: Free Movement and "Normal Family Life" in the Union', 46 *Common Market Law Review* (2009) p. 587.

⁵⁵ ECJ, *supra* n. 40.

⁵⁶ ECJ 11 Dec. 2007, Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind*.

⁵⁷ A. Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach', 15 *European Law Journal* (2009) p. 634.

⁵⁸ N. Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on?', 29 *Common Market Law Review* (2002) p. 731.

entitled to join European citizens in the host member state in the absence of the application of national immigration law at the point of entry into the Union.

Settled case-law of the Court denies that European law need find a remedy for the issue of reverse discrimination,⁵⁹ and the Court has stated on a number of occasions that European citizenship is not intended to extend the reach of EU law to 'internal situations' that have no link to EU law.⁶⁰ The Court does not explicitly retreat from this position in *Ruiz Zambrano* – it does not adopt Advocate-General Sharpston's three point test that could have offered a measured solution to the reverse discrimination conundrum⁶¹ – and yet this nevertheless appears to be the remarkable outcome achieved by its decision.

The subsequent case of *McCarthy* appears to withdraw somewhat from the bold decision in *Ruiz Zambrano*. The decision in *McCarthy* that Union law does not require the grant of a residency permit to a static European citizen does not however necessarily limit the scope of *Ruiz Zambrano* as regards the issue of reverse discrimination. As Advocate-General Kokott points out: 'The present case nevertheless does not appear to be the right context for detailed examination of the issue of discrimination against one's own nationals.'⁶² Mrs McCarthy did not in fact face reverse discrimination because a mobile European citizen who similarly had never been economically active would not have met the criteria for permanent residence. Mrs McCarthy therefore does not suffer a disadvantage by reason of the fact that she has not exercised her right of free movement: had she done so, she still would have been ineligible for permanent residence.

The decision of the Court is however neither as nimble nor as neat as neutralising the reverse discrimination effect. *Ruiz Zambrano* mirrors for the parent caregiver of a static European citizen child that right of residence established in *Chen* for the static European citizen child. The decision in *Ruiz Zambrano* however has in fact thrown *Chen* into relief, adding an extra right for the third country national parent: the right to receive a work permit. In *Chen*, the Court drew from the Citizens' Rights Directive a requirement of self-sufficiency, yet in *Ruiz Zambrano* the Court requires the member state to provide the conditions for the family to become self-sufficient by providing a work permit. One can appreciate why this may lead member states to reflect upon the question: 'who pays the cost of European citizenship?' The answer appears to be that member states pay the cost, not as a result of political agreement but by swift decision of the Court. The right to work includes the right to access to social welfare in times of hardship or lack

⁵⁹ ECJ *supra* n. 40, at paras. 77-78.

⁶⁰ ECJ 2 Oct. 2003, Case C-148/02, *Carlos Garcia Avello v. Etat belge*; ECJ 12 July 2005, Case C-403/03, *Egon Schemmp v. Finanzamt Munchen V*; ECJ 1 April 2008, Case C-212/06 *Government of the French Community and Walloon Government v. Flemish Government*.

⁶¹ Sharpston, *supra* n. 2, paras. 139-150.

⁶² Kokott, *supra* n. 30, para. 43.

of work. With that financial cost, member states must also bear a political cost and at a time of pressure on the labour market and in a political context where 'tough on immigration' policies are flavour of the moment, member states governments may not be keen to embrace a decision that offers a failed asylum seeker access to their labour market.⁶³

INDIVIDUAL JUSTICE, COLLECTIVE UNCERTAINTY?

The extension of residency rights under European citizenship to situations in which no frontiers have been crossed is unlikely to have been anticipated by even the most compliant and Euro-centric of member states. It is understandable why some may feel that the legitimacy of the Court is endangered by judicial activism, with unpredictable decisions extending the scope of European citizenship in a manner unforeseen and unsupported by member states.

The decision in *Ruiz Zambrano* is so ambiguous that it may reasonably be questioned whether the Court in this instance has prioritised individual justice over legal certainty and the consistent application of settled principle. A desire of the Court to help the *Ruiz Zambrano* family would be understandable; they are a family who in the face of their *non refoulement* decision had tried for fourteen years to regularise their immigration status, who had integrated into Belgian society, and who had contributed to the welfare system. And yet in relying upon European citizenship in 'hard cases' as an instrument of justice the Court raises much broader questions not only of the evolving nature of that status, but also of the systematic integrity of Union jurisdiction and the desirable limits of judicial activism.

Such unilateral development of Union citizenship rights by the Court would be less problematic if substantiated by thorough judicial analysis elaborating the reasoning underlying such a decision, thereby justifying its consequences and identifying the limitations of its application. Unfortunately in the absence of any such exposition we can neither hope to understand the basis of the decision in *Ruiz Zambrano* nor predict with any accuracy its likely consequences. The only conclusion that can be stated with any certainty is that *Ruiz Zambrano* will instigate a wealth of litigation seeking to clarify many of those questions raised by the

⁶³ Despite two countries so far inviting cases to be reconsidered following the decision (Ireland and Denmark) it remains to be seen how other member states will respond to the decision in *Ruiz Zambrano*. Based on the unsatisfactory transposition of the Citizens Rights Directive, effective implementation of the decision may pose a challenge for member states (see European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens to move and reside freely within the territory of the member states', COM(2008)840/3, <www.ec.europa.eu/romania/documents/information/raport_directiva_38-2004_en.pdf>, visited 29 April 2011).

brief and opaque judgment, and in doing so will cause the limits of European citizenship to be further tested and refined over the coming years.

