

## European Union citizenship anno 2011: *Zambrano, McCarthy and Dereci*

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### 1. Introduction

In 2011, the fundamental character of European Union (EU) citizenship has been tested before the Court of Justice of the European Union (CJEU) in a series of cases involving reverse discrimination suffered by static EU citizens in the field of family reunification. While the constitutional dimension of the Court's case law on EU citizenship has already been the topic of much scholarly debate<sup>1</sup>, the *Zambrano, McCarthy and Dereci* cases point towards a new phase in the development of a meaningful EU citizenship status. The Court has previously used EU citizenship to advance the right to free movement of EU citizens, regardless of their engagement in economically valuable activities, as well as the scope of the prohibition of discrimination on grounds of nationality<sup>2</sup>, prompting its designation as a new

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<sup>1</sup> E. Spaventa, Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects, (2008) *Common Market Law Review* 45, 13-45; E. Spaventa (2007) *Free Movement of Persons in the European Union. Barriers to movement in their constitutional context*. Kluwer; M. Dougan, The Constitutional Dimension on the Case law on Union Citizenship, (2006) *European Law Review* 31, 613-641.

<sup>2</sup> F. G. Jacobs, Citizenship of the European Union – A Legal Analysis, (2007) *European Law Journal* 13, 591-610.

fundamental freedom.<sup>3</sup> This article takes a close look at three recent cases (*Zambrano*, *McCarthy* and *Dereci*) in which EU citizenship has been invoked as an independent source of family reunification rights by static EU citizens, a category considered to be outside the scope of EU provisions on the right to move and reside freely within the Member States. The Court has acknowledged that in exceptional circumstances a right of residence can be derived by TCN family members of static EU citizens, in what were previously considered purely internal situations. Instead of banning the reverse discrimination suffered by static citizens, the Court has opted for applying a new method of delimiting EU and national spheres of competence when EU citizenship is at stake. The positions taken by the Advocate Generals regarding reverse discrimination are discussed as an indication of the contested nature of this issue and its implications for achieving equality in the EU.

## **2. Zambrano<sup>4</sup>**

### *2.1 The facts*

Mr. and Mrs. Zambrano, two Columbian nationals arrived in Belgium in 1999 on a valid visa together with the couple's first child. In 2000, after an unsuccessful asylum application, they were ordered to leave Belgium, but a non-refoulement clause was attached: they could not be sent back to Colombia in view of the critical situation there. The family remained in Belgium, where they filed several unsuccessful residence applications. In 2003 and 2005, the couple had two more children, Diego and Jessica, who acquired Belgian nationality. In 2001, although lacking permission to work, Mr. Zambrano took up employment at a Belgian

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<sup>3</sup> F. Wollenschläger, A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration, (2011) *European Law Journal* 17, 1-34; J. Kokott (2005), *EU citizenship – citoyens sans frontières?*, Durham European Law Institute.

<sup>4</sup> Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM)*, decision of 8 March 2011, nyr.

company; his work was declared with the competent authority, and social contributions were paid by his employer. In 2005, his contract was suspended and his request for unemployment benefits was rejected. Later, he resumed work at the same company but after official inquiries regarding his employment, his contract was terminated. His request for benefits was again refused. In 2009, he was granted a provisional and renewable residence permit, and a work permit; however, the latter did not have retroactive effect and his previous employment remained irregular.

The case before the national court stemmed from the refusal of the national authorities to pay the unemployment benefits claimed by Mr. Zambrano, due to his irregular stay throughout the employment periods completed, and the lack of a work permit. The referring court essentially asked whether Mr Zambrano could derive from EU law a right of residence after the birth of his Belgian children (EU citizens), even if they have never exercised free movement rights. Secondly, the national court requested clarifications on the relationship between, on one hand, the Treaty provisions on EU citizenship (Articles 20 and 21) and non-discrimination (Article 18), and on the other hand, the EU Charter of Fundamental Rights (Charter) provisions on non-discrimination (Article 21), the rights of the child (Article 24) and on social security and social assistance (Article 34) in respect of the residence right of a TCN family member and the requirement to hold a work permit for the same TCN family member.

## *2.2 The opinion of AG Sharpston<sup>5</sup>*

AG Sharpston has offered a comprehensive legal analysis of reverse discrimination suffered by static EU citizens, as well as presented several options for dealing with it. Her opinion focuses on three main issues: what triggers the application of the Treaty provisions on citizenship; the role of fundamental rights (in particular, the right to family life) in

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<sup>5</sup> Opinion of AG Sharpston in case C-34/09 *Ruiz Zambrano* delivered on 30 September 2010 nyr.

determining the scope of application of Articles 20 and 21 TFEU, and finally, the issue of reverse discrimination and the scope of Article 18 TFEU. First, she discussed the potential breach of the EU fundamental right to family life by the Belgian authorities. Based on the Court's case law that had declared the fundamental right to family life to be part of the general principles of EU law, and on the case law of the ECtHR on Article 8 ECHR<sup>6</sup>, she argued that the decision of the national authorities to order Mr Zambrano to leave Belgium, and their repeated refusal to grant him and his family a residence permit amounted to a potential breach of his children's fundamental right to family life and to protection of their rights as children. Applying *Carpenter* and *Zhu and Chen*<sup>7</sup> to Mr Zambrano's situation meant that his right to family life as their father was also breached.<sup>8</sup> When assessing the breach of the fundamental right against the family member's conduct, AG Sharpston argued that Mr Zambrano, despite having an irregular immigration status in Belgium at the time of birth of Diego and Jessica, was well integrated in the host society. Therefore, the family's removal would breach the children's fundamental right to family life under EU law.<sup>9</sup>

a) *Citizenship of the Union, purely internal situations and the requirement of movement*

AG Sharpston summarized the steps taken by the Court regarding the requirement of a link between the exercise of a classic economic freedom, and the existence of movement, noting

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<sup>6</sup> Ibid, paras 56-57.

<sup>7</sup> Case C-60/00 *Mary Carpenter* [2002] ECR I-6279 and Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

<sup>8</sup> Sharpston, para 62.

<sup>9</sup> The fact that Mr Zambrano had worked for almost the entire duration of his stay in Belgium counted in his favor as a sign of integration. Also relevant was that the family could not be removed to Colombia, the only country with which the children may be considered to have had some links.

that the case law, including that on EU citizenship,<sup>10</sup> showed a “dilution of the notion that the exercise of rights requires actual physical movement across a frontier”.<sup>11</sup> While some of the EU citizenship rights can be enjoyed in the absence of previous movement (e.g. the right to petition the European Parliament), the right to free movement was considered less self-evident, begging questions as to its nature.<sup>12</sup> AG Sharpston argued in favor of splitting it into two independent rights: a right to move and a right to reside. The advantage of this approach would be that EU citizens could rely on fundamental rights also when “merely” residing in the host state. The requirement to show movement in order to draw on EU rights in the state of own nationality was criticized because of its random results due to the constant refining of what counts as *movement*.<sup>13</sup> Following the Court’s approach in *Rottmann*, Sharpston argued that the situation of the *Zambrano* children falls *by reason of its nature and its consequences* within the ambit of EU law. Moreover, even in the absence of an independent right to reside, their situation should be assimilated to that of baby Chen: if the Belgian authorities would remove the family, the children would be practically deprived of their EU citizenship status

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<sup>10</sup> Case C-148/02 *Garcia Avello* [2003] ECR I-11613; *Zhu and Chen*, supra note 7; Case C-135/08 *Rottmann* [2010] ECR *nyr*.

<sup>11</sup> Sharpston, paras 73-77.

<sup>12</sup> *Ibid*, para 80. The options put forward were: a) a *combined* right “the right to move-and-reside”; b) a *sequential* right “the right to move and, having moved at some stage in the past, to reside”; c) two *independent* rights “the right to move” and “the right to reside”.

<sup>13</sup> As the AG asks, would a one-day visit to a park in France be enough to make the situation no longer purely internal; would two days or more seem more adequate? The Court has accepted that the reason for moving bears no relevance; see *Hartmann* a case involving a virtual frontier worker, where the worker continued to work in the state of nationality but had moved residence to a host state, case C-212/05 *Hartmann* [2007] ECR I-6303. EU law will also apply to citizens returning to their state of origin, for example Case C-370/90 *Surinder Singh* [1992] ECR I-4265, Case C-291/05 *Eind* [2007] ECR I-10719.

and the rights attached to it.<sup>14</sup> Since the Zambrano children cannot fully and effectively exercise EU citizenship rights without their parents (similar to the situation of baby Chen), the situation of their father comes within the scope of EU law. Thus, the decision of the Belgian authorities had to be analyzed against the right of the children as EU citizens to move and reside freely. The proportionality analysis followed the parameters set by the Court in *Rottmann*<sup>15</sup> and hinged on two issues: a long period of illegal residence, and not registering the children with the consulate of the home country, leading to the acquisition of Belgian nationality (possible abuse of rights). The family's successful integration into Belgian society<sup>16</sup> and the remote possibility of becoming an unreasonable burden on state finances tilted the balance in their favor.<sup>17</sup> The refusal to grant a derivative right of residence to the TCN ascendant was considered disproportionate in this set of circumstances.

*b) Reverse discrimination*

One way of avoiding reverse discrimination would be to declare, as proposed by the AG, that the right of residence is independent from movement, thus making EU citizenship an enough connecting factor to bring the situation within the scope of EU law. The second possibility explored is the capacity of Article 18 TFEU to counter reverse discrimination, as previously

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<sup>14</sup> Sharpston, para 95.

<sup>15</sup> Sharpston, para 111; *See also S. Mantu*, The end of nationality legislation as we know it?, (2010) *Journal of Immigration, Asylum and Nationality Law* 24, 182-191.

<sup>16</sup> Mr Zambrano had worked for the entire period of his residence, and paid social contributions, he had no criminal record, he had been awarded a renewable residence permit, and there were no indications that he was a danger to public order or public safety. The family was considered genuine and the children attended school.

<sup>17</sup> Case C-413/99 *Baumbast* [2002] ECR I-07091. In *Baumbast*, the Court has recognised that the exercise of the right of residence of EU citizens may be subordinated to the legitimate interests of the MS, as the beneficiaries of the right must not become an unreasonable burden on the public finances of the host state.

suggested by AG Sharpston in the *Flemish Care Insurance* case.<sup>18</sup> Her solution to reverse discrimination is to interpret

*“Article 18 TFEU [...] 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”*<sup>19</sup>.

Three conditions must be met before applying Article 18 TFEU:

1. the case should involve a static EU citizen resident in his state of nationality whose situation is comparable to that of EU citizens in that MS who can invoke rights under Article 21 TFEU;
2. the reverse discrimination complained of entails the violation of a fundamental right protected under EU law;
3. national law does not afford adequate fundamental rights protection. If the conditions are met, Article 18 TFEU applies and MS must justify the differential treatment of static EU citizens regarding family reunification.

### *c) Fundamental rights*

In its case law, the Court treats the issue of fundamental human rights in connection with that of competence: they may be invoked only when the contested measure comes within the scope of application of EU law.<sup>20</sup> The implied reasoning is that protecting fundamental rights

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<sup>18</sup> Opinion of AG Sharpston in Case C-212/06, *Government of the French Community and Walloon Government v. Flemish Government* [2008] ECR I-1683. See also, the opinion of AG Poiares Maduro in Case C-72/03 *Carbonati Apuani* [2004] ECR I-8027.

<sup>19</sup> Sharpston, para 150.

<sup>20</sup> For example, Case C-299/95 *Kremzow* [1997] ECR I-2629.

should not lead to a back door expansion of the Union's competences.<sup>21</sup> AG Sharpston proposed a new interpretation of the scope of fundamental rights that remained within the limits of the conferral of competence theory. She argued that EU fundamental rights should protect the citizen if the EU had competence, regardless of the type of competence (exclusive or shared), and of the fact that it had been exercised or not.<sup>22</sup> Nevertheless, aware that such an approach would need a serious overhaul of the Treaties and taking 2003 as the relevant moment, she concluded that in 2003 there was no constitutional progress regarding the state of affairs in the EU suggesting the existence of a fundamental right to family life protected by EU law.

### 2.3 *The Court's decision*

Unlike the AG's opinion, the Court has been very brief in its analysis, and managed to avoid the issues of reverse discrimination and fundamental rights altogether.<sup>23</sup> It regrouped the three questions into a single one, and started by pointing out that Article 3(1) of Directive 2004/38 is not applicable to the facts since it states that the EU citizen must move to or reside in a different state than that of his nationality. Relying on *Rottmann*, the Court argued 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.*"<sup>24</sup> The refusal to grant the TCN parent of dependent minor EU

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<sup>21</sup> K. Lenaerts, 'Civis europaeus sum': from the cross-border link to the status of citizen of the Union (2011) *Online Journal on free movement of workers within the European Union* 3, 6-19, available online at <http://ec.europa.eu/social/main.jsp?catId=475&langId=en&furtherPubs=yes>

<sup>22</sup> Sharpston, para 163.

<sup>23</sup> All intervening governments argued that EU law was not applicable since the case involved a purely internal situation.

<sup>24</sup> Case C-34/09, para 42.



children a residence and work permit in the state where the children reside and are nationals of, were considered such measures. The Court's arguments are straightforward: if the residence permit is denied, the children have to leave the territory of the Union in order to accompany their parents. If the work permit is denied, the parents may not have enough resources to provide for themselves and the family and they may be forced to leave the territory of the Union<sup>25</sup>.

### **3. McCarthy<sup>26</sup>**

#### *3.1 The Facts*

Shirley McCarthy is a dual British-Irish national who has lived her entire life in the UK where she is in receipt of state benefits. In 2002, Mrs McCarthy married a Jamaican national who lacks leave to remain in the UK and does not qualify as the spouse of a person settled there. In 2004, Mrs McCarthy was granted Irish nationality. She next applied for residence documents under EU law as an EU citizen, while her husband applied for residence documents as the spouse of an EU citizen. Both applications were rejected. In respect of Mrs McCarthy, the application failed because she could not be considered a worker, self-employed or self-sufficient person. Her husband was consequently found not to be the spouse of a "qualified person". Upon appeal, two questions were referred to the CJEU. First, whether a person in Mrs McCarthy's circumstances can be considered a beneficiary within the meaning of Article 3 of Directive 2004/38/EC. Second, if such a person can be considered to have resided legally in the host MS for the purposes of acquiring a right of permanent residence under the Directive.

#### *3.2 The opinion of AG Kokott<sup>27</sup>*

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<sup>25</sup> Ibid, para 44.

<sup>26</sup> Case C-434/09 *McCarthy* decision of 5 May 2011, *nyr*.

According to the AG, the case is not so much about Mrs McCarthy's right of residence in the UK, which she enjoys as a matter of national law. The case is about her TCN husband's right to remain in the UK, which is supposed to be achieved via EU law. Thus, at stake is not the "fundamental" right of an EU citizen to family reunification but the right of a TCN husband to remain in the state of residence and nationality of his spouse. This framing of the facts may explain why fundamental rights play no major part in Kokott's legal reasoning.<sup>28</sup>

AG Kokott argued that a dual national who has resided in the state of nationality her entire life could not rely on Directive 2004/38 against that state of nationality. In her view, Article 3 of the Directive, and the legislative context of its adoption indicate that it applies to EU citizens who move to or reside in another MS than that of nationality.<sup>29</sup> The right to free movement, enshrined in primary law (Article 21 TFEU), and Article 45(1) of the Charter, does not change the matter, since the Directive complies with the requirements of primary law. Unlike AG Sharpston, Kokott does not believe that a right of residence vis-à-vis the MS of nationality can be inferred from Article 21(1) TFEU in the absence of a cross-border element. In the present case, the only connecting factor with EU law was the applicant's dual nationality. In the past, the Court has argued that dual nationality may be a "*relevant factor when assessing the legal position of Union citizens vis-à-vis their MS of origin.*"<sup>30</sup> However,

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<sup>27</sup> Opinion of AG Kokott in Case C-434/09 delivered on 25 November 2010.

<sup>28</sup> It is true that the referring court posed its questions in terms of rights derived from Directive 2004/38 and not necessarily from EU citizenship status but the Court has not been shy in the past to reformulate the questions referred. For a discussion on this see, A. S. Sweet, and T. Brunell (2010) *How the European Union's Legal System Works - and Does Not Work: Response to Carruba, Gabel, and Hankla*, Faculty Scholarship Series. Paper 68, available at [http://digitalcommons.law.yale.edu/fss\\_papers/68](http://digitalcommons.law.yale.edu/fss_papers/68); M. P. Broberg, N. Fenger (2009) *Preliminary references to the European Court of Justice*, OUP, p 406.

<sup>29</sup> Kokott, para 25.

<sup>30</sup> *Ibid*, para 33.

AG Kokott does mention that in this particular case the British nationality seems the more effective one. This is an interesting remark because the effective nationality theory was firmly rejected in the Court's case law.<sup>31</sup> With the effectiveness of Mrs McCarthy's nationality looming in the background, the AG went to argue that while dual nationality may be enough of a connecting factor in respect of areas such as rules on determining a person's name and bring them under the scope of EU law, the same may not be true for the right of residence and the derived right to family reunification.<sup>32</sup> Mrs McCarthy was considered to be in the same situation as other static British citizens who have never made use of their EU rights.<sup>33</sup>

The AG admits that the application of EU provisions on family reunification in respect of citizens who have moved leads to reverse discrimination but stresses that EU law does not provide means to deal with it.<sup>34</sup> In her opinion, the possibility of making use of citizenship of the Union in order to end reverse discrimination goes against the Court's well rehearsed mantra that Union citizenship is not intended to extend the scope *ratio materiae* of EU law to an internal situation which has no link with EU law.<sup>35</sup> While the possibility of developing EU citizenship in the future in such a way as to abolish reverse discrimination is not ruled out, AG Kokott argues that this particular case is ill suited. Her main argument is that Mrs

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<sup>31</sup> See, Case C-396/90 *Micheletti* [1992] ECR I-4239, Case C-148/02 *Garcia Avello* [2003] ECR I-11613, Case C-353/06 *Grunkin Paul* [2008] ECR I-7639. The principle of effective nationality is drawn from the *Nottebohm* case and is considered by some scholars as an internationally accepted standard of nationality attribution, requiring a "bond of attachment" between the state and the individual. For a discussion on the CJEU's reception of this principle in its case law on EU citizenship see, S. Mantu (2011) *Nationality - an alternative control mechanism in an area of free movement?* in E. Guild and S. Mantu (eds) *Constructing and Imagining Labour Migration: Perspectives of Control from Five Continents*, 229-253, Ashgate.

<sup>32</sup> *Ibid*, paras 34-35.

<sup>33</sup> *Ibid*, paras 37-38.

<sup>34</sup> *Ibid*, para 40.

<sup>35</sup> For example, Case C-64/96 *Uecker and Jacquet* [1997] ECR I-3137.

McCarthy, even if found a beneficiary under the Directive, could not draw any rights of residence since she does not comply with the requirements set out in Article 7 (worker status or sufficient resources). In addition, she also fails to meet the requirements set for acquiring the right to permanent residence (Article 16 of the Directive), as in the past five years, she was not a worker or a self-sufficient person. Moreover, according to AG Kokott legal residence based on national law regarding nationals is excluded as a source of rights under Article 16 because it would allow persons like Mrs McCarthy to “cherry-pick”: she would enjoy the advantages of Directive 2004/38 as regards family reunification in respect of her spouse without meeting the objectives of the Directive - namely to give effect and to facilitate the free movement - and without being subject to any of the Directive’s conditions.<sup>36</sup>

AG Kokott’s solution to reverse discrimination is to suggest that Mrs McCarthy’s claims should be addressed at the national level by invoking Article 8 ECHR, as opposed to EU law.

### *3.3 The Court’s decision*

The Court has confirmed that Mrs McCarthy and her husband do not come under the scope of Article 3 of Directive 2004/38.<sup>37</sup> The Directive applies to citizens who move to or reside in a state other than that of which they are a national. Secondly, the subject of the Directive concerns the conditions under which the right to move and reside is exercised. The Court argues that the Directive cannot apply to the situation of a person who enjoys an unconditional right to reside in the MS of his nationality, but fails to discuss the situation of dual nationals. Thirdly, the Directive as a whole applies to residence, which is linked to the

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<sup>36</sup> Kokott, para 56.

<sup>37</sup>Case C-434/09 *McCarthy*, para 31. Similar to the *Zambrano* case, all intervening governments argued that this was a purely internal situation, outside the scope of EU law.

exercise of the freedom of movement for persons.<sup>38</sup> Dual nationality, on its own, is not enough to bring a citizen in Mrs McCarthy's situation under the personal scope of the Directive. Nevertheless, the Court explored whether dual nationality may be a source of rights under Article 21 TFEU (but ignored Article 20 TFEU altogether). Given that after *Zambrano*, Article 20 TFEU prevents national measures, which have the effect of depriving the EU citizen of the genuine enjoyment of the substance of his rights, the Court went to discuss whether the national measure had this particular effect.

The Court stressed that Mrs. McCarthy's situation was different from that of the applicants in *Garcia Avello* and *Grunkin-Paul*, in which dual nationality was enough to bring the situation under the scope of EU law in the absence of movement. In the "name cases", the discrepancies resulting from applying national rules on names to children with dual nationality were enough to cause serious inconveniences to the (future and potential) exercise of their rights as EU citizens. In the present case, it was argued that dual nationality did not cause any inconveniences to Mrs McCarthy, as she remained free to exercise the right to free movement and residence within the territory of the Union.<sup>39</sup>

#### **4. Dereci<sup>40</sup>**

##### *4.1 The facts*

The case involved five applicants, all TCNs who wished to live with their Austrian family members in Austria. None of the EU family members involved had exercised any rights to free movement. The cases differed in as much as two TCNs had entered Austria illegally (*Dereci, Maduike*); one TCN had married an Austrian national before entering Austria but the

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<sup>38</sup> Ibid, para 35.

<sup>39</sup> Ibid, para 54.

<sup>40</sup> Case C-256/11, *Dereci*, judgment of the Court delivered on 15 November 2011, nyr.

visa she subsequently got expired, requiring her to leave Austria and reapply from her country of origin (*Heiml*). The last two cases (*Kokollari* and *Stevic*) involved adult TCNs who wished to live together with their Austrian parents upon whom they claimed dependency.<sup>41</sup> The Austrian authorities rejected their residence applications and issued expulsion orders against them. The grounds for refusal included breaches of immigration law, lack of sufficient resources, and breaches of public policy. None of the EU citizens involved was dependent on their TCN family members.

Based on similarities with *Zambrano*, the referring court essentially asked if the refusal of the Austrian authorities to grant a right of residence to the TCNs involved can be interpreted “*as leading, for their family members who are Union citizens, to a denial of the genuine involvement of the substance of the rights conferred on them by virtue of their status as citizens of the Union*”.<sup>42</sup> Regarding Mr Dereci (a Turkish national), the referring court asked for clarifications in case no right of residence could be derived from EU law and it had to apply the standstill clause under the Association Agreement with Turkey.<sup>43</sup>

#### 4.2 *The view of AG Mengozzi*<sup>44</sup>

AG Mengozzi argued that there was no deprivation of the genuine enjoyment of the substance of the rights attached to the status of EU citizenship; nor were there any restrictions placed on the right to move and reside freely within the Union. In respect of Mrs Dereci, the refusal to grant her husband a right of residence in Austria did not end her own residence right in that

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<sup>41</sup> Mr Kokollari entered Austria at the age of two with his then Yugoslav parents and continues to reside there; Mrs Stevic resides in Serbia with her own family but seeks family reunification with her Austrian father.

<sup>42</sup> Ibid, para 33.

<sup>43</sup> I do not deal with the last question in this article.

<sup>44</sup> The case was decided via emergency procedure, and AG Mengozzi only expressed a view. View of AG Mengozzi in Case C-256/11, *Dereci* delivered on 29 September 2011 (French version).

country and did not prevent her from exercising free movement rights. The same reasoning applies to the *Heiml* and *Maduike* cases. In the two cases involving adult TCN children, not granting them rights of residence did not oblige their EU parents to leave the territory of the EU since they were not dependent (economically or legally) on their adult TCN children.

According to the AG these conclusions derive from the application of *Zambrano* and *McCarthy*, in as much as, the substance of the rights attached to the status of EU citizenship does not include respect for the right to family life as enshrined in Article 7 of the Charter nor for Article 8 ECHR.<sup>45</sup> This is something that AG Sharpston was less clear about, despite her otherwise positive engagement with fundamental rights in *Zambrano*. For AG Mengozzi, the Court made it clear in *McCarthy* that the right to respect of family life is on its own insufficient to bring within the scope of application of EU law the situation of an EU citizen who has not exercised the right to free movement.<sup>46</sup> This is explained by Art 6(1) TEU and the limitations of the Charter in respect of the scope of the Treaty (Article 51(2) Charter<sup>47</sup>). The consequences are that a static EU citizen sees his right to family life protected by national law and the ECHR, while a mobile citizen has the extra advantage of EU law protection. For the applicants in *Dereci*, the result is that in order to enjoy an effective family life on the territory of the Union, they must exercise a Treaty freedom.<sup>48</sup>

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<sup>45</sup> Ibid, para 37.

<sup>46</sup> Ibid, para 38.

<sup>47</sup> According to Article 51, the Charter is addressed only to the institutions and bodies of the Union with due regard for the principle of subsidiary and to the Member States only when they are implementing Union law. Paragraph 2 states that the Charter does not establish any new powers or tasks for the Union, nor does it modify the powers and tasks set out in the Treaty. See, Charter of Fundamental Rights of the European Union, 2000/C/364/1, available online [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>48</sup> Mengozzi, para 44.

### 4.3 The decision

The Commission and eight governments intervened during the procedure, and all but the Greek government denied that EU citizenship gives rise to a right of residence for TCN family members of EU citizens who have never exercised free movement rights. In their opinion, the *Zambrano* ruling applies only in exceptional circumstances. The Court first excluded the applicability of Directives 2003/86 and 2004/38<sup>49</sup>. Regarding the applicability of the Treaty provisions on EU citizenship, it reminded that the case of an EU citizen who has not exercised the right to freedom of movement does not necessarily mean that the situation is a purely internal one. Based on *Zambrano* and *McCarthy*, one must decide whether we are in the presence of a national measure that has the effect of depriving the Union citizen of the genuine enjoyment of the substance of the rights conferred by virtue of EU citizenship status<sup>50</sup>. The Court was keen to emphasize the exceptional character of cases where a right of residence has to be granted to a TCN family member in order not to compromise the effectiveness of the EU citizen's enjoyment of his rights. It explained at paragraph 66 that this criterion

*“... refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole”.*

Moreover,

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<sup>49</sup> The first directive, although dealing with the right to family reunification of TCNs, expressly excludes TCN family members of EU citizens from its scope. In respect of Directive 2004/38, the Court confirmed its decision in *McCarthy* that the concept of beneficiary in Article 3(1) of the Directive does not cover an EU citizen who has never exercised his right of free movement and has always resided in a MS of which he is a national. Case C-256/11 *Dereci*, para 54.

<sup>50</sup> *Ibid*, para 64.



*“the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.”<sup>51</sup>*

The Court goes to argue that a right of residence may still be granted *“by virtue of the right to the protection of family life”<sup>52</sup>*, which is independent of the issue of rights drawn from EU citizenship provisions. The two possible sources of such a right are Article 7 of the EU Charter of Fundamental Rights, and Article 8 ECHR if the Charter is inapplicable (because the situation of the applicants is not covered by EU law).

## **5. Reverse discrimination and the potential of EU citizenship**

The three cases discussed above illustrate the difficulties that still exist in capturing equality in a Union that is based on the rule of law, and in which respect for fundamental rights plays an important part.<sup>53</sup> Reverse discrimination, the delimitation between Union and national law, and the intersection of Union citizenship with fundamental rights protection are the main issues the Court has been asked to clarify. Despite AG Sharpston and AG Mengozzi’s calls for a clear answer on reverse discrimination, the Court has done its best in avoiding any mentioning of the issue altogether. The meaning of equality seems to be dividing not only the AG’s involved in these cases but also the members of the Court. The shortness of the operative part of the *Zambrano* decision has been remarked and speculated upon, as well as

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<sup>51</sup> Ibid, para 68. This is something for the national court to decide.

<sup>52</sup> Ibid, para 69.

<sup>53</sup> Sharpston, para 3.

the differences between the opinions of AG Sharpston and Kokott.<sup>54</sup> A clear statement from the Court that in the current stage of European integration reverse discrimination is no longer acceptable under EU law is still called for. The decision of the Court in *Zambrano* has already been the topic of scholarly analysis and criticism,<sup>55</sup> and will continue to divide camps as to its relevance after *McCarthy* and *Dereci*<sup>56</sup>.

Another angle, much less emphasized, is that it can no longer be denied that EU citizens have certain expectations from their status. The fact that their claims have been traditionally accommodated under the ECHR system<sup>57</sup> does not detract from their value or seriousness; they ultimately test how “fundamental” the status of EU citizenship actually is. Currently, various EU institutional actors are conveying a message that describes EU citizenship as a political priority awaiting transformation into legal measures aimed at ensuring a better protection and effectiveness of EU rights.<sup>58</sup> The Commission’s 2010 EU citizenship report

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<sup>54</sup> It is worth pointing out that we have had two Grand Chambers decisions (*Zambrano* and *Dereci*) and one coming from the third chamber (*McCarthy*). See, K. Hailbronner and D. Thym, Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l’emploi, (2011) *Common Market Law Review* 48, 1253-1270; P. Van Elsuwege, Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law, (2011) *Legal Issues of Economic Integration* 38:3, 263-276; A. Langsbergen and N. Miller, European citizenship Rights in Internal Situations: An Ambiguous Revolution?, (2011) *European Constitutional Law Review* 7, 287-307; P. Van Elsuwege and D. Kochenov On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights, (2011) *European Journal of Migration and Law* 13, 443-466.

<sup>55</sup> See, especially Hailbronner and Thym, supra cit note 54.

<sup>56</sup> There are currently two further cases in which the Court is asked to clarify *Dereci*-like situations: Joined Cases C-356/11 and C-357/11 *O and S* (references from Finland) and Case C-40/11 *Yoshikazu Iida v. City of Ulm*, (reference from Germany).

<sup>57</sup> As AG Kokott in *McCarthy* and the Court in *Dereci*, suggest the case to be.

<sup>58</sup> For a general overview of the measures proposed, see <http://ec.europa.eu/justice/citizen/> and the Europe for Citizens Programme. The Commission has proposed to designate 2013 the “European Year of Citizens”.

can be seen as an example of EU institutions taking seriously complains received from EU citizens trying to rely on their EU rights in everyday life.<sup>59</sup> The report looks at obstacles encountered by EU citizens in their roles as private individuals, consumers of goods and services, students and professionals, political actors,<sup>60</sup> without neglecting situations when EU citizens with TCN family members try to make use of their rights. What's more, the Commission proposed concrete steps to be taken for each type of obstacle encountered. This suggests that the complains voiced by some EU citizens are taken seriously. Static citizens are missing from these political documents. Yet, Article 20 TFEU states that every person holding the nationality of a Member State shall be a citizen of the Union. Likewise, the EU Charter of Fundamental Rights states in its Preamble that the Union “places the individual at the heart of its activities, by establishing a citizenship of the Union and by creating an area of freedom, security and justice”.<sup>61</sup> EU citizens who have not yet made use of their right to free movement are as “citizenly” as their mobile counterparts are. They are also entitled to freedom, security and justice. The expectations they have concerning their EU citizenship status should also be taken into account when designing or interpreting EU citizenship rights. In this context, the existing mechanisms for delivering equality to all EU citizens pose particular problems. Reverse discrimination is generally defined as occurring when Member States treat their own nationals worse than they treat nationals of other Members States, in situations where Union law applies.<sup>62</sup> In the field of family reunification, it leads to situations

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<sup>59</sup> EU Citizenship Report 2010 – Dismantling Obstacles to EU Citizen’s Rights, COM (2010) 603, [http://ec.europa.eu/justice/citizen/files/com\\_2010\\_603\\_en.pdf](http://ec.europa.eu/justice/citizen/files/com_2010_603_en.pdf).

<sup>60</sup> *Idem*, p 4.

<sup>61</sup> Charter of Fundamental Rights of the European Union, *supra* cit note 46.

<sup>62</sup> A. Walter (2008), *Reverse Discrimination and Family Reunification*, WLP; A. Tryfonidou (2009), *Reverse Discrimination in EC Law*, Kluwer Law; A. Tryfonidou, *Reverse Discrimination In purely Internal Situations: An Incongruity in a Citizens Europe*, (2008) *LIEI* 35(1), 43-67; H. Verschueren (2009) *Reverse Discrimination:*

where static EU citizens cannot rely on EU law to draw (generally) more generous rights because in the absence of a link with Union law, their situation is deemed a purely internal one. Moreover, static EU citizens may be treated worse by their state of nationality also when compared to TCN's who enjoy a long-term residence status on the basis of EU law, and who can claim family reunification rights based on that status.<sup>63</sup> As Groenedijk has argued, it should become (at least politically) increasingly difficult for Member States to justify treating own nationals worse than privileged TCNs.<sup>64</sup>

Although in the EU, there is no unified approach towards reverse discrimination,<sup>65</sup> it should be made clear that states are not required to treat their own nationals worse; it is a choice some of them deliberately make.<sup>66</sup> This became clear during the transposition of Directive 2004/38 into national legislation, when some MS have extended the Directive's provisions on family reunification to their own nationals regardless of whether or not they had made use of

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An Unsolvable Problem? in (eds.) P. Minderhoud and N. Trimikliniotis, *Rethinking the free movement of workers: the European Challenges ahead*, WLP, 99-118.

<sup>63</sup> Verschueren, *supra cit*, p 101; For example, Directive 2003/86 on the right to family reunification OJ (2003) L251/12 and the EU-Turkey Association Agreement. Although the right to family reunification under the Directive does not exactly match that of mobile EU citizens, it is nonetheless more extensive than the rights that some static EU citizens can derive based on EU law or Article 8/ECHR. For a comparison with McCarthy see, Case C-578/08 *Chakroun* [2010] ECR I-01839 involving the family reunification rights of a long-term TCN who was in receipt of social assistance.

<sup>64</sup> K. Groenedijk, Family Reunification as a Right under Community Law, (2006) *European Journal of Migration and Law* 8, 215-230.

<sup>65</sup> Walter, *supra note* 62, pp 5-18.

<sup>66</sup> In *Metock*, the intervening governments were aware of possible reverse discrimination as they argued that to allow TCN family members with an irregular residence status a right of residence based on EU law would lead to reverse discrimination in respect of static EU citizens, whose family reunification rights would be governed by less generous national provisions. The Court was not impressed by this argument, and went to reverse its *Akrich* jurisprudence. See, Case C-127/08 *Metock et al* [2008] ECR I-6241.

the right to free movement.<sup>67</sup> According to Walter's study on reverse discrimination, in those states in which static citizens are worse off than mobile ones, the justification is mainly political, and has to do with the desire to enact stringent policies in respect of family reunification as a manner of limiting the capacity of second and third generations of naturalized migrants to marry or have a family life with TCNs.<sup>68</sup> The facts of the *Dereci* case illustrate this point well.

According to the Court's well-rehearsed case law, EU law does not offer a solution to cases of reverse discrimination since purely internal situations are excluded from the scope of EU law.<sup>69</sup> The Court has taken this position in *Saunders*, for example, and argued that situations confined to one Member State are regulated by national law.<sup>70</sup> Its position relies on the theory of the conferral of powers between the Union and its MS. As a result, allowing EU law to apply in situations governed exclusively by national law would encroach upon national competences and go against the agreed allocation of competences in the Treaties. In the field of reverse discrimination, the underlying assumption is that the national mechanisms in place

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<sup>67</sup> For an overview of how MS have dealt with reverse discrimination during the transposition of Directive 2004/38 see <http://irelandsreversediscrimination.wordpress.com/2010/02/28/how-other-eu-states-avoid-or-create-reverse-discrimination/>

<sup>68</sup> Walter, supra note 62, p 21; Groenendijk, supra note 64, p 228; Elsuwege and Kochenov, supra note 54, p 460

<sup>69</sup> Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet*, [1997] ECR I-3171, para 23.

<sup>70</sup> Case 175/78 *Saunders* [1979] ECR I 129 in which a measure restricting the mobility of the applicant only within the territory of the UK was considered to show no link with Community law. For a similar approach, Case 35 and 36/82 *Morson and Jhanjan* [1982] ECR 3723 involving family reunification claims by Dutch nationals of Surinamese origin residing in the Netherlands. The Court argued that their claims in the absence of movement had no connection with Community law; Case C-299/95 *Kremzow* [1997] ECR I-2629 in which the Court argued that it has no jurisdiction regarding national legislation (in this case, the effects of criminal sanctions) lying outside the scope of Community law.

in each MS for the protection of nationals work properly and that citizens have political (via voting) and legal (by making legal claims) opportunities to demand from their national state a change in the way it regulates the issue.<sup>71</sup> This explains the Court's argument that national law is better placed to offer solutions to reverse discrimination. However, the regime designed by the EU around the rights of EU citizens does not exist in a legal vacuum; the cases discussed in this contribution illustrate the manner in which family reunification intersects with immigration control in an EU context. Moreover, the Court has stated in *Rottmann* that while there are still areas of law over which the MS retain competence, when exercising their powers in those fields, they must nevertheless comply with EU law.<sup>72</sup>

EU's lack of engagement with issues of reverse discrimination, especially in the sphere of family life, has been criticised on several accounts: the judicial and legislative advancement of the freedom of movement, the increasing role of EU citizenship, the *comunntarisation* of immigration law after the Treaty of Amsterdam, and the adoption of the EU Charter of Fundamental Rights.<sup>73</sup> A less quoted argument, but which can be found in AG Mengozzi's view, is based on the fundamental character of the right to free movement, which should include a negative aspect as well: the right not to move in order to benefit from EU law.<sup>74</sup> Although not all authors agree that reverse discrimination is barred under the Treaty provisions prohibiting discrimination on grounds of nationality (Article 18 TFEU)<sup>75</sup>, AG

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<sup>71</sup> K. Lenaerts, *supra* note 21.

<sup>72</sup> See, S. Mantu, *supra* note 15.

<sup>73</sup> Walter, *supra* note 62; N. Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move on?*, (2002) *Common Market Law Review* 39, 731.

<sup>74</sup> Walter, *supra* note 62; Verschueren, *supra* note 62.

<sup>75</sup> See, A. Tryfonidou, *Reverse Discrimination in EC law*, *supra* note 62, p 19. Her argument is that reverse discrimination is not discrimination on the basis of nationality but on the ground of non-contribution to the internal market. Thus, it does not engage Article 18 TFEU.

Sharpston has taken this view in more than one opinion. In the *Flemish Care Insurance* case, she has relied on the Court's more sophisticated approach to custom duties and internal situations (Article 30 TFEU) and on EU citizenship case law in order to instigate a critical discussion of the Court's definition of purely internal situations.<sup>76</sup> The arguments used in that context prefigure her opinion in *Zambrano*: static Belgian citizens are also EU citizens under Article 20 TFEU (ex-Article 17 EC), and in that capacity have a right of residence in their own state based on Article 21 TFEU (ex-Article 18 EC). Citizenship of the Union in combination with Article 18 TFEU (ex-Article 12 EC) *prima facie* prevents discrimination between mobile Belgians and static ones merely because EU law benefits the first category.<sup>77</sup> In this scenario, Member States must justify the different treatment they give static EU citizens in purely internal situations. On that occasion, her argumentation was not followed by the Court that opted to confirm that purely internal situations are outside the scope of EU law, and that EU citizenship is not intended to extend the material scope of the Treaty also to internal situations, which have no link with Community law.<sup>78</sup> In *Zambrano*, Sharpston added fundamental rights as further arguments that reverse discrimination should be prohibited under Article 18 TFEU, suggested that this approach be limited to citizenship cases, and proposed a three-step test to deal with it.

The background against which reverse discrimination is discussed is the delimitation of competences between the Union and the Member States, which is relevant in determining whether a situation is internal or not. In reality, the Court verifies if there is a link with

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<sup>76</sup> Opinion of AG Sharpston in Case C-212/06, *Government of the French Community and Walloon Government v. Flemish Government* [2008] ECR I-1683; T. Vandamme, Case note on Case C-212/06, (2009) *Common Market Law Review* 46, 287-300.

<sup>77</sup> Vandamme, p 292.

<sup>78</sup> This is a well-rehearsed mantra, see Case C-148/02 *Garcia Avello*, [2003], ECR I- 11613, para. 26; Case C-192/05 *Tas Hagen and Tas*, [2006], ECR I-1045, para.23; Case C-403/03 *Schempp*, [2005], ECR I-642, para.20

Community law that justifies its application. Initially understood as translating into the existence of interstate movement, the meaning of this link has been gradually made relative, to the point that in *Rottmann* the Court has found the situation of the applicant to be by reason of *its nature and its consequences* within the scope of EU law.<sup>79</sup> The lack of movement was not even mentioned by the Court as an indicator of an internal situation. Thus, the revolution in respect of the scope of the Treaty in citizenship cases had started before the ruling in *Zambrano*. This approach is further confirmed by the Court's reasoning in both *McCarthy* and *Dereci*, in as much as never having exercised free movement rights does not equate with being in a purely internal situation. The new test set by the court puts emphasis on the effects that the national measures complained of have on the enjoyment of the substance of the rights attached to EU citizenship. The immediate consequence is that not all internal situations will come within the scope of EU law, only exceptional ones. Because of its open formulation, the exact meaning of the test will have to be settled on a case-by-case basis, which has earned the Court severe criticism for creating legal uncertainty and employing dodgy legal reasoning.<sup>80</sup> However, based on a combined reading of all three cases it can be argued that being forced to leave the territory of the Union triggers the application of EU law. To this, one can add cases where loss of EU citizenship status is an issue, similar to the situation of Mr Rottmann.

Compared to the Court's take on reverse discrimination, the solutions proposed by AG Sharpston seem more generous. Her first option, acknowledging a right of residence based on Article 20 TFEU for static EU citizens, was also the most comprehensive solution since it would have included all static citizens. However, the Court's silence on this possibility on more than one occasion, and AG Kokott openly dismissing it in *McCarthy*, make it something

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<sup>79</sup> Case C-135/08, supra note 15, para 42. See also, N. Nic Shuibhne (2002), supra note 71; N. Nic Shuibhne, The Resilience of EU Market Citizenship, (2010) *Common Market Law Review* 47, 1597-1628.

<sup>80</sup> Hailbronner and Thym, supra note 54, p 1253.



of a dead end. Her second proposal involved the application of Article 18 TFEU under certain conditions. How far the implications of this option go is less clear, as EU protection would be subsidiary and available only when the minimum standards of protection under ECHR are not met. It may be that her proposal is not as generous as most authors think.<sup>81</sup>

One must first have a static EU citizen whose situation is otherwise comparable with that of an EU citizen who can invoke EU law. Would a McCarthy like situation satisfy this first limb of the test? In *McCarthy*, AG Kokott remarked on the case being ill suited; this suggests that in her opinion the group for comparison should be made up of EU citizens legally residing in a host state who fulfil the conditions set in secondary legislation for the exercise of the right to free movement. This particular reading ignores to a certain extent the innovations introduced by Directive 2004/38 regarding the right to permanent residence. After five years of legal residence in the host state, EU citizens acquire a right of permanent residence, which is no longer dependent on possession of sufficient resources or engagement in an economic activity. The right can be lost only in exceptional circumstances. In *Lassal*, the Court has allowed the aggregation of periods of legal residence leading to the acquisition of permanent residence, even if the applicant had a patchy employment history.<sup>82</sup> These developments suggest that AG Kokott's argument that Mrs McCarthy situation cannot be compared with that of EU citizens exercising rights based on Directive 2004/38 is not that straight forward. It is also difficult to explain why in *Chakroun*, a TCN relying on social benefits was allowed family reunification rights under EU law but someone like Mrs McCarthy, also relying on social benefits is unable to do so, simply because she has not moved.<sup>83</sup> In that case, the Court has been less optimistic about the capacity of Article 8 ECHR to offer protection. It stated

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<sup>81</sup> Van Elsuwege and Kochenov, *supra* note 54.

<sup>82</sup> Case C-162/09 *Lassal* [2010] ECR I- 00000.

<sup>83</sup> Case C-578/08 *Chakroun* [2010] ECR I-01839.

“ ... with regard to the Netherlands Government’s argument that authorisation should be granted if so required by Article 8 of the ECHR, suffice it to note that, as emerged at the hearing, Mrs Chakroun has still not been authorised to join her husband, to whom she has been married for 37 years.”<sup>84</sup>

Under the second limb of the test devised by AG Sharpston, a fundamental right protected under EU law must be violated but the assessment has to bear in mind the Strasbourg standards of protection. As such, “EU law would assume responsibility for remedying the consequences of reverse discrimination caused by the interaction of EU law with national law when (but only when) those consequences were inconsistent with the minimum standards of protection set by the ECHR.”<sup>85</sup> In the field of family reunification, the mismatch between the level of protection awarded by EU law to citizens who have exercised free movement rights and the protection awarded by Article 8 ECHR is problematic, as EU law provides for more extensive rights in several areas.<sup>86</sup> As AG Mengozzi has summarized the situation in his view in *Dereci*, static EU citizens have their right to family life protected by the national constitutional arrangements existing in their respective state, and by the ECHR standards, which their state must respect. If EU law is to remedy only those differences in treatment that do not even meet the threshold of protection under ECHR standards, then the situation of static citizens is not greatly improved. In fact, protection would be not only subsidiary as AG

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<sup>84</sup> Ibid, para 65

<sup>85</sup> Sharpston, para 147.

<sup>86</sup> H. Stalford, Concepts of Family Life under EU Law – Lessons from the ECHR, (2002) *International Journal of Law, Policy and the Family* 16, 410-434; Van Elsuwege and Kochenov, supra note 54, p 462. Currently, the ECtHR has taken a more generous view of family reunification under Article 8. In *A.A. v. United Kingdom* 8000/08 [2011] ECHR, it found that the deportation of a Nigerian adult child living with his mother in the UK would violate his rights under Article 8. UK sought deportation in connection with a previous conviction for rape.

Sharpston proposes, but also exceptional. Moreover, if protection is to be offered only when national law does not offer at least equivalent protection to that available under EU law, then the threshold of minimum ECHR standards suggests that fundamental rights, in this scenario, remain at the level of general principles of EU law; they have not yet matured into independent rights to be enjoyed by EU citizens on the basis of that status.

## **6. Conclusions: fundamental rights and EU citizenship**

Fundamental rights have played an important part in the legal argumentation of AG Sharpston. Their main authority has been to signal the transition of the Union from an integrated economic market towards something resembling a political unit. They have been mentioned as evidence of a shift in the relationship between the nationals of the Member States and the Union in respect of both reverse discrimination, and the advancement of EU citizenship as the fundamental status of the nationals of the MS.<sup>87</sup> However, the arguments derived by Sharpston from fundamental rights raise some difficult questions regarding their legal position, especially after the Charter has become primary law. Although not part of the original design of the EU legal order, fundamental rights have played an important part as building blocks of legitimacy in respect of the supremacy of EU law and the Court's authority over the interpretation of EU law.<sup>88</sup> In this respect, they resemble EU citizenship as both legal concepts are related with EU's attempts to overcome its economic dimension. In *Dereci*, the Court has broken its silence on the consequences of the intersection between fundamental rights protection and EU citizenship, only to disassociate the right to family life from EU

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<sup>87</sup> P. Eeckhout, The EU Charter of Fundamental Rights and the Federal Question, (2002) *Common Market Law Review* 29, 945-994.

<sup>88</sup> S. Smismans, The European Union's Fundamental Rights Myth, (2010) *Journal of Common Market Studies*, 48:1, 45-66.

citizenship status where static citizens are concerned. AG Mengozzi has argued that the right to family life is not part of the substance of EU citizenship. This poses questions about the substance of EU citizenship, and whether it can be reduced to the right to free movement or the rights expressly listed in Article 20 TFEU. For static citizens, such questions are relevant. There is an underlying assumption in all three cases that adult EU citizens are at all times free to move to a different MS, bring themselves within the scope of EU law (even by U-turn constructions<sup>89</sup>) and achieve family reunification on the basis of EU law. This view reinforces the “market” understanding of EU citizenship, as some citizens (like Mrs McCarthy) will never have the financial strength to engage in such an experiment.

With the adoption of the Charter of Fundamental Rights<sup>90</sup> and its transformation into binding primary law, EU citizenship was believed to start owing its designation as the fundamental status of the nationals of the MS, as fundamental rights became part of EU citizenship status as rights. As Guild points out, the Charter is a new mechanism for the delivery of rights since “it transforms the relationship between the individual and the state through a different type of rights entitlement arising from and embedded in the EU”.<sup>91</sup> Since the CJEU has the final authority over the interpretation of the Charter, the Court’s lack of direct engagement with the issue of fundamental rights protection in all three cases is disappointing. Its statement in *Dereci* that a right of residence can be derived independent of EU citizenship provisions, based on the Charter or, ultimately, the ECHR does not solve the issue. The message seems to be that when EU citizenship fails to offer a right to family reunification to static citizens,

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<sup>89</sup> See *Surinder Singh*, supra note 13.

<sup>90</sup> S. Peer and A. Ward (2004), *The European union Charter of Fundamental Rights*, Oxford: Hart Publishing

<sup>91</sup> E. Guild (2010), *The European Union after the Treaty of Lisbon – Fundamental Rights and EU Citizenship*, available online <http://www.ceps.eu/book/fundamental-rights-and-eu-citizenship-after-treaty-lisbon>; E. Guild *The variable Subject of the EU Constitution, Civil Liberties and Human Rights*, (2005) *European Journal of Migration and Law* 6, 381-394.

when the Charter also fails the citizen, one can still resort to Article 8 ECHR in order to achieve family reunification, since “*All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8.*”<sup>92</sup> The Court has not given guidance as to whether or not the applicants came within the scope of the Charter, which according to Article 51 should not extend the powers of the Union.<sup>93</sup> If static citizens come within the scope of EU law only in exceptional circumstances, does this mean that they are outside the scope of the Charter, too? For the EU citizens in the *Dereci* and *McCarthy* cases, their EU citizenship status did not include the protection of their right to family life since it did not involve the “*denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union*”. Thus, for some EU citizens the right to family life will be considered fundamental and worthy of protection under EU law in as much as it is a corollary of the exercise of free movement. This logic no longer seems appropriate after the introduction of EU citizenship and the Charter’s status as primary law; it no longer corresponds to the expectations embodied by the type of claims made by EU citizens, or by the insistence of national courts to raise questions about the protection offered by EU citizenship based on the Charter.<sup>94</sup>

As Bader reminds us “the status of citizenship is not conferred, given or granted [...] historically and in practice, it is always fought for”.<sup>95</sup> In *Grzelczyk*, the Court has declared EU citizenship destined to be the fundamental status of the nationals of the member states.<sup>96</sup>

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<sup>92</sup> *Dereci*, para 73.

<sup>93</sup> *Supra* note 46.

<sup>94</sup> See the manner in which the questions were formulated in *Zambrano* and *Dereci* and the new references quoted at note 56.

<sup>95</sup> V. Bader, *Citizenship of the European Union. Human Rights, Rights of citizens of the Union and of Member States*, (1999) *Ratio Juris* 2, 153-181 at 159.

<sup>96</sup> Case C -184/99 *Grzelczyk* [2001] ECR I-6193, para 31.

*Zambrano, McCarthy* and *Dereci* suggest that when the core of EU citizenship is threatened by national measures, EU law will step in and offer protection even if there is no cross-border element. What exactly this core entails remains to be fought as long as the Court refuses to declare that EU citizenship on its own is enough to bring an issue within the scope of EU law.