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# ‘Must I move to be with my family?’

The right to family reunification in EU law  
and the problem of reverse discrimination

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## ABSTRACT

The Court of Justice of the European Union has progressively revised the rule of purely internal situations to ensure a wider scope of application of the economic freedoms as well as the EU citizenship right to move and reside freely within the Union. This development, combined with the increasing importance of fundamental rights, has strengthened the family life protection of those EU citizens who come within the scope of EU law. The limit between the individuals who may benefit from a EU right to family reunification and fundamental rights protection and those who find themselves in purely internal situations has, however, become more legally uncertain. The disadvantage suffered by those who fall outside the scope of EU law is known as reverse discrimination.

The 2011 case *Zambrano* confirmed the trend towards an increasingly generous EU law protection of family life in cases where the exercise of freedom of movement and enjoyment of EU citizenship rights is potentially restricted by a Member State measure. By contrast, in the subsequent *McCarthy*- case, it became clear that families in purely internal situations may only rely on national immigration and procedural law to obtain family reunification and protection of their fundamental rights. This problem of reverse discrimination would disappear if EU fundamental rights protection covered all Member State nationals regardless of whether there was a cross-border dimension to their case. That, however, could only be the result of a leap towards a federalized EU structure where fundamental rights would have the character of constitutional EU citizenship rights.

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## ABBREVIATIONS AND DEFINITIONS

### ABBREVIATIONS

ECHR	European Charter of fundamental Human Rights
EU	European Union
TCN	third country national – a person not holding the nationality of any of the EU Member States
TEU	the Treaty on European Union
TFEU	the Treaty on the Functioning of the European Union

### DEFINITIONS

The Charter	the Charter of Fundamental Rights of the European Union
Community worker	a person coming within the scope of Article 45 TFEU on freedom of movement for workers
The Court	The Court of Justice of the European Union, located in Luxembourg
The Strasbourg-Court	The European Court of Human Rights, located in Strasbourg, France
The Treaty/ Treaties	the primary law Treaty/ Treaties in force at the relevant time

### OTHER DEFINITIONS

Regarding the numeration of Treaty Articles, the current numeration of the provisions in the TFEU and TEU is used except for when quoting case law from before the Lisbon Treaty amendments came into force in 2010.

In general, the expression EU law is used instead of Community law except for in quotations and express references to historical developments where Community law and Community worker are the more accurate expressions.

When referring to unspecified persons, such as EU citizens or Community workers, “he” and “his” are used as generic pronouns as this is the standard used in the Court’s case law.

# 1 Introduction

## 1.1 Family reunification and reverse discrimination in EU law

The rulings C-34/09 *Zambrano* and C-434/09 *McCarthy*, which came out on 8 March 2011 and 5 May 2011 respectively, essentially concerned the same issue: the boundary between those EU citizens who may and those who may not enjoy a right to family reunification under EU law. In *Zambrano*, the family members in question were the third country national, TCN, parents of two EU citizen children whereas the *McCarthy*-case concerned the TCN spouse of a EU citizen. The Advocates General Sharpston and Kokott presented quite contrary opinions regarding the applicability of EU law to protect the family lives of EU citizens. These differences were reflected in the following judgements. In *Zambrano* the Court of Justice of the European Union, the Court, ensured the TCN family member's possibility to benefit from a right of residence under EU law in the EU citizen's home country. By contrast, the same possibility was firmly rejected in *McCarthy*. The McCarthy spouses were therefore obliged to depend solely on the stricter national immigration law and procedures to obtain family reunification. The different outcomes of the two cases illustrate the problem of reverse discrimination: a EU citizen who does not come within the scope of EU law might be put at a disadvantage compared to those EU citizens who may rely on more beneficial rights and fundamental rights protection under EU law. The limit to relying on the right to family reunification – a sensitive area of great consequence for the concerned individuals – causes a distressing kind of difference in treatment between EU citizens.

## 1.2 Aim, purpose and questions

This master thesis aims to present and analyse the rule of purely internal situations and the issue of reverse discrimination in the EU case law concerning freedom of movement for persons, EU citizenship and the right to family reunification. The purpose is to show the developments in the Court's jurisprudence leading up to the two recent rulings in *Zambrano* and *McCarthy*. The main question is hence: How has the Court's rule of purely internal situations in the area of free movement of persons and the right to family reunification developed over the years? Supplementary questions to answer are: *Firstly*, how has this development been influenced by the introduction of EU citizenship as well as by the increasing importance of fundamental rights in EU law? *Secondly*, how does the Court address the issue of reverse discrimination in relation to free movement of persons and EU citizenship? And *finally*, to what extent are the cases *Zambrano* and *McCarthy* in line with the

Court's previous case law concerning purely internal situations, reverse discrimination and the possibility for TCN family members to obtain residence rights by virtue of EU law?

### 1.3 Methodology and delimitations

The research method used for the study is traditional legal method. The case law of the Court, expressed in both its rulings and the opinions of the Advocates General, are the main tools for the analysis. EU primary law and secondary legislation as well as books and articles by judicial scholars have been studied and are referenced accordingly.

These tools are used to present the rule of purely internal situations and the Court's approach to reverse discrimination in connection to free movement of persons, EU citizenship, family reunification and the fundamental right to respect for family life.

The analysis will not focus on the Court's approach to purely internal situations in other areas, such as free movement of goods and capital. Some case law from these areas are, however, referenced to illustrate the Court's aim to abolish restrictions to the exercise of all of the economic freedoms. Although the purely internal situations-rule and the occurrence of reverse discrimination is of concern for many areas of EU law, this master thesis is limited to these issues in connection to freedom of movement for persons and the right to family reunification.

### 1.4 Outline

Chapter 2 presents the rule of purely internal situations as the Court's traditional instrument to delimit the scope of the freedom of movement provisions. Chapters 3 and 5 show how the introduction of EU citizenship has resulted in the Court's revision of the purely internal situations-rule to give the rights attached to the status of EU citizenship an increasingly generous scope. Chapter 4 explains the phenomenon of reverse discrimination and the debate whether reverse discrimination should be seen as a problem to be solved on EU level. Chapters 5-6 discuss how the Court's jurisprudence concerning family reunification has developed towards an increasingly generous protection of the family life of those EU citizens who come within the scope of freedom of movement. Chapter 7 presents the Advocate's General opinions and the Court's rulings in *Zambrano* and *McCarthy*. Finally, chapter 8 provides a conclusion of the developments in the Court's case law and its current jurisprudence regarding the scope of EU law in the area of free movement, EU citizenship and family reunification.

## 2 The rule of purely internal situations

### 2.1 Limiting the scope of the economic freedoms

When acting and legislating within their national competences, the EU Member States may not enact rules or measures that obstruct the EU goal of an integrated internal market.<sup>1</sup> To further that goal, EU primary law provides the economic freedoms of movement of goods, services, workers and capital. The freedoms are combined with the prohibition on discrimination on grounds of nationality.<sup>2</sup> The Court's interpretations of the scope of the free movement provisions are essential since they limit the extent to which the Member States must adjust their national laws and policies to comply with their obligations stemming from primary law.<sup>3</sup>

For a set of factual circumstances to come within the scope of the economic freedoms, the Court has traditionally required an element of cross-border movement between at least two Member States.<sup>4</sup> In addition, the cross-border movement must have an economic purpose.<sup>5</sup> When the facts of a case do not fulfil these conditions, the EU should not interfere in the matter – only the national law of the Member State in which the case is confined should be applied to resolve the issue.<sup>6</sup> This is the rule of *purely internal situations*.

### 2.2 Free movement of economically active persons

To come within the scope of the economic freedoms, a person must, firstly, be a national of a Member State exercising economic activity - as a worker, a self-employed or a service provider. Secondly, the economic activity must be pursued in a Member State other than the person's Member State of nationality.<sup>7</sup> A Member State national may then rely on the right to family reunification provided in secondary legislation, which provides residence rights in the

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<sup>1</sup> Article 4 (3) the Treaty on European Union, TEU obliges the Member States to take all appropriate measures to ensure fulfilment of their tasks stemming from the Treaty and secondary legislation and refrain from actions that obstruct the attainment of the Union's objectives.

<sup>2</sup> Articles 28, 30, 34, 35 (goods) Article 45-48 (workers) Articles 49-55 (freedom of establishment) Article 56-61 (services) and Articles 63-66 (capital) the Treaty on the Functioning of the European Union, TFEU. Article 18 TFEU and Article 21 the Charter of fundamental rights of the European Union, the Charter provide a general prohibition on nationality discrimination.

<sup>3</sup> See Barnard and Odudu, 2009, *op.cit.* at pages 3-8.

<sup>4</sup> See Guimont, 2000, *op.cit.* at para 14-15 and 21 and the cases referred to there.

<sup>5</sup> In *Walloon Waste*, 1992, *op.cit.* at para 23, 26 and 28 even movement of waste was considered to have an economic purpose and came within the scope of Article 34 TFEU.

<sup>6</sup> Article 5 (2) TEU limits the EU institutions to only act and interfere in areas where the Member States have conferred their powers to the Union. Tryfonidou, "Reverse discrimination ..." 2009, *op.cit.* at page 9 describes this phenomenon as the home State principle.

<sup>7</sup> Spaventa, 2008, *op.cit.* at page 15 defines the necessary elements for coming within the scope of economic free movement of persons.



host Member State.<sup>8</sup> He and his family are also ensured protection against discrimination on grounds of nationality or residence: the right to equal treatment.<sup>9</sup>

### 2.2.1 *The jurisprudence of purely internal situations*

The 1979 case of *Saunders* shaped the jurisprudence of purely internal situations in the area of economic free movement of persons. It was also one of the first cases to confront the occurrence of so-called *reverse discrimination*: the disadvantage that the Member State's own nationals may suffer because they do not come within the protective scope of EU law.<sup>10</sup>

#### *Saunders, 1979*

Regina Saunders was a British national who was convicted of theft by a court in Wales. Her penalty was to return to her native region of Northern Ireland and not set foot in England or Wales for at least three years. She claimed that the penal measure restricted her freedom of movement in a way incompatible with the Treaty's freedom of movement for workers.<sup>11</sup> In his opinion, Advocate General Warner addressed the issue of reverse discrimination. Well before the introduction of EU citizenship, his view was that the protection against discriminatory treatment was applicable to all Member State nationals regardless of the presence of a cross-border element. If the Court found that the restraining order conflicted with free movement of workers then non-British Community workers would be protected from the UK imposing such a penal measure on them. Warner held that in that case, it would be against the right to equal treatment to allow it to be imposed on a British national.<sup>12</sup>

The Court did not agree. It stated that the Treaty's right to equal treatment only aimed at protecting non-national workers from less favourable treatment than national workers in a comparable situation.<sup>13</sup> Ms Saunders was a British national whose circumstances were confined to British territory and EU law could not apply to contest a restraining order in

“(…) situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law.”<sup>14</sup>

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<sup>8</sup> The residence rights for family members of Community workers were first laid down in Articles 10-11 in Regulation No. 1612/68, *op.cit.* They have been replaced by Articles 6-7 and 16 in Directive 2004/38, *op.cit.* which was to be transposed into the Member States' national legislations by 2006.

<sup>9</sup> The protection against nationality discrimination of workers is expressly stated in Article 45(2) TFEU. See also Article 18 TFEU, Article 21 the Charter and the Preamble and Article 7 in Regulation No. 1612/68, *op.cit.* The Court has confirmed that the right to equal treatment applies also to family members of Community workers, see *Meeusen*, 1999, *op.cit.* at para 22-25.

<sup>10</sup> For definitions of reverse discrimination see *inter alia* Ritter, 2006, *op.cit.* at page 691, Foster, 2010, *op.cit.* at page 322 and Poaires-Maduro, 2000 *op.cit.* at page 127 where he refers to Pickup. See also section 4 below.

<sup>11</sup> *Saunders*, 1979, *op.cit.* at para 1-3.

<sup>12</sup> Opinion in *Saunders*, 1979, *op.cit.* at 1142-1143.

<sup>13</sup> *Saunders*, 1979, *op.cit.* at para 8-10.

<sup>14</sup> *Id.* at para 11. See also para 12.

Implicitly, the Court thereby established that if Ms Saunders suffered reverse discrimination because of the inapplicability of EU law, this was a matter to be treated solely by national legislation and courts. As seen below in section 3.3 the introduction of EU citizenship did not change the Court's view on this point.

### 2.2.2 *Protecting returning workers from reverse discrimination*

*Knoors*, 1979

Mr Knoors was a Belgian national who had resided in the Netherlands where he had trained and worked as a plumber before returning to establish himself as a plumber in Belgium. By virtue of fulfilling the requirements of cross-border movement and economic activity, his case came within the scope of the Treaty's economic freedoms.<sup>15</sup> Despite being a Belgian national, he was therefore protected from the stricter Belgian professional qualifications for plumbers.<sup>16</sup> Belgium was indeed competent to maintain its national standards for its own nationals since the area was not harmonised on Community level. But the principle of mutual recognition hindered them from imposing the same requirements on Community nationals who had legally qualified as plumbers by the standards in another Member State. To require that those plumbers also fulfilled Belgian standards would have been indirect discrimination on grounds of nationality.<sup>17</sup> The *Knoors*-jurisprudence thereby established that neither foreign Member State nationals nor home Member State nationals, who have exercised an economic freedom, are in a purely internal situation. They are both protected against national measures that make it more difficult for them to establish themselves in the country.<sup>18</sup> Hence, reverse discrimination is not discrimination on grounds of nationality. In the area of the economic freedoms, it is a consequence of not fulfilling the requirements of cross-border pursuit of economic activity.<sup>19</sup>

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<sup>15</sup> The economic freedom at issue was the freedom of establishment, Article 49 TFEU.

<sup>16</sup> *Knoors*, 1979, *op.cit.* at para 15-20.

<sup>17</sup> *Id.* at para 10-11. The principle of mutual recognition was first established in the area of goods in the ruling in *Cassis*, 1979, *op.cit.* notably at para 8 and 14. In the absence of harmonisation measures, Germany was entitled to impose its national standards for alcoholic liquors on its domestic producers but had to accept liquors produced lawfully in other Member States being sold on the German market under the designation liquor.

<sup>18</sup> *Knoors*, 1979, *op.cit.* at para 24 and 28.

<sup>19</sup> Tryfonidou, "Reverse discrimination ..." 2009, *op.cit.* at pages 19-21 holds that reverse discrimination is discrimination due to the non-contribution to the Union's aims.

## 2.3 The restrictions-approach – challenging the cross-border element

### 2.3.1 *Prohibiting restrictive measures to ensure the internal market-goal*

As seen above, the Member States are prohibited to impose rules or measures that have a directly or indirectly discriminatory effect on persons that fulfil the requirements of economic activity with a cross-border element. To ensure the internal market-goal of the economic freedoms, the Court loosened the requirement of *physical* cross-border movement for the free movement provisions to apply. In the *Dassonville*-ruling, the Court widened the scope of application of the Article 34 TFEU on free movement of goods dramatically. It found that the Treaty also prohibited measures that were not discriminatory but nevertheless might have a *restrictive* effect on cross-border trade.<sup>20</sup> Consequently, even without movement of a certain good, the Court could contest a national measure that hindered the hypothetical cross-border trade of those goods in general.<sup>21</sup>

By adopting such a restrictions-approach, the Court has found that cases where the national measure and the affected goods are completely confined to a single Member State come within the scope of EU law.<sup>22</sup> Progressively, the Court has adopted a restrictions-approach to both the economic and non-economic free movement of persons as well as the enjoyment of EU citizenship rights.

### 2.3.2 *Economic free movement of persons – the deterrence-principle*

The restrictions-approach allowed the Court to contest any national measure that might impede the economic free movement of persons, regardless of whether it was applied without distinction to foreign or home Member State nationals. In the 1995 *Bosman*-case, a professional football-player could rely on the right of freedom of movement for workers against his home Member State Belgium to contest club transfer fees: a measure which restricted his possibility to accept job offers in football clubs abroad.<sup>23</sup>

In cases *Kraus* and *Gebhard*, the Court established that any measure having the effect of *detering* a person from making use of their right of economic freedom of movement came within the scope of the Treaty and had to be objectively justified.<sup>24</sup> This deterrence-principle has been used by the Court in the area of free movement of persons as an expression of the restrictions-approach. As shown below, it has motivated the Court's generous protection of

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<sup>20</sup> *Dassonville*, 1974, *op.cit.* at para 5.

<sup>21</sup> See Tryfonidou, "Reverse discrimination ..." 2009, *op.cit.* at pages 88-89. *Inter alia* cases *Brown Bees*, 1998, *op.cit.* at para 16-20 and *GB-INNO*, 1990, *op.cit.* at para 7-9 and 18-19 exemplify how the Court has used the restrictions-approach to protect also hypothetical cross-border trade.

<sup>22</sup> *Pistre*, 1997, *op.cit.* at para 43-45 and *Carbonati Apuani*, 2004, *op.cit.* at para 23-26.

<sup>23</sup> *Bosman*, 1995, *op.cit.* at para 98-100.

the rights to family reunification and equal treatment as well as the fundamental rights of the EU citizens who come within the scope of freedom of movement.

### 3 EU citizenship

#### 3.1 Defying the economic element of the purely internal situations-rule

The introduction of EU citizenship through the 1993 Maastricht Treaty started a new era in the Court's case law. Previously, Member State nationals had enjoyed protection against discriminatory treatment only in their capacity as economically active persons,<sup>25</sup> while secondary legislation provided residence rights for workers and self-employed persons who wished to settle in a host Member State.<sup>26</sup> The introduction of EU citizenship, however, resulted in a loosening of the requirement of economic activity for a person to enjoy these rights under EU law.

##### 3.1.1 *Equal treatment and residence as EU citizenship rights*

Article 20 (1) the Treaty on the Functioning of the European Union, TFEU state that EU citizenship is the status of all Member State nationals. Articles 20 (2) and 21 TFEU both provide the EU citizenship right to move and reside freely within the territory of the Member States without the demand of economic activity.<sup>27</sup> In developing the meaning and scope of EU citizenship, the Court has interpreted the right to equal treatment and the right to move and reside freely as directly effective citizenship rights.

*Grzelczyk*, 2001

In the landmark EU citizenship case *Grzelczyk* it was clear that pursuit of economic activity was no longer a precondition to come within the scope of the EU prohibition on nationality discrimination. Mr Grzelczyk was a Belgian student, residing in the UK. He had turned to the British social security system but was denied social allowance by virtue of being a non-national student. The Court held that since Mr Grzelczyk had exercised his EU citizenship right of freedom of movement his situation came within the scope of EU law. He was therefore entitled to rely on the right to equal treatment in Article 18 TFEU.

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<sup>24</sup> *Gebhard*, 1995, *op.cit.* at para 37 and *Kraus*, 1993, *op.cit.* at para 16, 23, 28, 32 and 42.

<sup>25</sup> In *Cowan*, 1989, *op.cit.* at para 17 the Court held that even passive economic players like service recipients may rely on the right to equal treatment when consuming services in another Member State. See *supra* at footnote 9.

<sup>26</sup> See *supra* at footnote 8.

<sup>27</sup> The right to move and reside freely is also a fundamental right according to Article 45 the Charter.

“Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality.”<sup>28</sup>

The general prohibition on nationality discrimination in Article 18 TFEU thereby applies also to EU citizens who do not pursue economic activity but make use of their right to free movement in Article 21 TFEU.<sup>29</sup> If the requirement of a cross-border element is fulfilled, they are not in a purely internal situation. In *Baumbast and R*, the same was held for the right of residence.

#### *Baumbast and R*, 2002

Mr Baumbast, a German national, had enjoyed a right of residence in the UK as a Community worker. After his economic activity ceased, British authorities contested that he and his family were residing lawfully in the UK. The Court established that by being a EU citizen, Mr Baumbast enjoyed a *directly effective* right of residence in the host Member State by virtue of Article 21 TFEU. That right might, however, be conditioned by secondary legislation stating the requirements of economic self-sufficiency and full health care insurance.<sup>30</sup> The Court underlined that any limits to the EU citizenship right of residence must be applied objectively and proportionately by the Member States.<sup>31</sup>

#### *D’Hoop*, 2002

The case *D’Hoop* concerned a Belgian national who had completed her upper secondary education in France. She had returned to Belgium to pursue university studies but was there denied a study grant. Belgian law provided that the grant was only given to students who had completed their primary studies in Belgium or foreign nationals who had obtained the equivalent qualifications in their home States. Belgian nationals who had studied abroad were therefore put at a disadvantage. The Court applied the deterrence-principle to argue that the contested measure might deter Belgian nationals from exercising their EU citizenship right to free movement. Since Ms D’Hoop had made use of that right she was not in a purely internal situation before her home Member State. She could therefore rely on the right to equal

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<sup>28</sup> *Grzelczyk*, 2001, *op. cit.* at para 31.

<sup>29</sup> *Id.* at para 29-30, 32-37. The same was held in *Trojani*, 2004, *op.cit.* at para 40. A homeless French national who, by virtue of Belgian immigration law, was residing lawfully in Belgium, was entitled to rely on the right to equal treatment in Article 18 TFEU as a EU citizenship right. Compare this ruling to Saunders, *supra* section 2.2.1.

<sup>30</sup> Article 21 TFEU provides that there may be conditions and limitations to the EU citizenship right to move and reside freely. Directive 2004/38, *op.cit.* state how the Member States may legally condition the residence of foreign EU citizens in their territories.

<sup>31</sup> *Baumbast and R*, 2002, *op.cit.* at para 81, 83-91.

treatment in Article 18 TFEU to protect her from being subject to the indirectly discriminatory Belgian rule.<sup>32</sup>

### 3.2 The elastic concept of the cross-border element

EU citizenship has abolished the requirement of economic activity for a person to come within the scope of EU law. But the Court has hesitated to also lift the requirement of a cross-border element.<sup>33</sup> The three cases above suggest that exercise of the right to free movement in Articles 20 (2) and 21 TFEU is a precondition for coming within the scope of the prohibition on nationality discrimination and the right of residence.<sup>34</sup> However, in developing the concept of EU citizenship, the Court has aimed at ensuring the effective enjoyment of the rights attached to that status. Consequently, the Court has narrowed down the concept of purely internal situations by accepting quite far-fetched ways to fulfil the cross-border element.<sup>35</sup> The consequence has been a strengthening of the status of EU citizenship and an extended scope of the EU protection against discriminatory treatment.

#### *Schempp, 2005*

Mr Schempp, a German national, was working and residing in Germany. His ex-wife, to whom he paid allowance, chose to move to Austria. Mr Schempp was therefore unable to deduct the allowance payments from his income tax since his ex-wife's income could not be taxed in the German system. The German Government held that the case was a purely internal situation but the Court found that the case in fact contained a cross-border element. Mr Schempp's ex-wife had made use of *her* EU citizenship right to move and reside freely. This movement affected the situation of her ex-husband. Although direct taxation was within the exclusive competence of each Member State, the Court reminded Germany that national measures must not obstruct the exercise of the EU citizenship right of freedom of movement. It therefore concluded that Article 18 TFEU should be applied to assess whether Mr Schempp was put at an unjustified disadvantage because of his wife's move.<sup>36</sup>

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<sup>32</sup> *D'Hoop*, 2002, *op.cit.* at para 3-5, 8-12, 21, 27-31, 33-36 and 39-40.

<sup>33</sup> Dautricourt and Thomas, 2009, *op.cit.* at page 447. Nic Shuibhne, 2002, *op.cit.* at page 757. Note that all the cases mentioned in section 3.1 involved migration between two Member States.

<sup>34</sup> For the view that freedom of movement is not merely one of several EU citizenship rights but a precondition for relying on the rights attached to EU citizenship, see Nic Shuibhne, 2002, *op.cit.* at page 749 and Spaventa, 2008, *op.cit.* at pages 27 and 31.

<sup>35</sup> Dautricourt and Thomas, 2009, *op.cit.* at page 444-448.

<sup>36</sup> *Schempp*, 2005, *op.cit.* at para 14-19, 22-29.

*Garcia Avello*, 2003

The facts in the *Garcia Avello*-case did not involve any inter-state movement. Mr and Mrs Garcia Avello were a Spanish-Belgian couple, residing in Belgium. Their two children obtained dual Spanish and Belgian nationality at birth. Belgian authorities did not, however, accept the use of the Spanish custom to use two surnames. Consequently, the children were registered under different surnames in Belgium and Spain. The Court had to decide whether the Belgian refusal was compatible with the children's status as EU citizens and the prohibition against nationality discrimination. All the intervening Member States argued that the situation was purely internal since the children were Belgian nationals, residing in Belgium and subject to an administrative rule for surnames that was equally imposed on all Belgians.<sup>37</sup> The Court agreed that the handling of surnames was exclusively within the competence of the Member States. However, since the children possessed the nationality of one Member State but were residing in another, the Court found that the matter was not a purely internal situation.<sup>38</sup> Consequently, the Garcia Avello children could rely on the general prohibition on discrimination in Article 18 TFEU, which requires:

“(…) that comparable situations must not be treated differently and that different situations must not be treated in the same way”<sup>39</sup>

The Court found that the Belgian authorities were wrong to impose the same treatment on the Garcia Avello children as on other Belgian nationals. By holding dual nationality in two Member States, they were not in the same situation as persons of solely Belgian nationality. Furthermore, since the children went under different surnames in their two Member States of nationality, their future, hypothetical exercise of their EU citizenship right of free movement might be seriously inconvenienced.<sup>40</sup>

*Rottmann*, 2010

The future, hypothetical exercise of freedom of movement sufficed as a cross-border element also in the *Rottmann*-case. Dr Rottmann was an Austrian national who had moved to Germany and resided there for many years. He subsequently acquired German nationality, which under Austrian law resulted in the loss of his Austrian citizenship. When German authorities found that Dr Rottmann had acquired German nationality on fraudulent grounds, they wanted to withdraw it. The result of that measure would have been to render Dr

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<sup>37</sup> *Garcia Avello*, 2003, *op.cit.* at para 14-20.

<sup>38</sup> *Id.* at para 21-28 and 36-37.

<sup>39</sup> *Id.* at para 31. See also para 29 and 30, where the Court combined Articles 18 and 20 TFEU to assess the legality of the Belgian measure.

<sup>40</sup> *Id.* at para 32-35 and 42-45.

Rottmann stateless.<sup>41</sup> Although acquisition of nationality was within the exclusive competence of the Member State, the Court found that this was not a purely internal situation. A national measure that was

“(…) placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC<sup>42</sup> and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.”<sup>43</sup>

Clearly, the Court rejected the national measure since it restricted Dr Rottmann’s possibility to make use of his EU citizenship rights. The internal-market goal of the economic freedoms seemed to be of less concern, as the Court upheld the quality of EU citizenship. The act of making Dr Rottmann stateless therefore had to be justified and proportionate in order to comply with the Treaty provisions on EU citizenship.<sup>44</sup>

### 3.3 EU citizenship does not remedy reverse discrimination

However creative the Court has been in accepting a sufficient cross-border element, there are still cases that are found to be purely internal situations. EU citizens then find themselves outside the scope of Article 18 TFEU. The early EU citizenship-case *Jacquet* established that mere Member State nationality is not enough to rely on the EU citizenship right to equal treatment to contest discriminatory treatment by Member State authorities.

*Jacquet*, 1997

Mrs Jacquet was a TCN spouse of a German national. Her husband had always resided and worked in Germany. Consequently, when Mrs Jacquet was subject to nationality discrimination by the University that employed her, she could not contest that treatment by relying on the EU prohibition on discriminatory treatment of family members of a EU citizen. The Court stated firmly that:

“(…) citizenship of the Union (…) is not intended to extend the scope *rationae materiae* of the Treaty also to internal situations, which have no link with Community law (…) Any discrimination which nationals of a Member State may suffer under the law of that State falls within the scope of the internal legal system of that State.”<sup>45</sup>

The statement confirmed that the *Saunders*-jurisprudence still stands and that EU law cannot be relied upon against discriminatory treatment in purely internal situations. The status of EU citizenship therefore does not prevent the occurrence of reverse discrimination: the

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<sup>41</sup> *Rottmann*, 2010, *op.cit.* at para 22-32.

<sup>42</sup> Now Article 20 TFEU.

<sup>43</sup> *Rottmann*, 2010, *op.cit.* at para 42. See also para 38-41.

<sup>44</sup> *Id.* at para 43-48 and 55-56.



disadvantageous treatment that Member State nationals might suffer because they are unable to invoke EU law.

## 4 Reverse discrimination

### 4.1 A consequence of the purely internal situations-rule

Reverse discrimination occurs as a consequence of the Court's unwillingness to interfere in purely internal situations.<sup>46</sup> As said above, nationals of a certain Member State might suffer a disadvantage because they are subject to national regulations and measures that EU law prohibits the Member State to apply to nationals or products originating from other Member States.<sup>47</sup> Poaires-Maduro has pointed out that it is unusual that a State wishes to discriminate its own nationals. It is rather that EU law might oblige a Member State to treat foreign EU nationals in a different, sometimes more privileged, way than the national policies and legislation intend to treat its own nationals.<sup>48</sup>

As seen in *Knoors* and *D'Hoop*, reverse discrimination is not discrimination on grounds of nationality. It is rather a discrimination based on not coming within the scope of EU law.<sup>49</sup> In the area of free movement of persons, such differential treatment has traditionally been due to the absence of the cross-border element and the economic purpose. However, the jurisprudence of purely internal situations has, as seen above, been revised. The Court's restriction-based approach to free movement of persons combined with its loosening of the economic purpose requirement and generous interpretation of the cross-border element have extended the scope of EU law. EU citizens who are working or residing in a Member State other than their nationality are obviously fulfilling the cross-border requirement. Hence, only non-migrant Member State nationals with no connection to the Treaty's economic freedoms or EU citizenship provisions might be subjected to reverse discrimination.<sup>50</sup>

In practice, reverse discrimination becomes apparent when differential treatment is based on internal, regional borders. As described by Nic Shuibhne, Scottish Universities may demand higher university fees from students from England or Wales but EU citizens from any

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<sup>45</sup> *Jacquet*, 1997, *op.cit.* at para 23.

<sup>46</sup> Tryfonidou, "Reverse discrimination ..." 2009, *op.cit.* at page 9 and Dautricourt and Thomas, 2009 *op.cit.* at page 434.

<sup>47</sup> Ritter, 2006, *op.cit.* at pages 690-691 and *supra* at footnote 10.

<sup>48</sup> Poaires-Maduro, 2000, *op.cit.* at page 127.

<sup>49</sup> See *supra* at footnote 19.

<sup>50</sup> Dautricourt and Thomas, 2009, *op.cit.* at page 434.

of the other Member States are entitled to the same treatment as the Scottish students.<sup>51</sup> The *Flemish Welfare Aid*-case from 2008 concerned a provision that required persons working in the Belgian-Flemish region to reside there in order to be covered by the Flemish health care scheme. This put Belgian nationals who were residing in the Walloon region while working in the Flemish region at a disadvantage compared to foreign EU citizens and Belgian nationals who had exercised their right of freedom of movement. Only the two latter groups were protected from the indirectly discriminatory residence requirement by virtue of the EU prohibition on discriminatory treatment.<sup>52</sup>

In the area of family reunification, reverse discrimination becomes apparent when a TCN spouse of a EU citizen is permitted to reside and engage in economic activity in all EU Member States except for the spouse's own.<sup>53</sup> As seen below in section 7.2, this particular type of reverse discrimination was challenged in the *McCarthy*-case.

## 4.2 The Court's approach to reverse discrimination

The Court, by maintaining that EU law is inapplicable to cases that fall outside the scope of EU law, has manifested that the effects of reverse discrimination is a matter to be solved within the national jurisdictions of the Member States.<sup>54</sup> Accordingly, some Member States' own legislation contain equality laws that may be used to avoid reverse discrimination of its own nationals. The Court has proved willing to assist the Member States with interpretations of EU law also in purely internal situations in order to remedy the effects of reverse discrimination.

### *Dzodzi*, 1990

Mrs Dzodzi was a Togolese national who entered Belgium to marry a Belgian national. The husband died after just a few months and Mrs Dzodzi had not yet obtained a permit to remain and reside in Belgium. She appealed against the authorities' decision to expel her. The national court asked the Court to interpret the conditions for the right of residence of family members to deceased Community workers. Even if Mrs Dzodzi's situation was purely

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<sup>51</sup> Nic Shuibhne, 2002, *op.cit.* at page 732 and 763 gives examples of reverse discrimination.

<sup>52</sup> *Flemish Welfare Aid*, 2008, *op.cit.* notably at para 33-34, 37-48 where the Court clarified that Articles 45 and 49 TFEU prohibited indirectly discriminatory treatment of workers and self-employed who fulfilled the cross-border element. In her Opinion in *Flemish Welfare Aid*, 2008, *op.cit.* at para 116 Advocate General Sharpston pointed out the paradox of accepting differential treatment based on regional borders but not national.

<sup>53</sup> Nic Shuibhne, 2002, *op.cit.* at page 732. In *Metock*, 2008, *op.cit.* at para 76 the intervening Member States pointed out that the Court's generous interpretation of the right to family reunification of migrant EU citizens in Directive 2004/38, *op.cit.* aggravated the problem of reverse discrimination of non-migrant home State nationals.

internal, the national court still needed an interpretation of said conditions in order to apply a Belgian law that prohibited reverse discrimination of national workers. Consequently, the residence rights granted to TCN spouses of foreign Community workers present on Belgian territory should be extended to also TCN spouses of Belgian nationals who were outside the scope of the economic freedoms. By lack of a cross-border element, the Court found the case to be a purely internal situation. It argued that it nevertheless came within its jurisdiction to provide an interpretation of Community law to the Belgian court so it could apply national law to remedy reverse discrimination.<sup>55</sup>

The Dzodzi-principle was extended in the case *Guimont*, which concerned free movement of goods. The Court found the case to be a purely internal situation but the national court had not stated that domestic law prohibited reverse discrimination. Nevertheless, the Court chose to interpret Community law since, hypothetically, national law might be used to remedy reverse discrimination.<sup>56</sup>

#### 4.3 A problem or a necessary consequence of purely internal situations?

Reverse discrimination occurs only in purely internal situations, which are, by definition, beyond the scope of EU law. It can therefore be argued that only national courts and legislators are rightfully competent to decide whether and how to remedy reverse discrimination. Reverse discrimination is thus perceived as a necessary consequence of the purely internal situations-rule, which draws the line between the powers of the EU and that of its sovereign Member States.<sup>57</sup>

Others argue, that, since it is the Court's interpretation of EU law and its own purely internal situation-rule that causes reverse discrimination, the responsibility to solve any adverse effects should lie on the EU.<sup>58</sup> Because of the Court's restrictions-approach to free movement of persons and the loosened cross-border requirement in the area of EU citizenship rights, the situations found to be purely internal might become fewer but the reverse

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<sup>54</sup> See comment on *Saunders supra* section 2.1.1, *Jacquet*, 1997, *op.cit.* at para 23 and *supra* section 3.3, *Metock*, 2008, *op.cit.* at para 77-79 and *Flemish Welfare Aid*, 2008, *op.cit.* at para 39-40.

<sup>55</sup> *Dzodzi*, 1990, *op.cit.* at para 3-7, 13-16, 22-24, 27-28, 35 and 41-42. See *Steen II*, 1994, *op.cit.* at para 8-11 where the Court held that national anti-discrimination law may be used to remedy reverse discrimination.

<sup>56</sup> *Guimont*, 2000, *op.cit.* at para 18-24. See comments to the case in Broberg and Holst-Christensen, 2010, *op.cit.* at pages 261-263. The same approach was applied in *Reisch*, 2002, *op.cit.* at para 24-27. Ritter, 2006, *op.cit.* at pages 696-703 strongly criticises that the Court interprets EU law in purely internal situations regardless of whether the national courts has stated that they wish to use domestic anti-discrimination law in the case.

<sup>57</sup> Ritter, 2006, *op.cit.* at pages 706-707 and 709-710, Davies, 2003, *op.cit.* at page 144. Poaires-Maduro, 2000, *op.cit.* at page 137 points out that for the sake of diversity and competition, the Member States should be able to choose their own approaches to reverse discrimination. See also *supra* at footnote 6.

<sup>58</sup> Dautricourt and Thomas, 2009, *op.cit.* at pages 436-439, and Nic Shuibhne, 2002, *op.cit.* at pages 766-769.

discrimination that they result in seems arbitrarily motivated and becomes less and less justifiable.<sup>59</sup>

In her opinion in *Flemish Welfare Aid*, Advocate General Sharpston argued that Article 21 TFEU should be read as containing two free-standing EU citizenship rights: a right of freedom of movement *and* a right of residence, both reliable also against the Member State of nationality.<sup>60</sup> The latter suggestion is not entirely new. As early as in the 1982 *Morson and Jhanjan*-case, the Commission submitted that the only solution to the problem of reverse discrimination would be a generalized right of residence for all Member State citizens alike.<sup>61</sup> The effect would be that also EU citizens who had no cross-border element in their case would come within the scope of EU law.

There is, however, reason for the Court to hesitate in taking a step towards completely abolishing the purely internal situations-rule. Unlimited applicability of the rights attached to EU citizenship would give the Court jurisdiction to scrutinize literally any rules that the Member States impose on their own nationals. This might force a dramatic deregulation process in the Member States and open a floodgate of litigation since all State measures could be challenged.<sup>62</sup> Such a development would also be a huge step towards a federalized EU where EU citizenship entails rights of a constitutional character.<sup>63</sup> In her opinion in *Flemish Welfare Aid*, Sharpston acknowledges that considerable political and legislative processes are required for such an evolution. It should not be the result of a single Court-ruling.<sup>64</sup>

It can nevertheless be argued that reverse discrimination is an incongruity with the concept of EU citizenship, the increasing importance of fundamental rights and the principle of equality as well as with the aim of establishing a market without internal frontiers. If the

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<sup>59</sup> Tryfonidou, "Reverse discrimination ..." 2009, *op.cit.* at pages 161-162. Spaventa, 2002, *op.cit.* at page 31. Dautricourt and Thomas, 2009, *op.cit.* at pages 444-446 and at page 435 referring to the Opinion in *Konstantinidis*, 1992, *op.cit.*

<sup>60</sup> Opinion in *Flemish Welfare Aid*, 2008, *op.cit.* at para 143-144. Dautricourt and Thomas, 2009, *op.cit.* at pages 447-449 and referring to Sharpston's Opinion in *Flemish Welfare Aid*, argue that mere Member State nationality and thereby status of EU citizenship should be sufficient to bring a situation within the scope of EU law regardless of cross-border movement. As a result, the scope of Article 18 TFEU would be applicable to combat the effects of reverse discrimination.

<sup>61</sup> *Morson and Jhanjan*, 1982, *op.cit.* at page 3731. The case is presented in the next chapter.

<sup>62</sup> See arguments presented by Ritter, 2006, *op.cit.* at pages 701-702, Davies, 2003, *op.cit.* at page 143. Dautricourt and Thomas, 2009, *op.cit.* at pages 49-450. Although critical to the phenomenon of reverse discrimination, Nic Shuibhne, 2002, *op.cit.* at page 732 underlines that she does not intend to advocate for an omnipotent EU.

<sup>63</sup> Advocate General Jacobs proposed such a development in his Opinion in *Konstantinidis*, 1993, *op.cit.* at para 46. De Búrca, 2011, *op.cit.* at pages 484-485 and Tryfonidou, "Family Reunification ...", 2009, *op.cit.* at pages 650-651 hold that the Lisbon Treaty amendments, which grant the Charter the status of primary law, do not have the effect of establishing a set of EU citizenship constitutional rights.

<sup>64</sup> Opinion in *Flemish Welfare Aid*, 2008, *op.cit.* at para 156. She also points this out in her Opinion in *Zambrano*, 2010, *op.cit.* at para 171-177. See below in section 7.2.1.

status of EU citizenship is to have true substance, it seems unjustified that differentiation between EU citizens is made on the basis of the Court's blurred and legally uncertain definition of the cross-border element.<sup>65</sup> As shall be seen in the section below, to leave some EU citizens outside the scope of EU law has the most devastating consequences in the area of family reunification.

## 5 The right to family reunification in EU law

### 5.1 A means to facilitate economic free movement of persons

As early as in the late 1960's in Regulation No. 1612/68, EU law recognized the importance of ensuring the right of Community workers to be joined by their family members when pursuing economic activity in a host Member State. Regardless of nationality, spouses, children and dependant relatives in the ascending line, were entitled to derive a right of residence from the status of their Community worker family member.<sup>66</sup> The reason for granting these rights was to facilitate the economic free movement of Member State nationals, which served the internal market-goal. The right to family reunification with TCN family members was thus not an objective per se. It was rather an effect of the secondary legislation that aimed to ensure full effect of the economic freedoms.<sup>67</sup>

The case *Morson and Jhanjan* illustrated the effect of reverse discrimination in the area of family reunification. The Court here affirmed that Member State nationals could not enjoy a EU right to family reunification unless it was necessary for facilitating economic cross-border migration. True to the *Saunders*-jurisprudence, the Court denied the applicability of the rights to equal treatment and family reunification in Regulation No. 1612/68 to purely internal situations.

#### *Morson and Jhanjan*, 1982

The case concerned the Surinamese nationals, Mrs Morson and Mrs Jhanjan; the mothers of two naturalised Dutch nationals. Their children had resided and worked only in the Netherlands but the mothers claimed a right of residence as dependent family members in the

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<sup>65</sup> See arguments put forward by Tryfonidou, "Reverse discrimination ..." 2009, *op.cit.* at pages 162-171, O'Leary, 1996, *op.cit.* at pages 275-278, Advocate General Poaires-Maduro in his Opinion in *Carbonati Apuani*, 2004, *op.cit.* at para 67-69, Poaires-Maduro, 2000, *op.cit.* at page 126 and Advocate General Sharpston's Opinion in *Zambrano*, 2011, *op.cit.* at para 127-138.

<sup>66</sup> See *supra* section 2.2 and footnote 8. See also Costello, 2009 *op.cit.* at page 588.

ascending line of Community workers. They based their argument on Regulation No. 1612/68 combined with the prohibition on nationality discrimination in Article 18 TFEU. The Dutch Government, in its place, argued that in the absence of harmonisation measures on Community level, immigration policies and legislation were strictly within the competence of each Member State.<sup>68</sup> The Commission shared this view and held that the prohibition on nationality discrimination could not be relied upon in purely internal situations and was therefore not a remedy for reverse discrimination.<sup>69</sup> The Court agreed and based its ruling on the wording and purpose of the provisions governing free movement of workers and equal treatment. It held that both provisions were means to attain the internal market goal. The family reunification rights in secondary legislation and the protection against discrimination were therefore only applicable to those workers who made use of their right of economic freedom of movement in a host Member State.<sup>70</sup> The *Morson and Jhanjan*-ruling thereby showed that family reunification with TCN family members does not have to be ensured in purely internal situations, which are, per definition, not connected with the internal market-goal that the economic freedoms serve.<sup>71</sup>

## 5.2 Towards a rights-aimed jurisprudence?

As said above, the Court developed a deterrence-principle in the area of free movement of persons as an expression of its restrictions-approach. As a result, the Member States may not impose measures on their own nationals that might have a deterrent effect on their exercise of the economic freedoms or the EU citizenship right to free movement. In cases *Singh* and *Eind*, the Court found that a Member State's refusal to grant residence rights to TCN family members was a measure that might have such a deterrent effect. The Court referred to the deterrence-principle to ensure the right to family reunification of Community workers who return to their home Member States.

### *Singh*, 1992

Mrs Singh was a British national married to a man of Indian nationality. The couple had moved to and resided in Germany for three years where Mrs Singh had been a Community worker. Mr Singh had there derived a right of residence from the status of his wife by virtue

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<sup>67</sup> For this interpretation of the aims of the secondary legislation in question, see *Dzodzi*, 1990, *op.cit.* at para 22-24, the Advocate General's Opinion in *Jia*, 2006, *op.cit.* at para 69 and 72 and *Carpenter*, 2002, *op.cit.* at para 38. See also Tryfonidou, "Family Reunification ..." 2009, *op.cit.* at page 646.

<sup>68</sup> *Morson and Jhanjan*, 1982, *op.cit.* at pages 3729-3730.

<sup>69</sup> *Id.* at page 3731.

<sup>70</sup> *Id.* at para 13-18.

of Regulation No. 1612/68. The couple returned to the UK where Mrs Singh took up economic activity as a self-employed person. Mr Singh was however denied a residence permit under British immigration law. He appealed against the decision by claiming a right of residence on the same grounds as he had in Germany; he was the spouse of a migrant, economically active Member State national. UK authorities held that, since Mrs Singh was a British national the matter was outside the scope of the Treaty's economic freedoms and the residence rights derived from secondary legislation were therefore inapplicable. Only British immigration law could apply to purely internal situations.<sup>72</sup>

The Court, however, held that the Member States were prohibited to take measures, which deterred their own nationals from making use of their right to free movement. A person might be deterred if his home Member State presents obstacles to the entry and residence of his family members. Mr Singh therefore had to be granted at least the same rights in the UK as he did when accompanying his wife in a host Member State.<sup>73</sup>

Mrs Singh was an economically active person who had crossed the border from one Member State to another to work and then re-entered the first (her home) Member State to pursue economic activity there. It was therefore not clear whether the ruling should be interpreted as protecting the first or the second act of cross-border movement. If it was the second movement, then the Court simply used the *Morson and Jhanjan*-jurisprudence. The right to family reunification is ensured to facilitate economic migration between Member States, regardless of where the Community worker is a national. If, on the other hand, the Court aimed at protecting the first movement, from the UK to Germany, the deterrence-principle is badly motivated. It was this first movement that resulted in Mr Singh's benefit from EU residence rights in the first place. If the Singh-couple had remained in the UK, national immigration laws would have unarguably applied to Mr Singh.<sup>74</sup> There is then no apparent connection between facilitating the internal market-goal and granting Mrs Singh the right to family reunification. The Singh-ruling can thus be read as the Court's first step towards developing a *rights-aimed jurisprudence* detached from the Union's economic goals.<sup>75</sup> It thus becomes an aim in itself for the Court to ensure the enjoyment of rights of the Member State nationals who come within the scope of freedom of movement. The

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<sup>71</sup> See for example Tryfonidou, "Family Reunification ...", 2009, *op.cit.* at page 637.

<sup>72</sup> *Singh*, 1992, *op.cit.* at para 13-14.

<sup>73</sup> *Id.* at para 15-16 and 19-23.

<sup>74</sup> Costello, 2009, *op.cit.* at page 618, Poireres-Maduro, 2000, *op.cit.* at pages 124-125 and Tryfonidou, "Reverse Discrimination ..." 2009, *op.cit.* at pages 98-101.

<sup>75</sup> *Inter alia* Costello, 2009, *op.cit.* at page 588, Spaventa, 2008, *op.cit.* at page 39 talk of the Court's tendency to adopt a rights-aimed jurisprudence.

introduction of EU citizenship and the increasing importance of fundamental rights in EU law have strengthened this development. In the subsequent case *Eind* it was clear that the Court ensured the right to family reunification of a former Community worker even though the granting of that right did not have any bearing on his original pursuit of economic activity in a host Member State.

*Eind*, 2007

Mr Eind was a Dutch national whose TCN daughter, Rachel, had come from her home State of Surinam to join her father in the UK, where he was working. She had there enjoyed a right of residence as the family member of a Community worker. Mr Eind later returned to the Netherlands where he, because of ill health, didn't pursue any work but lived off of social benefits. The Dutch authorities denied Rachel a right of residence under national immigration law. The Member State held that the secondary legislation governing the rights of Community workers and their family members didn't apply since, by contrast to the *Singh*-case, Mr Eind had not returned to his home State to pursue an economic activity. The matter was therefore a purely internal situation.<sup>76</sup> The Court disagreed and held that to ensure the internal market-goal, the secondary legislation adopted to give the economic freedoms effect had to be interpreted generously.<sup>77</sup> In addition, the Court referred to the right of all EU citizens, to move and reside freely within the Union, which strengthened Mr Eind's right to return to his own State without being economically active.<sup>78</sup>

“Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right of a Community national to return to the Member State of which he is a national cannot be considered to be a purely internal matter.”<sup>79</sup>

Being a Dutch national, Mr Eind's residence in the Netherlands was per definition lawful, unconditional and not dependent on economic activity or self-sufficiency. Consequently, a Community worker's right to family reunification in the Member State of origin could not be conditional on whether he pursued any economic activity there. Since Mr Eind had made use of his right of freedom of movement as a worker when he moved to the UK, Rachel, by analogy of the rights of family members in Regulation No. 1612/68, was entitled to a right of residence in her father's home State.<sup>80</sup>

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<sup>76</sup> *Eind*, 2007, *op.cit.* at para 9-13.

<sup>77</sup> *Id.* at para 43.

<sup>78</sup> *Id.* at para 32.

<sup>79</sup> *Id.* at para 37. See also para 35-36 and 44.

<sup>80</sup> *Id.* at para 31-32, 38-40.



As in *Singh*, the use of the deterrence-principle seems awkwardly motivated. Since Mr Eind had never resided with Rachel in the Netherlands before, protecting his family life in his home country seems unconnected to facilitating his exercise of economic free movement.<sup>81</sup> *Singh* and *Eind* are better understood if seen as part of the Court's development of a rights-aimed jurisprudence parallel to the internal market-goal. To borrow Tryfonidou's vocabulary, it's as if the Court seeks to protect any individual who have contributed to the economic aims of the Union since it does not only grant rights to ensure the effectiveness of the economic freedoms.<sup>82</sup> To merely *have* exercised an economic freedom is thus sufficient to have a protected right to family life under EU law.

### 5.3 The advantage of coming within the scope of EU law

A EU citizen who wishes to be reunited with a TCN family member has a clear advantage if his situation comes within the scope of the free movement provisions and the subsequent secondary legislation. If the family can only rely on the national immigration laws of the EU citizen's home Member State, they might face considerable difficulties in terms of long procedural delays, complicated formal requirements and strict individual assessments.<sup>83</sup> By contrast, if the TCN is the spouse, child or dependant parent of a EU citizen who fulfils the conditions laid down in Directive 2004/38, a residence permit should be obtained by merely providing a valid passport and documentation attesting the family relationship.<sup>84</sup>

The cases *Singh* and *Eind* showed that Community workers continue to enjoy the right to family reunification in secondary legislation also if they return to their Member State of nationality. But the Court's rights-aimed jurisprudence has resulted in a generous protection of family life also in cases where the secondary legislation was not applicable. The next chapter presents the cases, which exemplify this approach. In *Carpenter* the Court ensured the right to family reunification of a service provider by referring to the fundamental right to respect for family life in Article 8 European Charter of fundamental Human Rights, ECHR. In *Baumbast and R* and *Zhu and Chen* TCN parents were entitled to indirectly derive a right of residence from EU law by virtue of being the primary carers of children who were enjoying rights under EU law.

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<sup>81</sup> The intervening Member States disputed that the refusal to grant Rachel a residence permit in the Netherlands could have a deterrent effect on Mr Eind's exercise of freedom of movement to the UK. *Id.* at para 33. See also Tryfonidou, "Family Reunification ...", 2009, *op.cit.* at pages 644-646.

<sup>82</sup> Tryfonidou, "Family Reunification ...", 2009, *op.cit.* at pages 646-647.

<sup>83</sup> Costello, 2009, *op.cit.* at 588-591. In the Opinion in *Jia*, 2006, *op.cit.* at para 33 Advocate General Geelhoed pointed out that the Member States were entitled to only admit a TCN person into their territory after an individual assessment.

## 6 Extending the protection of family life

### 6.1 Fundamental rights in EU law

For a long time, the Court has referred to fundamental rights, as enshrined in the ECHR and the constitutional traditions of the Member States, as general principles for interpreting EU law.<sup>85</sup> The 1992 Maastricht Treaty, which introduced the status of EU citizenship, contained the recognition of fundamental rights as an integral part of EU law. In 2000, the EU presented its own Charter of Fundamental Rights of the European Union. The 2009 Lisbon Treaty granted the Charter the same primary law status as the EU Treaties alongside the pledge that EU is to become a contracting party to the ECHR.<sup>86</sup> However, the application of the Charter is limited to the actions of the EU institutions and to the Member States only when the latter are implementing EU law.<sup>87</sup> Also, Article 6 the Treaty on European Union, TEU states that neither the Charter nor the EU's accession to the ECHR shall have the consequence of extending the EU's competences.

#### 6.1.1 Article 8 ECHR in the Court's case law

As fundamental rights have gained importance in EU law the Court has increasingly relied on the right to respect for family life in Article 8 ECHR in cases concerning family reunification.<sup>88</sup> Although all the Member States are contracting parties to the ECHR, family reunification is not a fundamental right in itself. According to the Strasbourg-Court, Article 8 ECHR does not guarantee the enjoyment of family life in any particular country. If family reunification can be obtained in another European State or the home State of the TCN family member, then denying a right of residence to one or more family members does not infringe Article 8 ECHR. The consequence might well be that a EU citizen is obliged to move to another State or outside the EU in order to live with his TCN family member. The Strasbourg-jurisprudence thus provides the contracting States a wide margin of discretion in their

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<sup>84</sup> Article 10 (2), Directive 2004/38, *op.cit.*

<sup>85</sup> Article 6 (3) TEU. See *inter alia* De Búrca, 2011, *op.cit.* at pages 477-480. See *inter alia* cases, *Internationales Handelsgesellschaft*, 1970, *op.cit.* *SPUC v Grogan*, 1991, *op.cit.* *Familiapress*, 1997, *op.cit.* *Schmidberger*, 2000, *op.cit.* *MRAX*, 2002, *op.cit.* *Viking Line*, 2007, *op.cit.*

<sup>86</sup> Article 6 TEU.

<sup>87</sup> Article 51 the Charter. See also De Búrca, 2011, *op.cit.* at 484-485 who discussed the meaning of the limited scope of the Charter. Tryfonidou, "Family Reunification ...", 2009, *op.cit.* at page 651 points out that the Charter seems to have a narrower field of application than fundamental rights as general principles of EU law. See also *supra* footnote 63.

<sup>88</sup> In *Baumbast and R*, 2002, *op.cit.* at para 72 the Court invoked Article 8 ECHR to interpret the provisions of Regulation No. 1612/68, *op.cit.* In *Akrich*, 2003, *op.cit.* at para 58-60 the Court urged the Member States to consider the rights in Article 8 ECHR before expelling the concerned TCN family member. See *inter alia* *Foster*, 2010, *op.cit.* at 337 and *Costello*, 2009, *op.cit.* at page 593. See also the *Carpenter*-case below.

immigration control.<sup>89</sup> The Court, on the other hand, strives for a generous as well as uniform interpretation of primary law and the secondary legislation that is to give it effect.<sup>90</sup> In addition, whereas national procedural law might obstruct litigation based on the ECHR, fundamental rights are used directly as general principles for interpreting EU law whenever a situation comes within its scope.<sup>91</sup> In the *Carpenter*-case, the Court combined a heavy reliance on Article 8 ECHR with accepting a tenuous cross-border element to ensure the right to family reunification.

### *Carpenter*, 2002

Mrs Carpenter was a Philippine national, residing in the UK with her British national husband and stepchildren. Her residence permit, granted under British immigration law, had expired but she continued to remain in the country, appealing against the expulsion order against her. She claimed a right of residence by virtue of Community law since her EU citizen husband was exercising the right of freedom of movement for services. Mr Carpenter ran a business selling advertising space in periodical journals. By use of online communications and occasional travels abroad, he provided his services mainly to advertisers established in other Member States. For these travels, he was dependent on his wife's presence in the UK to care for his children. Furthermore, if Mrs Carpenter were deported to the Philippines, her husband would have to follow her in order to continue their family life together. This would in itself be a hindrance to his exercise of the economic freedom of movement for services.<sup>92</sup>

By generously interpreting the cross-border element in the case, the Court accepted that Mr Carpenter's occupational activity came within the scope of the free movement of services.<sup>93</sup> However, the secondary legislation governing the right of residence of family members could only be applied if the EU citizen and spouse effectively moved to a *host* Member State.<sup>94</sup> The Court therefore had to find another legal basis for granting Mrs Carpenter a right of residence. By applying the restrictions-approach it found that the national measure to expel Mrs

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<sup>89</sup> *The Family Reunification-case*, 2006, *op.cit.* at para 46, 52-56. See also Costello, 2009, *op.cit.* at pages 612 and 590-591 where she cites the Strasbourg-Court's ruling 'Abdulaziz' from 1985.

<sup>90</sup> *Id.* and see *inter alia* cases *Zhu and Chen*, 2004, *op.cit.* at para 31, *Eind*, 2007, *op.cit.* at para 43, *Metock*, 2008, *op.cit.* at para 68 and 84.

<sup>91</sup> Article 6 (3) TEU. The fundamental right to respect for family life is also expressed in Articles 7 and 33 the Charter, and is to be respected by the EU institutions and the Member States when implementing EU law. See *supra* section 6.1.

<sup>92</sup> *Carpenter*, 2002, *op.cit.* at para 13-17 and 21.

<sup>93</sup> *Id.* at para 28-30. The Court referred to its previous ruling in *Alpine Investments*, 1995, *op.cit.* where providing services over the telephone cross-border had been enough to come within the scope of the Treaty's free movement of services.

<sup>94</sup> *Id.* at para 32-36. For the current secondary legislation in force, see Article 3 in Directive 2004/38, *op.cit.*

Carpenter would constitute an obstacle to Mr Carpenter's exercise of the freedom to provide services.<sup>95</sup>

In addition, the Court seemed to be driven by a rights-aimed approach. Since Mr Carpenter was a EU citizen, pursuing one of the economic freedoms, his fundamental rights should be ensured under EU law.<sup>96</sup>

"The decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr Carpenter of his right to respect for family life within the meaning of Article 8 of the Convention for the Protection of Human Rights (...), which is among the fundamental rights which, according to the Court's settled case-law (...) are protected in Community law."<sup>97</sup>

The case clearly shows the advantage of coming within the scope of EU law to obtain family reunification. Under the Strasbourg-regime, Article 8 ECHR would not have been infringed if the Carpenter family could have obtained family reunification in another country.<sup>98</sup> In the Court's view, however, such a result would have restricted Mr Carpenter's exercise of his right of freedom of movement for services as well as interfered with his enjoyment of the fundamental right to respect for family life.

## 6.2 TCN parents indirectly deriving residence rights from EU law

### 6.2.1 Indirect residence rights derived from secondary legislation

#### *Baumbast and R*, 2002

In *Baumbast and R*, the Court ensured a continued right of residence in the UK for a TCN parent who was the primary carer of the children she had with a Community worker. While residing in the UK, the couple had divorced but the ex-husband, a French national, remained in the country as a Community worker. His two minor children therefore derived their rights of residence as well as the right to access to primary education by virtue of Regulation No. 1612/68. However, since the children resided with their TCN mother, they were dependent on her care and support to exercise those rights. The Court argued that the mother therefore had to be granted residence rights in the UK so her children could enjoy the rights that they in turn derived from the status of their father.<sup>99</sup> The TCN mother thus *indirectly* derived a right of

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<sup>95</sup> *Id.* at para 39.

<sup>96</sup> Hofstotter, 2005, *op.cit.* at pages 551-552 holds that it was evident that the Court was here rather concerned with protecting the fundamental rights of Mr Carpenter since the link between his wife's residence in the UK and his cross-border economic activity was rather far-fetched.

<sup>97</sup> *Carpenter*, 2002, *op.cit.* at para 41.

<sup>98</sup> *Id.* at para 42. See also *supra* sections 5.3 and 6.1.1.

<sup>99</sup> *Baumbast and R*, 2002, *op.cit.* at para 58, 60-63 and 71-75.

residence from said Regulation. She was two-times removed from the Community worker that made the provisions applicable in the first place.<sup>100</sup>

### 6.2.2 *Indirect residence rights derived from primary law*

#### *Zhu and Chen, 2004*

The Court ensured residence rights to a TCN primary carer also in *Zhu and Chen*. This case, however, concerned the possibility to indirectly derive a right of residence from the EU citizenship right to move and reside freely in Article 21 TFEU.

Mrs Zhu<sup>101</sup>, a Chinese national, had entered the UK when she was six months pregnant. She continued to Northern Ireland – officially a part of the UK – where she gave birth to her daughter Catherine. By virtue of the Irish *ius soli* rule, Catherine acquired Irish nationality and consequently became a EU citizen. After the birth, Mrs Zhu and Catherine moved to Wales and thus remained within the UK. None of them was, however, granted a residence permit under British immigration law. Mrs Zhu appealed, basing both their claims on Catherine's status as a EU citizen. The Court referred to its ruling in *Garcia Avello* and found that Catherine, by holding the nationality of one Member State while residing since birth in another, satisfied the cross-border element and came within the scope of Article 21 TFEU and the secondary legislation conditioning that provision.<sup>102</sup>

Although she was an infant, the Court held that Catherine was capable of exercising her directly effective EU citizenship right to move and reside freely within the Union. The conditions to that right were fulfilled since Catherine's mother provided the sufficient economic resources for her. Catherine was therefore legally exercising her right under Article 21 TFEU and should be granted a residence permit in the UK.<sup>103</sup> Mrs Zhu, however, could not derive a right of residence by virtue of the family rights in secondary legislation. Such rights are only granted to relatives in the ascending line who are *dependent* on the migrating EU citizen.<sup>104</sup> In this case, the situation was the opposite. It was the EU citizen, Catherine, who was completely dependent on her TCN parent. Mrs Zhu was both the provider of sufficient resources and the primary carer who was the necessary support to enable Catherine's

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<sup>100</sup> See comments to the case by Broberg and Holst-Christensen 2010, *op.cit.* at pages 563-564 and Foster, 2010, *op.cit.* at page 337.

<sup>101</sup> As noted by Advocate General Sharpston in her Opinion in *Zambrano*, 2011, *op.cit.* at footnote 22, there has been some confusion of surnames in the *Zhu and Chen*-case. The correct names of the applicants are Catherine Zhu and Mrs Zhu.

<sup>102</sup> *Zhu and Chen*, 2004, *op.cit.* at para 8-12 and 24-26. See also the comments made by Tryfonidou, "Family Reunification ...", 2009, *op.cit.* at page 649.

<sup>103</sup> *Zhu and Chen*, 2004, *op.cit.* at para 20, 26-30 and 41. See *supra* at section 3.1.1 on *Baumbast and R*.

<sup>104</sup> *Id.* at para 42-43. Article 2 (2) in Directive 2004/38, *op.cit.* defines which family members who may benefit from the Directive's residence rights. See also *supra* section 5.1 on the ruling in *Morson and Jhanjan*, 1982.

enjoyment of her rights under Community law. Mrs Zhu therefore indirectly derived her right of residence from her daughter's exercise of her right in Article 21 TFEU.<sup>105</sup> As will be seen below in section 7.2 the *Zhu and Chen* and *Zambrano*-cases have many similarities.

### 6.3 An ever more generous scope of the family rights in Directive 2004/38 *Metock*, 2008

In *Metock*, the Court gave its, by far, most generous interpretation of the family rights that may be derived from secondary legislation.<sup>106</sup> The case concerned the TCN spouses of four EU citizens who were exercising their right to free movement of workers in Ireland. The TCN spouses had made their first entrance in the EU when arriving in Ireland where their initial asylum applications had been rejected. The marriages to the EU citizens had taken place after arriving in the country. The Irish law transposing the newly adopted Directive 2004/38 required that, to be eligible for a right of residence in Ireland, a TCN spouse of a migrant EU citizen must first have acquired lawful residence in another Member State. The Court however, found that the Directive did not allow for a requirement of prior lawful residence. It held that it was within the EU competence to disqualify such national legislation where

“(…) the fact that it is impossible for the Union citizen to be accompanied or joined by his family in the host Member State would be such as to interfere with his freedom of movement by discouraging him from exercising his rights of entry into or residence in that Member State.”<sup>107</sup>

As in *Singh* and *Eind* the Court applied the deterrence-principle. The four EU citizens had evidently moved to Ireland to work before marrying their TCN spouses. Hence, their initial exercise of freedom of movement could not depend on their right to family reunification with their spouses.<sup>108</sup> The Court however, reasoned that to deny their TCN spouses residence rights, might deter EU citizens from *remaining* in the host Member State since it encouraged them to leave in order to pursue their family lives elsewhere. It was therefore unimportant whether the migrant EU citizen had formed his family before moving to a host Member State or whether

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<sup>105</sup> *Id.* at para 13, 28 and 44-46. See also comments by Hofstetter, 2005 *op.cit.* at pages 553-557.

<sup>106</sup> At the time, several Articles in Regulation No. 1612/68, *op.cit.* as well as three other residence directives had been repealed and replaced by Directive 2004/38, *op.cit.*

<sup>107</sup> *Metock*, 2008, *op.cit.* at para 63. See also para 58-70. This was an overruling of the Court's previous case law in *Akrich*, 2003, *op.cit.* at para 49-54 where the Court had accepted that the Member States were competent to decide whether they wished to require TCN spouses to have obtained prior lawful residence in another Member State.

<sup>108</sup> Compare to the Court's reasoning in *Morson and Jhanjan*, *Singh* and *Eind* discussed *supra* in sections 5.1 and 5.2.

the marriage took place after migrating.<sup>109</sup> This was a clear narrowing of the margin of appreciation that the Strasbourg-jurisprudence grants contracting States.<sup>110</sup>

The intervening Member States raised the objection that such a broad interpretation of Directive 2004/38 would result in “unjustified reverse discrimination”<sup>111</sup> of those EU citizens who fell outside its scope. True to its ruling in *Jacquet*, the Court denied responsibility for any effect of reverse discrimination, by pointing out that the situation of EU citizens who fell outside the scope of freedom of movement,

“(…) any difference in treatment between those Union citizens and those who have exercised their right of freedom of movement, as regards the entry and residence of their family members, does not therefore fall within the scope of Community law.”<sup>112</sup>

In *Metock*, the Court wanted to ensure the effectiveness of also the EU citizenship right to free movement and applied the restrictions-approach without distinguishing between the economic and non-economic freedoms. It referred to the stated aim in Directive 2004/38 to “strengthen the right of free movement and residence of *all* Union citizens”<sup>113</sup> as well as

“(…) the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate the obstacles to the exercise of fundamental freedoms, guaranteed by the EC Treaty”

(…)

“(…) 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.”<sup>114</sup>

Since the Irish measure might discourage foreign EU citizens from moving to and remaining in Ireland, it hindered the internal market-goal of the economic freedoms as well as restricted the exercise of the EU citizenship right to move and reside freely.<sup>115</sup> The ruling clearly confirmed that the fundamental right to respect for family life was protected for all EU citizens who came within the scope of Directive, 2004/38.

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<sup>109</sup> *Metock*, 2008, *op.cit.* at para 83-93. Costello, 2009, *op.cit.* at page 601 holds that the ruling thus as makes Directive 2004/38, *op.cit.* an instrument not only for family reunification but also family *formation* with a TCN spouse.

<sup>110</sup> According to the Strasbourg-Court, Article 8 ECHR would not be infringed if a State measure encouraged or obliged a EU citizen to move to another State in order to enjoy family reunification. See *supra* section 6.1.1 on *Carpenter*. See also Costello, 2009, *op.cit.* at pages 603-604.

<sup>111</sup> *Metock*, 2008, *op.cit.* at para 76.

<sup>112</sup> *Id.* at para 78. See *supra* section 3.2.2 on the ruling in *Jacquet*.

<sup>113</sup> *Metock*, 2008, *op.cit.* at para 59 and citing Directive 2004/38, *op.cit.* 3 recital in the Preamble. Emphasis added.

<sup>114</sup> *Metock*, 2008, *op.cit.* at para 56 and 62. The Court applied a similar restrictions-approach to national measures that discourage the exercise of economic freedom of movement in *Eind*, 2007, *op.cit.* at para 44 and *Carpenter*, 2002, *op.cit.* at para 38.

<sup>115</sup> Costello, 2009, *op.cit.* at page 604 points out that if “an equally broad notion is applied to home State measures, the potential scope of the citizenship provisions becomes limitless”.

## 6.4 Aggravating the problem of reverse discrimination

EU citizenship as the status of *all* Member State nationals has abolished the requirement of economic activity to come within the scope of the generous family life protection in EU law. The Court's elastic and thereby legally uncertain concept of the cross-border element has thus become the sole parameter for distinguishing purely internal situations. As shown in the chapter below, the rulings in *Zambrano* and *McCarthy* affirm that the more generously the Court interprets the cross-border element and protects the family life and fundamental rights protection of those who come within the scope of freedom of movement; the more unjustified becomes the reverse discrimination of those EU citizens who find themselves in purely internal situations.<sup>116</sup>

## 7 Zambrano and McCarthy

### 7.1 Two cases concerning EU citizenship and family reunification

The rulings in *Zambrano* and *McCarthy* both confirmed the Court's use of the restrictions-approach to also non-economic freedom of movement and its aim to ensure the rights of those EU citizens who come within the scope of Articles 20 and 21 TFEU. The outcome in *Zambrano*, however, where the cross-border element was as hypothetical as in *Rottmann* and *Garcia Avello*, is in contrast to the subsequent *McCarthy*-ruling. In the latter case, the Court confirmed that there is indeed a limit to the scope of EU law protection of family life. Reverse discrimination thereby continues to occur in the area of EU citizenship, family reunification and fundamental rights protection.

### 7.2 *Zambrano*, 2011

The Colombian nationals Mr and Mrs Ruiz Zambrano arrived in Belgium in 1999 and applied for asylum. Belgian authorities refused their request but held that the family should not be sent back to Colombia in view of the critical situation there. Mr Ruiz Zambrano applied three times for a permanent residence permit from the Belgian Alien's Office but was rejected. The Zambrano family registered in a Belgian municipality and Mr Ruiz Zambrano obtained full-time employment with a local company. The children Diego and Jessica were

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<sup>116</sup> See Tryfonidou, "Family Reunification ..." 2009, *op.cit.* at pages 648-652 where she criticises the Court's liberal approach to EU citizenship and family rights since it erodes the legal justification ground for reverse discrimination of EU citizens in purely internal situations. For other critics to the occurrence of reverse discrimination see *supra* at footnote 59.



born in 2003 and 2005 respectively. Since they were unable to obtain Colombian nationality, Belgian law obliged that both children acquired Belgian nationality.<sup>117</sup> As a consequence, Diego and Jessica became EU citizens.

In 2005, Belgian labour authorities found out that Mr Ruiz Zambrano had been working for almost five years without a work permit and ordered the immediate termination of his employment contract. He applied for unemployment benefits but was refused. In his appeal, Mr Ruiz Zambrano argued that the Belgian constitutional principle of equality combined with the Court's ruling in *Zhu and Chen* protected him and his children from reverse discrimination. He should consequently be entitled to derive a right of permanent residence and a work permit from the EU citizen status of his children.<sup>118</sup> The only difference between the cases was that, unlike Catherine Zhu, Diego and Jessica Zambrano were residing in their Member State of nationality.<sup>119</sup> The Labour Court in Brussels subsequently referred to the Court for a preliminary ruling concerning the meaning of Articles 18, 20 and 21 TFEU and the fundamental rights in the Charter. The children, Diego and Jessica, had never left their Member State of nationality. By lack of the necessary cross-border element, the Belgian Government and all intervening Member States held that the issue was a purely internal situation.<sup>120</sup> A core question was therefore whether the children's status as EU citizens was sufficient to bring the matter within the scope of EU law.<sup>121</sup>

### 7.2.1 *The Opinion of Advocate General Sharpston*

Sharpston thoroughly analysed the scope and quality of EU citizenship. She began by assessing that there was a potential violation of the fundamental rights that are protected under EU law: considering how the Court generously interpreted Article 8 ECHR in *Carpenter*, the expulsion order against Mr Ruiz Zambrano would infringe his children's fundamental right to respect for family life.<sup>122</sup>

Furthermore, Sharpston held that even if the Court were to find that the situation was purely internal, the referred questions were admissible and important to answer. The Belgian constitutional principle of equality had recently been applied in a Belgian court to ban the occurrence of reverse discrimination in a similar case. The national court therefore needed an

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<sup>117</sup> *Zambrano*, 2011, *op.cit.* at para 14-22.

<sup>118</sup> *Id.* at para 25 – 34 and 38 and Advocate General Sharpston's Opinion in *Zambrano*, 2011, *op.cit.* at para 39-43.

<sup>119</sup> Opinion in *Zambrano*, 2011, *op.cit.* at para 95-97, 103-104, 117 and 137.

<sup>120</sup> *Zambrano*, 2011, *op.cit.* at para 1-2 and 35-37.

<sup>121</sup> Opinion in *Zambrano*, 2011, *op.cit.* at para 91.

<sup>122</sup> *Id.* at para 54- 66. Compare to the Court's reasoning on Mr Carpenter's fundamental right to family life in *Carpenter*, 2002, *op.cit.* at para 41-45 and see *supra* section 6.1.1.

interpretation of EU law in order to determine whether there was reverse discrimination of the Zambrano family as well.<sup>123</sup> Sharpston's conclusion was, however, that the issue was not a purely internal situation. She presented three alternative possibilities for how Mr Ruiz Zambrano could be granted a residence and work permit by virtue of EU law.

### *1) A free-standing EU citizenship right of residence*

As in her opinion in the *Flemish Welfare Aid*-case, Sharpston proposed to interpret Articles 20 (2) and 21 TFEU as containing two free-standing EU citizenship rights: a right to free movement and a right of residence, reliable also against the Member State of nationality. As a result, EU citizens, who had never moved across inter-state borders, could also contest national measures that interfered with their fundamental right to respect for family life in Article 8 ECHR. If the Court were to follow this line of reasoning it would have truly remarkable consequences and reverse discrimination would no longer be an issue in EU law.<sup>124</sup>

Sharpston held that, similar to Catherine Zhu, the Zambrano children could not exercise the proposed free-standing right of residence without the support of their parents. Mr Ruiz Zambrano should therefore be granted residence and work permits as the primary carer and provider of resources for his children who were exercising their EU citizenship right of residence.<sup>125</sup>

In addition, she pointed out that to deny Mr Ruiz Zambrano residence rights in Belgium would presumably have the consequence of Diego and Jessica having to leave the EU. They would then be unable to exercise their right of residence as well as any future, hypothetical exercise of freedom of movement.<sup>126</sup> As shall be seen below, this was the line of reasoning that the Court later followed in its ruling.

### *2) Reverse discrimination*

Sharpston proposed an alternative possibility to motivate why Mr Ruiz Zambrano should be entitled to derive a right of residence from EU law. Article 18 TFEU, which expresses the principle of equality, could be applied to prohibit reverse discrimination on EU level.<sup>127</sup>

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<sup>123</sup> Opinion in *Zambrano*, 2011, *op.cit.* at para 36-44. In *inter alia* cases *Dzozdi*, 1990, *op.cit.*, *Guimont*, 2000, *op.cit.* and, *Reisch*, 2002, *op.cit.* the Court answered questions referred by the national courts although the cases were purely internal situations See *supra*, section 4.2.

<sup>124</sup> Opinion in *Zambrano*, 2011, *op.cit.* at *inter alia* para 69-81, 84 and 122. See also *supra* section 4.3 and footnotes 60-61.

<sup>125</sup> *Id.* at para 117.

<sup>126</sup> *Id.* at para 98-102.

<sup>127</sup> *Id.* at para 123-150 and notably para 144. Compare to the Advocate's General Opinion in *Saunders*, 1979, *op.cit.* at 1142-1143.

Sharpston criticised the Court's acceptance of reverse discrimination in the area of EU citizenship rights. She pointed to the paradoxical situation of a EU where only EU citizens whose situations qualify for the scope of EU law, may rely on the EU code of fundamental rights while EU citizens whose situations are found to be purely internal, may not refer to the same fundamental rights protection. The exclusion of some EU citizens from that protection becomes increasingly unjustified given the arbitrariness of the loosened and legally uncertain cross-border element requirement.<sup>128</sup>

### 3) *Fundamental rights as EU constitutional rights*

Thirdly, Sharpston held that EU law was bound to take an evolutionary leap towards a constitutionalized, free-standing fundamental rights protection in any area where the Member States have conferred powers to the EU. EU law would thereby develop into recognising the fundamental right to respect for family life as a directly effective constitutional right for all EU citizens and not only applicable to situations that prove a link to some other EU provision.<sup>129</sup>

“In the long run, only seamless protection of fundamental rights under EU law in all areas of exclusive or shared competence matches the concept of EU citizenship.”<sup>130</sup>

However, Sharpston concluded that the proposed approach would be a significant step towards a federalized EU structure. This would require extensive political processes, legislation and further evolutions in case law. She therefore discarded her own proposal as premature and inapplicable to the present situation of Mr Ruiz Zambrano.<sup>131</sup> In the last point she however expressed that such a constitutional evolution was anticipated and necessary.<sup>132</sup>

#### 7.2.2 *The Judgement of the Court*

The ruling was remarkably short but the Court clearly confirmed that it has adopted a restrictions-approach to the exercise of non-economic free movement and aims to protect the rights attached to the status of EU citizenship. The ruling seemed to once and for all abolish the requirement of a cross-border element for the enjoyment of EU citizenship rights but, as shall be seen below, it did in fact not put an end to the rule of purely internal situations.

Firstly, the Court rejected that the *Zambrano*-case came within the scope of the family member rights in Directive 2004/38. As in *Carpenter*, the secondary legislation could only

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<sup>128</sup> *Id.* at para 83-88, 125-138 and 141.

<sup>129</sup> *Id.* at para 151-170. See also the Opinion of the Advocate's General in *Konstantinidis*, 1993, *op.cit.* at 1211-1213 where he proposed that EU citizens should enjoy the same fundamental rights-protection wherever they go in the Union.

<sup>130</sup> *Id.* at para 170.

<sup>131</sup> *Id.* at 171-176.

govern the situation of EU citizens who had effectively resided in another Member State than that of nationality.<sup>133</sup> Instead, the Court examined the scope of the EU citizenship rights in Article 20 TFEU. By referring to its reasoning in the *Rottmann*-case, the Court stated 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>134</sup>

The Court then applied this jurisprudence to the factual circumstances. Similar to Advocate General Sharpston, the Court held that presumably, Diego and Jessica would be forced to leave the EU if their parents were deported. The same consequence could be assumed if their father was not granted a work permit. He would then not be able to provide sufficient resources for him and his family. Consequently, the refusal to grant Mr Ruiz Zambrano a residence and work permit had the effect of depriving his EU citizen minor children, who were dependent upon him, the genuine enjoyment of the substance of their EU citizenship rights.<sup>135</sup>

The Court was, however, silent on the point of whether, as Sharpston proposed, there is a free-standing right of residence expressed in Articles 20 (2) and 21 TFEU, the enjoyment of which Diego and Jessica risked losing if they were forced to leave the EU. As in *Garcia Avello* and *Rottmann*, the Court might rather have been protecting the future, hypothetical exercise by Diego and Jessica of the EU citizenship right to move and reside freely within the EU. Exercise of that right would have been impossible if they were no longer in the EU. Similar to Catherine Zhu, Diego and Jessica would have to fulfil the condition of sufficient resources to legally exercise their EU citizenship right of residence in any other Member State. This would be difficult if their father did not enjoy legal residence and work permit in Belgium to begin with.<sup>136</sup>

It is noteworthy that the Court did not address the question of reverse discrimination, since the referring Belgian court was concerned with that issue. Instead the Court used *Zambrano* as a basis to further widen the scope of Article 20 TFEU and thereby affirm the legal quality of EU citizenship.

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<sup>132</sup> *Id.* at 177.

<sup>133</sup> *Zambrano*, 2011, *op.cit.* at para 39. See also *Carpenter*, 2002, *op.cit.* at para 34-36 and Article 3 in Directive 2004/38, *op.cit.*

<sup>134</sup> *Zambrano*, 2011, *op.cit.* at para 42. See also para 40-41 and *Rottmann*, 2010, *op.cit.* at para 42.

<sup>135</sup> *Zambrano*, 2011, *op.cit.* at para 43-45.

<sup>136</sup> Article 21 TFEU and Article 7 in Directive 2004/38 *op.cit.* allow the Member States to condition the right of residence in a host Member State with economic self-sufficiency. In *Zhu and Chen*, 2004, *op.cit.* at para 26-28 Catherine Zhu was held to fulfil said condition since her TCN mother provided the necessary resources for her. See *supra* section 6.2.2.

As Wiesbrock has pointed out, the ruling has the peculiar result that, for the purpose of obtaining family reunification, it is now more advantageous to come within the scope of Articles 20-21 TFEU than of Directive 2004/38. EU citizens who effectively move to another Member State must fulfil the Directive's conditions of self-sufficiency. If, however, as for the Zambrano family, the Directive does not apply, the residence rights indirectly derived from primary law are granted unconditionally.<sup>137</sup> What the Court pointed out in *Eind* must apply also to the Zambrano children; their residence in their home State of Belgium must be unconditional. Therefore, their family member's derived residence rights could not depend on the children fulfilling the Directive's requirement of sufficient economic resources either.<sup>138</sup>

The result of the rulings in *Zambrano* and *Rottmann* is a further narrowing of the purely internal situations-rule in the area of free movement of persons and EU citizenship rights. Clearly, the right of non-economic freedom of movement and the associated EU citizenship rights do not require a factual cross-border element to be applicable. This jurisprudence was applied to the subsequent ruling in *McCarthy*. By referring to *Zambrano* and looking at whether the national measure at hand was hindering Mrs McCarthy from enjoying her EU citizenship rights, the Court determined whether her case came within the scope of EU law.

### 7.3 *McCarthy*, 2011

Mrs McCarthy was a British national, living and residing in the UK since birth. By virtue of her mother being an Irish national, she automatically obtained Irish nationality when she was born. As a holder of dual nationality, Mrs McCarthy attempted to bring her situation within the scope of EU law. The intention was that her husband, of Jamaican nationality, would be able to derive a right of residence in the UK from her status as a EU citizen.<sup>139</sup>

Mr and Mrs McCarthy had married in 2002 but Mr McCarthy lacked permission to stay in the UK. According to British immigration law, being the spouse of a UK national was not enough to obtain a residence permit. A TCN person had to qualify for residence in the country

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<sup>137</sup> See the EU-Observer online article by Wiesbrock, 2011, *op.cit.*

<sup>138</sup> *Id.* and *Eind*, 2007, *op.cit.* at para 31, In *Carpenter*, 2002, *op.cit.* at para 42-44 the Court pointed out that since Mrs Carpenter's residence rights were derived from Article 8 ECHR, her residence in the UK could only be conditioned by the legal limitations to fundamental rights in the ECHR: she must not constitute a threat to public order and public safety.

<sup>139</sup> *McCarthy*, 2011, *op.cit.* at para 22-23 and the Advocate General Kokott's Opinion at para 2, 8 and 20-23. Mrs McCarthy surely posed this claim in the light of the Court's Judgement in *Garcia Avello*, 2003, *op.cit.* where dual nationality had been a sufficient cross-border element to bring the matter within the scope of EU law. For a thorough critic of the arbitrariness of accepting artificial cross-border elements as connecting factor with EU law see Tryfonidou, "Family Reunification ..." 2009, *op.cit.* at pages 634-653.

on independent grounds.<sup>140</sup> Consequently, it would be a clear advantage to be the TCN spouse of a EU citizen who came within the scope of the Treaty's freedom of movement provisions. The stricter UK immigration rules would not be imposed on the family members of a EU citizen who came within the scope and fulfilled the requirements for lawful residence of Directive 2004/38.<sup>141</sup>

Following her marriage, Mrs McCarthy made sure to obtain an Irish passport. She then applied for a right of residence in the UK on the basis of being a national of another EU Member State. Her husband simultaneously applied for a derived right of residence as the spouse of a migrant EU citizen. British authorities refused both applications on the grounds that Mrs McCarthy did not come within the scope of the British legislation transposing Directive 2004/38.<sup>142</sup> The fact was that Mrs McCarthy was unemployed and living off of state benefits. Even if her dual nationality would have been enough to come within the scope of the Directive she did not fulfil the requirements of self-sufficiency.<sup>143</sup> Mrs McCarthy immediately appealed against the decision and was to spend several years of bringing appeals and receiving rejections from various British courts. The most recent appeal came to the British Supreme Court, which decided to refer two questions for preliminary ruling to the Court: *Firstly*, could a person of dual Irish and British nationality who had always resided in the UK come within scope of the Directive 2004/38? *Secondly*, could such a person be assessed to have resided lawfully in the host Member States in circumstances where she was unable to satisfy the Directive's requirements of being a worker, self-employed or otherwise economically self-sufficient person?<sup>144</sup> Although Mrs McCarthy held that her dual nationality was sufficient to bring her situation within the scope of EU law, all intervening Member States as well as the Commission were of the opposite view.<sup>145</sup>

### 7.3.1 *The opinion of Advocate General Kokott*

Advocate General Kokott's answer to the referred questions was decisively no. She concluded that Mrs McCarthy's case did not come within the scope of EU law. Her husband's possibility to obtain a residence permit was a purely internal situation to which only national

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<sup>140</sup> *McCarthy*, 2011, *op.cit.* at para 13-15.

<sup>141</sup> Articles 3, 7-9 and 16 in Directive 2004/38 *op.cit.*

<sup>142</sup> *McCarthy*, 2011, *op.cit.* at para 16-17. The UK law transposing Directive 2004/38, *op.cit.* defined the beneficiaries of the provisions very similar to the definition of beneficiaries in the Directive's Article 3.

<sup>143</sup> Opinion in *McCarthy*, 2011, *op.cit.* at para 9, 25 and 43-44. See also Articles 3 and 7 in Directive 2004/38, *op.cit.*

<sup>144</sup> *McCarthy*, 2011, *op.cit.* at 18-21.

<sup>145</sup> Opinion in *McCarthy*, 2011, *op.cit.* at para 19 and 23.

immigration law applied.<sup>146</sup> Kokott found that since Mrs McCarthy had never made use of her right to free movement, the right to family reunification in secondary legislation was not applicable.<sup>147</sup> Nor did she come within the scope of the EU citizenship rights in Articles 18, 20 and 21 TFEU. The fact that she held dual nationality was not causing her inconvenience or discrimination similar to the Garcia Avello children.<sup>148</sup>

“Union citizens such as Mrs McCarthy neither suffer prejudice to their right of free movement nor are discriminated against compared with other British nationals who are in a comparable situation. The mere fact that she has not only British but also Irish nationality does not make it necessary to apply to her and her family members the EU law provisions on the right of entry and of residence.”<sup>149</sup>

Furthermore, Kokott held that Article 21 TFEU could not be read as containing a free-standing EU citizenship right of residence, reliable also against the Member State of nationality. Effective cross-border migration to a Member State other than that of nationality was a precondition for relying on the right of residence.<sup>150</sup>

Kokott admitted that reverse discrimination might arise as the result of applying the more generous EU rules to EU citizens who come within the scope of freedom of movement but not to those who lack a sufficient connection.<sup>151</sup> By referring to the Court’s statement in *Metock*, her conclusion was however that “EU law provides no means of dealing with this problem.”<sup>152</sup> She acknowledged that the Court’s view of EU citizenship as the fundamental status of the Member State nationals might, in time, lead to a revision of its current approach to reverse discrimination. But she underlined that the *McCarthy*-case was not the appropriate basis for such a new turn. As a dependant on social allowances, Mrs McCarthy could not have fulfilled the Directive’s requirements of self-sufficiency in order to legally reside in a host Member State. Therefore, not even if reverse discrimination was prohibited would Mrs McCarthy and

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<sup>146</sup> Opinion in *McCarthy*, 2011, *op.cit.* at para 25, 30-31, 38, 45 and 57. It is significant to note that Kokott’s Opinion in *McCarthy* came out on 25 November 2010. This was after Sharpston had published her Opinion in *Zambrano* on 30 September 2010 but before the Court’s ruling in *Zambrano* on 8 March 2011.

<sup>147</sup> *Id.* at para 30. Compare this to the cases *Singh*, 1992, *op.cit.* and *Eind*, 2007, *op.cit.* which both concerned Member State nationals who had effectively migrated to a host Member State and then returned to their home State. Article 3 (1) in Directive 2004/38, *op.cit.* states that “This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national”

<sup>148</sup> Opinion in *McCarthy*, 2011, *op.cit.* at para 34.

<sup>149</sup> *Id.* at para 38.

<sup>150</sup> *Id.* at para 31 and footnote 26 where Kokott states that she is aware that Advocate General Sharpston takes the opposite view in her Opinion in *Zambrano*, 2011, *op.cit.*

<sup>151</sup> Opinion in *McCarthy*, 2011, *op.cit.* at para 39.

<sup>152</sup> *Id.* at para 40. As the Court made clear in *Metock*, 2008, *op.cit.* at para 77-80 such difference in treatment of a Member State’s own nationals who have not exercised the right to free movement is the responsibility of the Member State.

her husband be in a comparable situation to those migrant EU citizens who may rely on the conditioned residence right in Article 21 TFEU.<sup>153</sup>

Kokott concluded her opinion by recognizing that the refusal to grant Mr McCarthy a right of residence might be an interference with the fundamental right to respect for family life in Article 8 ECHR. However, since the case was a purely internal situation, any infringement of the McCarthy couple's rights under the ECHR was strictly within the jurisdiction of the national court to address.<sup>154</sup>

### 7.3.2 *The Judgement of the Court*

The Court chose to divide its assessment in two parts. The core question was whether the situation of Mrs McCarthy could come within the scope of firstly, Directive 2004/38, or secondly, the EU citizenship right to move and reside freely, which is specified in Article 21 TFEU.<sup>155</sup>

#### 1) *The applicability of Directive 2004/38*

As in the *Carpenter*-case, the Court underlined that the right to family reunification laid down in secondary legislation was only applicable when a EU citizen effectively resided in a Member State other than that of nationality. Article 22 in Directive 2004/38, which provides that EU citizens may rely on the right to move and reside freely within the whole territory of the Member States, should be understood as only referring to “the whole territory of the *host* Member State”, which presupposed movement from the home State.<sup>156</sup> The right of residence stated in Directive 2004/38 could consequently not be regarded as a free-standing right. Residence was to be seen as a merely ancillary right to freedom of movement and a means to facilitate cross-border migration. The fact that Mrs McCarthy held dual nationality could not mean that she was exercising her right to free movement.<sup>157</sup>

Furthermore, since the right of residence in a person's State of nationality is unconditional, a Member State national could never be subject to the requirements for lawful residence laid

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<sup>153</sup> *Id.* at para 43-44. See also references *supra* footnote 138.

<sup>154</sup> *Id.* at para 59-60. See also *Metock*, 2008, *op.cit.* at para 79 where the Court reminded the Member States that in purely internal situations, EU citizens were protected under Article 8 ECHR through national law.

<sup>155</sup> *McCarthy*, 2011, *op.cit.* at para 26.

<sup>156</sup> *Id.* at para 30-33 and 37-39. Compare this to the view taken by the Advocate General in *Saunders*, 1979, *op.cit.* at 1143 that the Treaty's freedom of movement for workers should cover every part of the Member States' territories, including a person's home State.

<sup>157</sup> *McCarthy*, 2011, *op.cit.* at para 35-37 and 40-41.



down in that Directive.<sup>158</sup> Consequently, the Directive's residence rights were not applicable against a person's home Member State.

Lastly, since TCN family members could only derive their right of residence from the status of a EU citizen who came within the Directive's scope, Mr McCarthy could not rely on said provisions either.<sup>159</sup>

## 2) *The applicability of Article 21 TFEU*

For the second assessment, the Court began by echoing its case law regarding purely internal situations:

“(…) the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State”<sup>160</sup>

It was clear that Mrs McCarthy had never resided outside the UK or exercised an economic freedom. This fact was, however, not enough to immediately discard the case as a purely internal situation.<sup>161</sup> The Court confirmed that Mrs McCarthy, by virtue of being a EU citizen, was entitled to rely on her right to free movement in Article 21 TFEU against her Member State of nationality.<sup>162</sup> However, by referring to its latest jurisprudence, the Court firmly rejected that Mrs McCarthy's situation came within the scope of that provision. The fact that British authorities did not take Mrs McCarthy's dual nationality into account when denying her a EU based right of residence in the UK, had in no way affected her enjoyment of the substance of her EU citizenship rights or restricted her exercise of her right to free movement.<sup>163</sup>

The Court did not mention the obvious intention of Mrs McCarthy to obtain a EU based residence permit for herself so that her husband could derive a residence right from her status. Neither was there any reference to the right to respect for family life in Article 8 ECHR, or

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<sup>158</sup> *Id.* at 29 and 34. See *Singh*, 1992, *op.cit.* at para 22 and *Eind*, 2007, *op.cit.* at 31-32 where the Court referred to a person's unconditional right under international law, to enter and reside in the territory of his State of nationality.

<sup>159</sup> *McCarthy*, 2011, *op.cit.* at para 42-43.

<sup>160</sup> *Id.* at para 45. Compare to the Court's similar statements in *Saunders*, 1979, *op.cit.* at para 11, *Metock*, 2008, *op.cit.* at para 77 and *Flemish Welfare Aid*, 2008, *op.cit.* at para 33.

<sup>161</sup> *McCarthy*, 2011, *op.cit.* at para 46-47. The Court was certainly considering the recent ruling in *Zambrano* and its elastic concept of the cross-border element, in *inter alia Schempp*, 2005, *op.cit.* which necessitated a careful assessment of Mrs McCarthy's circumstances.

<sup>162</sup> *McCarthy*, 2011, *op.cit.* at para 48.

<sup>163</sup> *McCarthy*, 2011, *op.cit.* at para 49-56. See notably para 53 where the Court pointed out that the national measures in *Garcia Avello*, 2003, *op.cit.* and *Zambrano*, 2011, *op.cit.* would have had the consequence of depriving the claimants of effective enjoyment of their EU citizenship rights and constituted an obstacle to the exercise of the right to free movement and residence in Article 21 TFEU. See also *supra* section 6.2.2 on *Zhu and Chen*, 2004, *op.cit.* and section 3.2 on *Rottmann*, 2010, *op.cit.*

Articles 7 and 33 the Charter.<sup>164</sup> By its silence on this point, the Court confirmed the limited scope of the Charter.<sup>165</sup> Fundamental rights cannot be ensured under EU law in purely internal situations and they do not have the character of being constitutional EU citizenship rights.<sup>166</sup>

## 8 Conclusion

### 8.1 The generous but legally uncertain scope of EU law

As the Court has looked beyond the Union's internal market-goal, the rule of purely internal situations has been narrowed down to the benefit of a widened scope of the freedom of movement for persons provisions. This has resulted in and an increasingly generous protection of the right to family reunification. The Court has adopted a restrictions-approach to facilitate the exercise of also non-economic free movement and has taken the aim to ensure the enjoyment of EU citizenship and fundamental rights of those EU citizens who come within the scope of Articles 20 and 21 TFEU. But as the traditional requirements of economic activity and physical cross-border movement have been lifted, it has become more and more uncertain what conditions a EU citizen must fulfil to enjoy family life protection under EU law.

### 8.2 Abolishing restrictions and ensuring fundamental rights

The cases *Singh*, *Eind*, and *Metock* showed that to *have* exercised economic freedom of movement is enough to rely on the right to family reunification with TCN family members under secondary legislation. In *Metock* the Court made no difference between the exercise of the economic freedoms and the EU citizenship right of freedom of movement but upheld the fundamental right to family life of also non-economically active EU citizens.

In *Grzelczyk* and *Baumbast and R*, the Court further strengthened the status of EU citizenship by establishing that equal treatment and the right to move and reside freely are

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<sup>164</sup> In her Opinion in *McCarthy*, 2011, *op.cit.* at para 59-60 Kokott pointed out that the McCarthy's were covered by the protection of Article 8 ECHR by virtue of the UK being a contracting party to the ECHR. See *supra* section 7.3.1.

<sup>165</sup> Article 51 the Charter and Article 6 TEU limit the Charter's scope of application to the actions of the EU institutions and to the Member States only when they are implementing Union law and explicitly prohibit that the Charter provisions should extend the competences that the Member States have conferred to the Union. Tryfonidou, "Family Reunification ...", 2009, *op.cit.* at page 652 points out that the Court must clarify the meaning of Article 51 the Charter.

<sup>166</sup> *Id.* See de Búrca, 2011, *op.cit.* at pages 484-485 and compare to the statements in the Advocate General Opinions in *Konstantinidis*, 1993, *op.cit.* and *Zambrano*, 2011, *op.cit.* referred to *supra* at footnotes 129-132 that EU citizens should be ensured a uniform fundamental rights protection wherever they are within the Union.

directly effective EU citizenship rights. In addition, fundamental rights have gained importance in EU law and are ensured for any EU citizen who comes within the scope of freedom of movement. This scope has widened as a result of the Court's restrictions-approach and generous interpretation of the cross-border element to include the protection of also future, hypothetical exercise of the right to free movement. When the relevant secondary legislation has not been directly applicable for obtaining family reunification, the Court has entitled TCN family members to indirectly derive residence rights from EU law by the use of Article 8 ECHR and parents as providers and carers of children who come within the scope of EU law.

### 8.3 *Zambrano* and *McCarthy* – contrasting rulings

At first glance, the *Zambrano*-ruling seemed to put an end to the rule of purely internal situations. In line with the *Rottmann*-case, it showed that Articles 20 and 21 TFEU are applicable without any physical cross-border movement or residence in a host Member State if the future, hypothetical enjoyment of EU citizenship rights is at stake. With regards to the right to family reunification, *Zambrano* confirmed that the Court is especially concerned with the rights of minors. As the Court had also made clear in *Baumbast and R* and *Zhu and Chen*, the children's factual or potential exercise of their rights under EU law necessitated the residence rights of their TCN parents.

The *McCarthy*-ruling, on the other hand, confirmed two things. Firstly, although the requirement of physical cross-border movement has been lifted, there are still purely internal situations where EU law is inapplicable. Secondly, the Court is less generous to extend the scope of EU law when it comes to adult EU citizens who wish to enjoy family life in their home Member States. The argument that the Court should remedy reverse discrimination as it results in unjustified difference in treatment between EU citizens was not convincing in the case of Mrs McCarthy since she was not in a comparable situation to a migrant EU citizen like Mrs Singh or Mr Eind. In contrast to the non-migrant Mr Carpenter, she did not pursue any of the economic freedoms. Nor was she economically self-sufficient, as Catherine Zhu was – thanks to the resources provided by her mother. An expulsion order against her husband would not have had the effect of forcing her to leave the Union, which had been the risk in the *Zambrano*-case. Consequently, she could not have fulfilled the conditions for a right of residence in secondary legislation in a host Member State. As the Court did not find that Mrs McCarthy's factual or hypothetical exercise of her EU citizenship right to free movement in Article 21 TFEU was at risk, there was no reason to protect her fundamental right to family life under EU law either.

#### 8.4 No EU remedy for reverse discrimination

The combination of the Court's restrictions-approach to non-economic freedom of movement and its rights-aimed jurisprudence has filled the status of EU citizenship with strong legal quality. Nevertheless, the more generous the Court protects the rights of the individuals who come within the scope of the economic freedoms or the EU citizenship right to free movement, the more problematic becomes the occurrence of reverse discrimination of those who find themselves in purely internal situations.

The *Zambrano*-ruling established that also non-migrant and non-economically active EU citizens might come within the scope of EU citizenship rights. The delimiting factor is whether there is a potential restriction to their exercise of the right to free movement and the enjoyment of the subsequent EU citizenship rights. By contrast, Mrs McCarthy's potential enjoyment of her EU citizenship rights was not at risk if she could not obtain the residence permit in the UK that she had applied for. Hence, without being able to point to an obstacle to the exercise of freedom of movement, her case was a purely internal situation. Her fundamental right to respect for family life could therefore only be ensured through British law and by reliance on the Strasbourg-jurisprudence, which does not oppose to refusing her husband a residence permit in the country where she is a national. By lack of comparability with those EU citizens who fulfil the conditions for lawful residence, the *McCarthy*-case was not ideal for tackling the issue of reverse discrimination. It is, however, not certain that the Court would have delivered a different ruling if Mrs McCarthy would have been a worker or economically self-sufficient. Since the Court refrained from remedying reverse discrimination in cases like *Metock* and *Flemish Welfare Aid*, it cannot be assumed that it would have done it in the *McCarthy*-case either, even if the facts had been different.

The problem of reverse discrimination is aggravated by the Court's elastic definition of the cross-border element and the wide, legally uncertain concept of restrictions. How are national authorities and courts to establish which measures that might restrict the potential exercise of free movement and enjoyment of EU citizenship rights? How can it be justified that the EU protection of the fundamental right to family life in Article 8 ECHR is more generous than the Strasbourg-jurisprudence requires the Member States to be? In this author's view, the most important issue is to define a justifiable and legally certain ground for why some EU citizens fall outside the scope of EU family life protection while others may rely, directly or indirectly, on EU law to obtain family reunification with TCN family members. Currently, because of the absence of a clear delimitation ground, the surest way for a EU

citizen to enjoy the right to family reunification with a TCN family member is to effectively move to a host Member State and there prove to fulfil the conditions for lawful residence.

### 8.5 A question of the future direction of the EU

The issues of how to limit the scope of EU law and how to address the subsequent reverse discrimination are not yet solved. In the delicate area of family reunification and for the purpose of a uniform fundamental rights protection, as sought by the Advocates General Jacobs and Sharpston in *Konstantinidis* and *Zambrano* respectively, it is much needed that the Court or the EU legislator find a solution. The solution must, however, be politically and socially well anchored. The issue of purely internal situations does not just concern which quality and meaning the status of EU citizenship shall have, it is also part of the greater issue of what future direction the EU is to take. As acknowledged by Sharpston, it is not unlikely that the EU will take a leap towards a federalized structure, where mere Member State nationality would be sufficient to enjoy a set of constitutional rights. The Court would then no longer need to motivate a complicated restrictions-rationale or search for obstacles to the enjoyment of EU citizenship rights to include certain EU citizens within its protective scope. But there are vast implications to completely abolishing purely internal situations in the area of EU citizenship and fundamental rights. The wordings that the Member States have chosen in Article 51 the Charter and Article 6 TEU prove that they are not yet ready for such a development. Out of respect for its limited competences, the Court should rightfully hesitate to extend the scope of EU citizenship and fundamental rights to purely internal situations. However, the Court's increasingly blurred distinction between those EU citizens who do and those who don't come within the scope of Article 21 TFEU seems more and more unjustified and creates a high level of legal uncertainty. Is the Court trying to speed up a process of constitutional and social integration? Or is it simply interpreting the EU Treaties in a way that the Member States have in fact laid the ground for, although the political processes have not proven to live up to it in time? More importantly, is there a social legitimisation ground for giving EU citizenship a constitutional character, which would make it a more important status than the peoples' national citizenships? Considering the rise of nationalist parties in several Member States, which oppose the idea of multiculturalism, seek to limit free movement of persons and object to common EU immigration laws, it seems distant to assume that there is enough social acceptance for a step towards a more federalized EU.

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