17 Union Citizenship: Fundamental Status and Fundamental Rights Analysis of the Recent Jurisprudence of the Court Related to Union Citizenship

The Rottmann, Zambrano, McCarthy and Dereci Cases

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What an enormous number of swathings!
Isn't the kernel soon coming to light?
(Pulls the whole onion to pieces)
I'm blest if it is! To the innermost centre,
it's nothing but swathings-each smaller and smaller.-
Nature is witty!
"Henrik Ibsen, Peer Gynt"1867

17.1 Introduction

Perhaps it is not an overstatement to say that the *institution of Union citizenship* is one of the most contradictory concepts of the *sui generis* legal order of the European Union.[1] Its paradoxical nature was greatly shaped by the respective *activism* of the Court, since more

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1 The very term "Union citizenship" goes back to one of the founding fathers of the European Union, Altiero Spinelli, who employed it for the first time in 1984 in the EP's Draft Treaty Establishing the European Union. A. Von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei & M. Smrkolj, 'Reverse Solange – Protecting the essence of fundamental rights against EU member states', 49 *Common Market Law Review* 2, 2012, p. 501.

and more layers where added to the original, rather laconically worded concept introduced by Maastricht. In the beginning it seemed that the institution of Union citizenship will merely be of symbolic relevance,[2] serving as a sort of remedy against the ills of the democracy deficit of the Union.[3] With time, it became recognized as an institution contributing to a stronger protection of member states' citizens against discriminatory acts of national authorities. Today, it is known as the fifth and most dynamically evolving fundamental freedom.[4] In the motivation of its judgments the Court does not cease to stress its nature as the "fundamental status" of member states' nationals, breaking away the concept from the mere notion of the "market citizen" and elevating it to a higher dimension "paving the way towards federalism".[5] In short, the "citizen" has started to form the European legal space.[6] This is also substantiated by the recent case law of the Luxembourg court regarding the status of Union citizens and the efficient enforcement of rights derived therefrom, in particular its groundbreaking jurisprudence in the *Rottman*[7] and *Zambrano*[8] cases.

It is undisputable that the cases cited above played a defining role in the development of European law. It was the *Rottmann* case where the Court examined for the first time the relationship between the *withdrawal of member state citizenship and the citizenship of the Union*. In this regard the Court held that the member states do not enjoy unlimited discretion (at least not in cases where the loss of national citizenship leads to a corresponding loss of Union citizenship). Without doubt, the above judgments of the Luxembourg forum – albeit not completely – succeeded in overcoming the previously strictly enforced requirement of a cross-border element.[9] In the *Zambrano* Judgment the Court interpreted Article 20 TFEU[10] on Union citizenship for the first time as an *independent, autonomous source* of rights, even in the absence of a cross-border element in the case. Based on the above legal basis, the judgment essentially guaranteed rights of residence and employment

2 S. O'Leary, 'Putting Flesh on Bones of European Citizenship', 24 *European Law Review* 1999, pp. 68, H. van Eijken & S.A. de Vries , 'A new Route into the Promised Land? Being a European Citizen after Ruiz Zambrano', 36 *European Law Review*, 2011, p. 704.

3 A. Wiesbrock, 'Disentangling the "Union Citizenship Puzzle"? The McCarthy case', 36 *European Law Review*, 2011, p. 861.

4 Editorial Comments, 'Two-speed European Citizenship? Can the Lisbon Treaty help close the gap', 45 *Common Market Law Review* 2008, p. 1.

5 This trend was further strengthened with the entry into force of the Lisbon Treaty, as the EU "places the individual at the heart of its activities by establishing the citizenship of the Union"(Charter of Fundamental Rights, Preamble, second paragraph.)

6 *See* Von Bogdandy *et al.* 2012, p. 502.

7 *See* Case C-135/08, *Janko Rottman v. Freistaat Bayern*, Judgment of the Court of Justice (Grand Chamber) of 2nd March 2010 [2010] ECR I-1449

8 *See* Case C-34/09, *Ruiz Zambrano*, Judgment of 8 March 2011 [2011] ECR I-0000.

9 Even if this requirement was only formally applied in several cases.

10 Art. 20 TFEU provides that 'every person holding the nationality of a Member State shall be a citizen of the Union. Both Art. 9, Title II. of TEU and Art. 20-25, Section II: of TFEU contain provisions on Union citizenship. Art. 9. declares, that citizenship of the Union shall be additional to, and not replace national citizenship.

to a Colombian couple in Belgium, whose children possessing Belgian and consequently Union citizenship had never left the territory of the country in question. Thus, the Luxembourg forum has arrived at the protection of the "central core" of citizenship rights derived from Article 20 TFEU, without requiring any cross-border elements in the facts of the case and no doubt providing a striking example for the way forward in the judicial development of European law.

The above judgments were received well in scientific literature. Many authors find that with the *Rottman* and *Zambrano* Judgments of the Court (indeed, some would even add the McCarthy case to this collection), the development of Union law has arrived at a *turning point*.[11]

On a somewhat heart-rending note Eijken and De Vries claim that with the above judgments the ECJ is widening the material scope of Union citizenship and paving the way towards the "promise land" while at the same time it reinforced the constitutional nature of the institution.[12]

Kochenov takes an even bolder approach by asserting that Union citizenship – developed independently of the concept of national citizenship[13] – will in the future focus on the protection of the rights of citizens who represent a real "Europeanness" through their values and their physical presence in the territory of the Union.[14] The author optimistically claims that with the said judgments we have entered a new era of European federalism. Kochenov contends that it is not by chance that with the *Zambrano* Judgment the Court guaranteed residence and employment rights to Columbian, that is third country citizens in the territory of a member state.[15] Azoulai takes a similar stance, interpreting the above judgments as an inclination of the Union to decide for the future autonomously about the conditions of membership in its community of citizens.[16] However, there are some reserved approaches as well, appealing for a more moderate view of these judgments.[17] These critical assessments are foremostly sceptical about the insufficient motivation of the Court substantiating the new approach taken in the *Zambrano* case.[18] Finally, some

11 According to Guild it is remarkable that such an outstanding decision was delivered on 8 March which is generally celebrated as International Women's Day. *See* E. Guild, 'The Court of Justice of the European Union and Citizens of the Union: A Revolution Underway? The *Zambrano* Judgment of 8 March 2011', <http://eudo-citizenship.eu/citizenship-news/453-the-court-of-justice-of-the-european-union-and-citizens-of-the-union-a-revolution-underway-the-zambrano-judgment-of-8-march-2011>.

12 *See* Eijken and De Vries, 2011, p. 721.

13 *Ibid.,* p. 720.

14 D. Kochenov, 'A real European citizenship, a new jurisdiction test, a novel chapter in the development of the Union of Europe', 18 *Columbia Journal of European Law* 1, 2001, p. 58-63.

15 *See* Kochenov, 2001, p. 99.

16 L. Azoulai, 'A comment on the Ruiz Zambrano judgement: a genuine European integration' <http://eudo-citizenship.eu/citizenship-news/457-a-comment-on-the-ruiz-zambrano-judgment-a-genuine-european-integration>.

17 P. Craig, 'The ECJ and ultra vires action: a conceptual analysis', 48 *Common Market Law Review* 2011, p. 415.

authors object not only to the methodology employed by the Court, but to the outright disrespect it has shown towards the positive law of the Union.[19]

Although we acknowledge the need for further discussion on various crucial points of these cases, we agree on many points with the above cited enthusiasm of certain authors, and we may safely say that the last one and a half decades of the Court's case law, especially as regards the residence rights of third country family members (in particular in the *Zu and Chen*, the *Eind*, *Metock* and *Zambrano* cases) generally revealed a *positive trend*.

A highlight of this trend is the *Zambrano* case, which, as already mentioned above, follows the line of argument rendered in the *Rottman* case and guarantees rights of family reunification to the third country parents of a Union citizen of Columbian origin in a purely internal situation. At the same time we cannot fail to recognize the fact that in the cases following the *Zambrano* Judgment, that is in the *McCarthy* and *Dereci* Judgments the Court – at first implicitly and then more openly – seeked to confine its previous, more liberal jurisprudence and assess the status of Union citizenship and the entitlements derived therefrom from the *economic viewpoint* of the free movement of persons.

Through the assessment of the Court's relevant case law, the present article attempts to answer the question: did the Court succeed in finding the *core*, or better yet, the *substance* of Union citizenship in the new, constitutionalized European legal order? Can the Union overcome the deadlock it has navigated itself into and definitively sever the institution of Union citizenship from economic aspects – aspects that are wholly unrelated to the substance of Union citizenship?[20]

Closely connected to the above is the question to what extent in its respective case law the Luxembourg forum relies on fundamental rights considerations serving as a basis for the legitimacy of Union citizenship, such as the requirement to respect family life as laid down in Article 8 of the European Convention on Human Rights (hereinafter referred to as ECHR) and Article 7 of the Charter of Fundamental Rights. Finally, we cannot avoid answering the question: what are the consequences of the Court's new case law, that is, its readiness to "disregard the requirement of a cross-border element in certain cases". Does it solve the problem of reverse discrimination, how will it affect third country nationals

18 Von Bogdandy *et al.* 2012, p. 504, N. Nic Shuibhne, 'Seven Questions for Seven Paragraphs', 36 *European law Review* 2011, p. 161.

19 Hailbronner and Thym overtly stated that "It is difficult to conceive of more drastic disrespect for written legal rules" as the Court showed in its Zambrano decision. K. Hailbronner & D. Thym, 'Case Law, C-34/09 *Gerardo Ruiz Zambrano v. Office National de l'emploi (Onem)*', 48 *Common Market Law Review*, 2011, p. 1260: "the above mentioned directive is not to be used in a situation similar to the main proceedings". The secondary law, indeed, does not openly sanction the legalization of such illegal status by this means. However we should not forget the pursuit of the Union to eliminate illegal employment.

20 Kochenov 2001, p. 109.

and last, but not least: in what way does it promote, or, on the contrary, does it obstruct the enforcement of the principle of legal certainty? The casuistic jurisprudence of the ECJ yields many dangers. National fora and the Union citizens themselves have no choice but to wait for the preliminary ruling of the Court before they can be certain of the scope of their entitlements.

Therefore, the primary issue today is not whether Union citizenship is of symbolic value, but much rather where the limits of the expansive interpretation rendered by the Court may lie.

17.2 The Re-Modeling of the 'Concept of Purely Internal Situation' in the Court's Case law

Due to the complexity of the topic it is worth briefly clarifying the true significance of the *Rottman* and *Zambrano* cases. With its judgments described below, the Court – albeit only under certain circumstances – *disregarded the requirement of a cross-border element* and concentrated on the status of Union citizenship and the effective enforcement of the rights stemming therefrom.

According to the classic requirement of a cross-border element: "citizenship of the Union, established by Article 17 EC, is not, however, intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law."[21] In its case law, the Court consistently stressed the need for a cross-border element in order to be able to invoke Treaty rights deriving from Union citizenship,[22] irrespective of the fact that this entails a previous or potential, future enforcement of free movement.[23] Thus, in the *Grunkin Paul* case[24] the Court pointed to possible difficulties arising from the divergent use of family names which the Union citizen may encounter when making use of free movement rights in the future. This approach however, was widely criticized by legal scholarship.[25]

21 *See* Case C-148/02 *Garcia Avello v. Belgium*, Judgment of 2 October 2003 [2003] ECR I-11613, para. 26.

22 M. Király, *Az Európai Unió gazdasági joga I,* ELTE Eötvös Kiadó, 2010, p. 88.

23 *See* Cases C-291/05 *Eind*, Judgment of 11 December 2007 [2007] ECR I-10719, *C-192/05 Tas-Hagen and Tas*, Judgment of 26 October 2006 [2006] ECR I-10451, C-499/06 *Halina Nerkowska* , Judgment of 22 May 2008 [2008] ECR I-3993, C-208/09 *Sayn Wittgenstein*, Judgment of 22 December 2010 [2010] ECR I-13693.

24 *See* Case C-353/06 *Grunkin-Paul v. Standesamt Niebüll*, Judgment of 14 October 2008 [2008] ECR I-7639.

25 M. Maduro, 'The scope of European remedies: the case of purely internal situations and reverse discrimination', *in:* C. Kilpatrick, T. Novitz & P. Skidmore (Eds.), *The Future of Remedies in Europe*, Hart Publishing, 2000, p. 117.

17.2.1 The Rottmann Case

The Court first seemed to depart from its previous case law in the *Rottmann* case,[26] where it had to take position regarding a *German citizen possessing a German place of residence* in the framework of a preliminary ruling. According to the facts of the case, Mr Rottmann, originally of Austrian nationality, made use of his rights of free movement and settled down in Germany. Here, he applied for naturalization but did not make mention of the fact that he was subject to criminal proceedings in Austria. After the German authorities were informed about the arrest warrant, they withdrew the naturalization on the grounds that Mr Rottmann obtained German citizenship by deception. However, the problem was that due to his German naturalisation, Mr Rottmann also lost his Austrian citizenship and consequently, his status as union citizen, a status that would have enabled him to travel to Germany and establish himself there.

Instead of taking the easy way out, the ECJ decided not to make reference to the fact that Mr Rottmann had previously *made use of his rights related to free movement*, which in turn made it possible for him to obtain German citizenship. The Court much rather stressed that the decision of the national authority to withdraw the national citizenship may affect Mr Rottmann's status as a Union citizen[27] as well as the rights stemming therefrom, which falls "by reason of its nature and its consequences" within the ambit of European Union law.[28] Therefore, based on the *Rottmann* Judgment, all national measures may come under scrutiny which may result in the loss of Union citizenship in the meaning of Article 9 TEU, as all such facts by reason of their nature and consequences come within the scope of application of Union law.[29] In situations falling within the ambit of Union law, national rules must comply with the law of the European Union, even if rules related to the withdrawal of national citizenship fall under member state competence.[30] In the concrete case, the Court found that the deprivation of citizenship for reasons of

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26 *See* Eijken and De Vries 2011, pp. 711-712, Wiesbrock 2011, p. 866, Á. Mohay, 'A Rottmann-ügy. Újabb adalékok az uniós polgárság és a tagállami állampolgárság összefüggéseihez',2 *Jogesetek magyarázata*, 2011, p. 57.

27 It is not the first time that Union citizenship was designated a fundamental status by the Court in its case law. The Court declared it for the first time in its famous *Grzelczyk* Judgment related to obtaining minimum subsistence allowance. Union citizenship is destined to be the fundamental status of nationals of the member states, *See* Case C-184/99 sz. *Grzelczyk*, Judgment of 20 September 2001 [2001] ECR I-6193, para. 31.

28 *See Rottmann* Judgment, paras 42-43.

29 If the court had decided in the case at hand that the situation did not fall under the scope of EU law, it would have essentially enabled the member states to apply their national law, by disregarding EU law concerning Union citizenship.

30 The legal reasoning underlying the *Rottman* case was based on the well established approach elaborated in the *Micheletti* case. The Court in this case only stated that it is not permissible for the legislation of a member state to restrict the effects of the grant of the nationality of another member state by imposing an additional condition for recognition of that nationality with a view to the exercise of a fundamental freedoms provided for in the Treaty.

deception was in accordance with Union law, since the deprivation at hand could not be considered an arbitrary act. At the same time, the Court declared that the proceeding national court when assessing the decision on the withdrawal of naturalization must take into consideration the consequences the decision entails for the legal status of the affected person under Union law in the light of principle of *proportionality*.

17.2.2 The Ruiz Zambrano Case

17.2.2.1 The Facts of the Zambrano Case

Following along the path struck in the *Rottmann* case, the Court in the later *Ruiz Zambrano* case did not insist on "creating" a cross-border element. The case referred for a preliminary ruling concerned a decision of the Belgian authorities rejecting the application for residence of a Columbian couple, Ruiz Zambrano and his wife and the refusal to recognize Mr Zambrano's entitlement to unemployment benefit.

According to the facts of the case Mr Zambrano and his wife arrived in Belgium in 1999 together with their son, where they applied for refugee status. The Belgian authority denied their request and issued a decree obliging the family to leave the territory of the state, which – with due regard to the ongoing civil war in their home state of Columbia – also contained a clause of non-refoulement. Thus, the couple remained in the territory of Belgium without a valid residence permit or work permit in said state. Meanwhile, Mrs Zambrano gave birth to two other children who, thanks to the Belgian rules aimed at preventing statelessness were granted Belgian citizenship, and in consequence, also Union citizenship. Mr Zambrano namely – with due consideration to the generous Belgian rules – deliberately failed to register his children at the consulate of his country of origin, while he meticulously followed the procedure based on which his children acquired Belgian citizenship.[31] Meanwhile, Mr Zambrano became unemployed. His application for unemployment benefit however was refused due to lack of entitlement. Mr Zambrano contested the above decisions on the grounds that he is the direct relative in the ascending line of two Belgian minors, that is, two Union citizens. In its reference for a preliminary ruling the Brussels Employment Tribunal asked the Court whether the above case falls under the scope of Union law even though the infants possessing Union citizenship have never exercised of their rights of free movement?

Under this approach, international law ought to recognize that the term of the genuine link between the state and the citizen is outdated, as EU law has overridden the regional international legal content of the term. *See* in detail: M. Szabó, 'The EU under Public International Law: Challenging Prospects', *in:* Barnard & Catherine, *The Cambridge Yearbook of European Legal Studies*, Vol. 10, Hart Publishing, 2007-2008.

31 Under Colombian law, children born abroad acquire nationality only when their parents actively register with the embassy; if the parents had opted in favour of registration, the unconditional Belgian rules on the prevention of statelessness would not have applied. *See* Hailbronner & Thym 2011, p. 1254.

17.2.2.2 The Court's Ruling Delivered in the Zambrano Case

In the grounds for the ruling the Court made clear that directive 2004/38/EC is *not applicable* to the case. Article 3 paragraph 1 thereof is namely only applicable to those Union citizens who move to a member state or reside in a member state of which they are not citizens. Therefore, the Court made no attempt to discern at least a weak cross-border element in the facts of the case. Hailbronner, Thym and Wiesbrock found that such a far-fetched, albeit possible element would be the fact that the family's return to Columbia could pose a possible future obstacle to the free cross-border movement of the children.[32] In light of the jurisprudence of the Court however, this solution does not seem well-founded due to the argument's hypothetical nature.[33]

In lack of a cross-border element the Court – stressing the fundamental nature of the legal status of Union citizenship – focused on the consequences of the application of the relevant national provisions for the efficient enforcement of Union citizens' civil rights. According to the logic followed by the Court, the expulsion of Mr Zambrano from the territory of the state and denying him a work permit would deprive his children of Belgian citizenship of the enjoyment of rights afforded to them under Union law.

> It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.[34]

In line with the grounds of the judgment, all 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"*[35] are incompatible with Article 20 TFEU regulating the legal status of Union citizenship. Thus, the Court

32 Wiesbrock 2011, p. 866. A. Lansbergen & N. Miller, 'Court of Justice of the European Union Court of Justice of the European Union, European Citizenship Rights and Internal Situations: an Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi* (ONEM)', 7 *European Constitutional Law Review*, 2011, pp. 287-307.

33 *See* Case C-180/03 *Moser v. Land Baden-Wwuemberg*, Judgment of 28 June [1984] ECR 2539. In this case the (conflicts of law) principle based on potential future movement was refused by the Court. *See* Z. Asztalos, *Miskolci jogi Szemle*, 2. évf. (2. szám), 2007, p. 58.

34 *See Zambrano* Judgment, para. 44.

35 *Ibid.*, para. 42.

derived this right – in lack of a cross-border element – directly and exclusively from Article 20 TFEU.[36]

A serious defect of the above doctrine promoting "the genuine enjoyment of the substance of union citizens' rights" (Zambrano test) however is that the Court imposes no restrictions on legal effects and does not define their scope. Unfortunately the Court fails to deliver a dogmatically sound reasoning and misses the opportunity to define the central core of citizens' rights.[37] The Court merely determines legal effects applicable in the case at hand, *i.e.* the rights of residence of the minors possessing Union citizenship and the parents' right to residence and work. At the time of the ruling rendered in the Zambrano case the outcome of the then pending *McCarthy* and *Dereci* cases based on similar facts, was completely uncertain.

17.2.3 The McCarthy Case[38]

17.2.3.1 Facts of the McCarthy Case

Shirley McCarthy was a British citizen who was born in the United Kingdom and never left the country. She also possessed Irish citizenship due to the fact that her mother was born in Ireland. In her home state she became dependant on social assistance. Following her marriage with a Jamaican citizen – who, according to British immigration law could not acquire residence rights – she applied for a passport in the hope of being able to rely on a cross-border element and ensuing beneficial Union citizenship rights.

Later, Ms McCarthy and her husband sought leave to reside in the UK as a migrant Union citizen and her spouse on the basis of family reunification rules under Union law. The British authority denied their request on the grounds that the applicant does not "meet the conditions set forth by law", that is, she is not an economically active migrant, nor a person able to support herself. Considering the fact that she draws social assistance and never exercised her right of free movement neither she, nor her husband – under derived entitlement – may enjoy the benefits conferred by Union law.

In essence, the court referring the question for preliminary ruling wanted to know whether under Union law the mere fact of dual citizenship would render a person a beneficiary of such rights even if this person had never left the United Kingdom in her entire life.

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36 Due to the lack of cross-border element, the judicial body implicitly did not refer to the 2004/38/EC directive and the family reunification rights of third-country relatives.

37 D. Kochenov, 'On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights', 13 *European Journal of Migration and Law*, 2011, p. 451.

38 C-434/09, McCarthy case, Judgment 5 of May 2010.

17.2.3.2 The Ruling of the Court in the *McCarthy* Case

In this case the Court reiterated the *inapplicability* of Directive 2004/38/EC,[39] that is, where the Union citizen in question possesses dual citizenship, but never made use of her rights of free movement.

As regards the applicability of Article 21 of the TFEU enshrining the free movement and residence rights of Union citizens in the present case, the Court referred to its case law according to which legal acts of the Union may not be applied to situations where all relevant facts are *restricted to a single member state*.[40] At the same time, it also declares that the mere fact that Ms McCarthy had never made use of her rights of free movement does not mean that her situation falls under the scope of purely internal situations.[41] At this point the Court makes reference to the Zambrano test, that is, the fundamental nature of Union citizenship and the *doctrine of protecting the "substance" of Union citizenship rights.*[42]

However, the Court found that there was no element of the case, which indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU."[43] The Court motivated its decision by the fact that "the failure by the authorities of the United Kingdom to take into account the Irish nationality of Mrs McCarthy for the purposes of granting her a right of residence in the United Kingdom in no way affects her in her right to move and reside freely within the territory of the member states, or any other right conferred on her by virtue of her status as a Union citizen."[44] At the same time, the Court attempts to delimitate the Zambrano and the McCarthy rulings by declaring that "by contrast with the case of Ruiz Zambrano, the national measure at issue in the main proceedings in the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union."[45]

By applying the Zambrano test, the ruling – albeit not to the advantage of the applicants – seemed to reinforce the foundations of the new approach taken in the cases cited above, that is, the new concept of Union citizenship as a uniform legal status in the European legal space.

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39 *See McCarthy* Judgment, para. 43.

40 *See McCarthy* Judgment, para. 45. The ambiguity of the test is a good illustration of the structure of EU legislation related to Union citizenship. While Art. 21 TFEU may only be applied in cross-border cases, this is not true for the applicability of the non-exhaustive list of Union citizenship rights enshrined in Art. 20 TFEU. Granting Mr. Zambrano's right to reside has a closer link to Union citizenship rights in general, than the children's rights to free movement and residence.

41 *See McCarthy* Judgment, para. 46.

42 *See McCarthy* Judgment, para. 47.

43 McCarthy Judgment para. 49.

44 *See McCarthy* Judgment.

45 *See McCarthy* Judgment, para. 50.

By adopting the new doctrine the Court undoubtedly opened the door to the application of union law even in cases lacking a cross-border element. The main question however is how wide this door was opened. As we have seen, the Court applied the same test in both cases but arrived at different conclusions. Therefore, we may only determine that insofar as the Court does not interpret this concept *unduly restrictively*, it may undoubtedly contribute to widening the scope of union law.[46] In the following we shall analyse the *precise scope* of the Zambrano ruling.

17.3 The Scope of Union Citizenship

17.3.1 The 'Zambrano Test'

The very first question that arises is how the following requirement set forth by the Court should be interpreted: "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."
Since the *Zambrano* and *Rottman* Judgments, we know that the genuine enjoyment of the substance of the rights is breached where the residence of the Union citizen in the territory of the Union (Zambrano) or the status of Union citizenship itself (Rottmann) is in jeopardy.
Latter naturally involves the deprivation of the enjoyment of rights conferred by virtue of the status of Union citizenship, reducing this aspect to that of secondary relevance.[47]
As regards the rights conferred by virtue of the status of Union citizenship the Court in its decisions cited above – albeit tacitly – established a sort of hierarchy of norms, the apex of which is the *right to free movement and residence* within the Union.[48] At first it seemed that the Court in its *Zambrano* Judgment effectively *separated the rights of free movement and residence*. However, in its judgments following the case in question the Court narrowed down significantly the precedent set in the *Zambrano* case by declaring that the *involuntary exit from a concrete member state* without leaving the territory of the Union does not deprive the Union citizen from enjoying the substance of Union citizenship rights.[49] At the

46 Wiesbrock 2011, p. 867.
47 N. Nic Shuibhne, '(Some Of) The Kids Are All Right: Comment on McCarthy and Dereci', 49 *Common Market Law Review* 1, 2011, p. 364. In case the Court-regarded essence of the Union citizenship rights are violated, there is indeed, no need to set forth cross-border elements.
48 However, in the *Zambrano* case Advocate General Sharpston added, that the Zambrano children have the right to residence, along with the right to diplomatic and consular protection in the member states, as well as the permissions granted in Art. 20(2) and Art. 24 TFEU.
49 Art. 21 TFEU "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

same time according to the wording of the primary law, residence rights are guaranteed within the territory of the member states, with no exceptions, not even for the country of origin. The approach described above, however tacitly, was already present in the McCarthy case, but acquired clear contours only in the Dereci case presented below.

17.3.2 The Dereci Case[50]

17.3.2.1 The Facts of the *Dereci* Case

The *Dereci* case concerned the Austrian residence rights of third country family members of Union citizens, who had never made use of their free movement rights. The applicants' situation differed significantly with regard to whether or not they entered the territory of Austria legally, the nature of their family ties to the Union citizen and finally, the fact of dependency and the degree of such dependency.

In the instant cases the Austrian Ministry of the Interior denied applying the regulation similar to the Directive 2004/38/EC and related to the family members of Union citizens to the applicants of the instant cases, since the Union citizens in question had never made use of their rights of free movement. According to the referring court however, the question arises whether or not the test applied by the Court in the *Zambrano* case could be relevant in the instant cases.

In my view, the statements contained in the opinion delivered by the Advocate General in the Dereci case shall have a significant impact on the future case law of the Court, therefore, a brief overview of the arguments calling for the consideration of individual situations seems appropriate.

17.3.2.2 The Opinion of the Advocate General Delivered in the *Dereci* Case

As regards the applicability of the Zambrano test, Advocate General Mengozzi finds that neither of the five cases implies the risk that the Union citizens affected would be deprived of the enjoyment of the substance of Union citizenship rights. At the same time the Advocate General stresses the significance of individual situations, which must indeed be taken into consideration by the Court when assessing preliminary references. In the Advocate General's view, the assessment of these individual situations shall yield an exact delimitation of the judgment rendered in the *Zambrano* case. At this point he gives a practical example based on a hypothetical scenario:

> "The answer to the first question referred for a preliminary ruling would be the same if certain factual circumstances were different. For example, if Mrs Dereci were, for whatever reason, unable to work and thus to provide for the

50 C- 256/11, *Dereci* case, Judgment 15 of November 2011.

> needs of her children, I believe that there would be a serious risk that the refusal to issue a residence permit to her husband and, a fortiori, his expulsion to Turkey would deprive the couple's children of the genuine enjoyment of the substantive rights attaching to the citizenship of the Union by forcing them, de facto, to leave the territory of the Union. How could a mother of three young children without her own resources, despite the right of residence in Austria which she enjoys by virtue of her nationality, take care of her children if she is unable to work and, therefore, also unable to settle permanently in another Member State with her family members?[51]

Thus, in his opinion, Advocate General Mengozzi ascribes a great significance to the consideration of the individual circumstances by the Court in each and every case. Furthermore, in his opinion he gives a quite wide interpretation of the concept of dependency, including both economic, legal and administrative assistance and emotional care. At the same time he points out that the present case law of the Court is not at all satisfactory from the point of view of legal certainty.[52]

17.3.2.3 The Ruling of the Court

Similarly to the Advocate General's opinion and along the lines of the *McCarthy* Judgment the Court first refers to the inapplicability of Directive 2004/38/EC in the case. Second, it reinforces its ruling in the *McCarthy* case, according to which "the situation of a union citizen who, like each of the citizens who are family members of the applicants in the main proceedings, has not made use of the right to free movement cannot, for that reason alone, be assimilated to a purely internal situation."[53] At the same time it laid down the theoretical possibility of applying the Zambrano test by stating:

> Article 20 TFEU precludes national measures which have the effect of depriving union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status.[54]

As regards the actual application of the test, the Court no longer concealed in the *Dereci* Judgment what it tried to hide in the *McCarthy* case. In order for the test to apply, there must be a "situation in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole".[55]

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51 *Mengozzi* opinion, para. 47.
52 *Mengozzi* opinion, para. 49.
53 *See Dereci* Judgment, para. 61.
54 *Dereci* Judgment, para. 64.
55 *See Dereci and others* Judgment, para. 66.

The Court goes on by stating:

> Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.[56]

At this point the Court also takes a stance on the question of the right to family life, notwithstanding the fact that its position is less than positive. Similar to the opinion delivered by Advocate General Mengozzi, the Court makes reference to the prohibition of widening the scope of Union competences enshrined in Article 51 paragraph 2 of the Charter and advises the referring court to first, before assessing the applicability of the requirement of the respect for family life, determine whether or not the situation of the applicants in the main proceedings falls under the scope of Union law. At the same time, it draws the attention of the member states to the fact that should the facts of the case not fall under the scope of Union law, as signatory parties they are nevertheless bound by the ECHR and must respect the right to respect for private and family life guaranteed under Article 8 of the Convention.[57]

In sum, the Court in the Dereci case made a clear distinction between the involuntary exit from the territory of the Union and the country of origin (a doctrine which had already been, although not expressly, but tacitly present in the *McCarthy* case), delimitating the consequences of its case law regarding residence rights.

At the same time, in the light of the *Dereci* ruling it is worth examining the judgments of the Court presented above, in particular its ruling in the *McCarthy* case with due regard to the applicability of the aspects contained in the opinion delivered by Advocate General Mengozzi. In the following I shall focus on the complete analysis of the case as well as on the possible effect the Advocate General's opinion on the concept of dependency would have had on the ruling, had the Court followed this interpretation.

17.3.3 The Evaluation of the Court's Zambrano *and* McCarthy *Rulings in Light of the Judgment Rendered in the* Dereci *Case*

As we have seen, according to the *Dereci* Judgment, the expulsion of family members only affect the substance of Union citizenship rights in case the Union citizen is *de facto forced*

56 *Dereci and others* Judgment, para. 68.
57 *Dereci and others* Judgment, para. 73.

to leave the territory of the Union. However, in the view of the Court, the applicants of the McCarthy and the Dereci cases were not faced with such a risk, as they were free to make use of the advantages inherent in their free movement rights.

At this point, the question arises: did the Zambrano family really have the possibility to move to another member state?[58] Unfortunately, this question was not posed in the course of the proceedings, therefore, it is difficult to answer it in hindsight.

What is certain, is that in the *Zambrano* case the entire family could acquire residence rights in Belgium, that is, the territory of the country of origin, whereas Ms McCarthy was left with merely three alternatives. Firstly, she had the choice of remaining in the United Kingdom without her husband (which poses serious problems from the aspect of family life, we shall return to this point below, in detail), second, she could move to another member state, and finally, she could decide to leave the territory of the Union and settle down in Jamaica with her spouse.

As regards the *McCarthy* ruling, it is incomprehensible why the Court arrived at a significantly different conclusion than in the Zambrano case. It is possible that the Court's bias towards children (*see Zambrano* and *García Avello* cases) led to a different outcome in the *McCarthy* case, since in the latter case it was "merely" a spouse and not the couple's children who attempted to invoke rights. Even if this were the case, it is important to note that it is not the McCarthy case which could serve as an appropriate backdrop for such a "value based" decision.

For the sake of completeness it is worth noting that although the Advocate General's opinion and the judgment itself merely mention Ms McCarthy and her husband, it is apparent from the Court's files[59] that Ms McCarthy was raising three children, including a disabled, dependant child. In contrast, both the opinion and the ruling make reference to the fact that Ms McCarthy draws social assistance. Neither document however, makes mention of the *nature of this assistance*, or more precisely, the question whether Ms McCarthy receives such assistance as a disability care fee. Unfortunately, the documents do not shed light on the question whether or not it was the disability of her child that rendered Ms McCarthy unable to pursue a gainful employment, which would have allowed her to assume the more advantageous status of an economically active citizen under Union law. In this

58 In accordance with Art. 6, para.1 of 2004/38/EC, Union citizens shall have the right of residence in the territory of another member state for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport, para. 2 of Art. 6 applies this right to family members in possession of a valid passport who are not nationals of a member state and are accompanying or joining the Union citizen. The Zambrano parents, Mr McCarthy and the *Dereci* case applicants potentially all fall under this category. Since the *Metock* Judgment, there is no further requirement for previous legal residence in the EU. This would provide great opportunities for every family to set up a business or becoming employed, which would ensure a long-term residence in the host country.

59 Para. 8. Court of Appeal, *Shirley McCarthy v. Secretary of State for the Home Department* (2008) EWCA Civ 641.

regard another important question is also left unanswered, that is, in what way this inactive status actually impeded her "free movement" to another member state.

In theory, Ms McCarthy is free to move to another member state, however, in practice this is much more *problematic* than it is presumed by the Court. The statement therefore – as presented by the national court – according to which there is no element of the facts of the case which would lead to the conclusion that Ms McCarthy was impeded in making use of her rights of free movement, seems flawed. The concept of the different forms of dependency referred to by Advocate General Mengozzi will in the future allow for more a circumspect balancing of all relevant elements of the case, even if in the given case the Court found that this did not lead us closer to the disclosing the substance of Union citizenship rights.[60]

As far as the methodology employed by the Court is concerned, it seems problematic that it makes categorical *factual statements* in the reasoning of both the Zambrano and the McCarthy cases. In the former case, to the benefit of the applicant, in the latter, to its detriment. However, it must be pointed out that this approach is misguided in both cases. In accordance with Article 267 TFEU setting out the framework of the preliminary ruling procedure the Court should leave it to the national forum to "supply" the facts. Should it nevertheless engage itself in such "risky business", its *assessment must cover all facts* – such as those mentioned above – that are *relevant to the case*.

What is more, with this methodology the Court actually assumes a role that was never and could never have been the intention of the Union legislator. This way namely, the Court could function as a "lower court" supplying and meticulously evaluating the facts of the case, without however being in full possession of all relevant facts.[61] At the same time the Court could proceed as a sort of constitutional court, embedding the factual questions thus gleaned into the already far too elaborate matrix of primary law.[62]

To sum up, the application of the Zambrano test along the very narrow lines of the *McCarthy* and *Dereci* Judgments leaves us with the well-established requirement of a cross-border element – at least for those applicants who can actually rely on such an element. Even if we accept that the applicants of the *McCarthy* and *Dereci* cases have a real alternative to move to another member state – thus breathing life into their Union rights related to free movement (*see, Akrich* case) the question arises, is it really worth motivating Union citizens to *enforce their rights in such an artificial way*. And is it really worth continuing to beguile ourselves by thinking that – from the point of view of the applicability of Union rights – there is a defining difference between moving to another member state for a short period

60 *Supra* note 53, Opinion of the Advocate General in the *Dereci* case, para. 47.

61 *See* the reasoning in the *McCarthy* case, where the Court 'forgot' about the peresence of the children and also failed to answer the relevant questions regarding dependency.

62 Shuibhne 2011, p. 371.

of time and for the sole reason of exploiting Union citizenship rights and between staying in the country of origin and not making use of the right to free movement.
This gives rise to a number of other questions, for example, how long does the Union citizen have to stay away from his or her country of origin in order to be able to rely on Union law? Are the three months set forth under the directive sufficient or must it be a longer period of time? In light of the *McCarthy* and *Dereci* cases, sooner or later the Court will be bound to answer these questions.

17.4 Fundamental Rights? Guaranteeing the Respect for Family Unity in the Light of Union Citizenship

Evidently, a basic consideration underlying the *Zambrano, McCarthy* and *Dereci* cases is the *protection of family unity*. The duty to respect family life as a requirement of protecting fundamental rights is enshrined in both Article 7 of the Charter of Fundamental Rights and Article 8 of the ECHR.
In view of these legal bases, it seems surprising that there is no reference to the protection of fundamental rights or the Charter[63] itself in the *Zambrano* and *McCarthy* Judgments, notwithstanding the fact that the Advocate Generals included these in their opinions, indeed, the referring court in the *Zambrano* case even included these in its questions.[64]
As regards the right to family unity under Union law the opinions delivered by the Advocate Generals in the *Zambrano* and *McCarthy* cases are consistent, both yielding a negative outcome in this aspect. In her opinion delivered in the *McCarthy* case, Advocate General Kokott clearly states: in lack of the applicability of Union law fundamental rights considerations may be enforced by the national courts themselves or, incidentally, by the European Court of Human Rights.[65] Advocate General Sharpston in her opinion on the Zambrano case on the other hand embarks upon a lengthy analysis of the correlation between fundamental rights guarantees under Union law and the issue of competences.[66] According to her opinion, in case the EU possesses either exclusive or shared competences in a given area of law, Union fundamental rights protection must be guaranteed to Union citizens even in cases where the competence at issue had previously not been exploited.[67] Still, she

63 Wiesbrock 2011, p. 869 In this case, the lack of the reference to fundamental rights is acceptable, as the Charter of Fundamental Rights was not binding at the time.
64 The implicative forum questioned the applicability of the Charter's Arts. 21, 24 and 34. *See Zambrano* Judgment, para. 35
65 *See* Opinion of General Advocate Kokott, para. 60.
66 The opinion focuses on the Court's references to fundamental rights in the Charter. Mentioning the term 'fundamental law', 101 times clearly indicates the same. On the contrary, the Court mentions the expression only 4 times, but only repeating the applications on the preliminary ruling of the Belgian Court. *See* Hailbronner & Thym 2011, p. 1255.
67 Opinion of General Advocate Sharpston, para. 163.

concludes her arguments with a laconic, yet meaningful point that at the time of the facts relevant to the instant case the Union right to the respect for family life was not invokable.[68] The opinion delivered by Advocate General Sharpston sheds light on the delicate and complicated nature of the issue. Von Bogdandy and his co-authors give a good illustration of the problem by stating: "Linking union citizenship with EU fundamental rights is a seasoned project".[69]

Indeed, the fundamental rights protection of family life is not bereft of antagonism considering the context of migration. The Court first acknowledged the fundamental right to family life as forming part of the general principles of Union law in the Carpenter case.[70] In doing so, it relied on the case law of the European Court of Human Rights.[71] However, instead of referring to the fundamental right of family life, in its judgments following the *Carpenter* case, such as the *MRAX*, *Baumbast* and *Metock* rulings the Court attempted to employ *sui generis* Union law solutions to guarantee the right to family unity for the benefit of Union citizens.

The preference of the Court to apply *sui generis* solutions is presumably based on practical considerations.[72] Should the Court invoke fundamental rights to substantiate the entry and residence rights of third country family members of Union citizens, following this logic, the same rights would have to apply to the family members of third country citizens living and residing within the territory of the Union. However clear and simple this argument would be, it would stand in clear contrast with the previous case law of the Court, in particular its ruling on the annulment of the Directive of family reunification.[73] This approach is vividly illustrated by the Zambrano case in which, as I have already mentioned, the Court made no reference whatsoever to the fundamental requirement of the respect for family life. Instead, it guaranteed the protection of family unity within the territory of the country of origin under the framework of "the effective enjoyment of Union citizenship rights".

This approach raises particular concerns in light of the recent case law of the Strasbourg court, not to mention the prospect of the accession of the Union to the Convention. Whereas the Convention and the Court's earlier case law was far from being

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68 In her opinion Sharpston also denies that her suggestion would have far-reaching consequences on the federal balance, or, that in the given case the EC should adopt it. In order to do so, it is not just the case law that must improve, but the member states themselves should make straightforward political declarations on the importance of the role of fundamental rights in the EU. *See* Sharpston opinion, para. 173.

69 Von Bogdandy *et al.* 2012, p. 505.

70 For a comprehensive assessment on the general principles of EU law, *see* M. Szabó, 'Általános jogelvek a nemzetközi bíróságok és az Európai Bíróság joggyakorlatában', 12 *Európai Jog* 2, pp. 26-34.

71 What is more, the EC protected the applicant's family life by the means of freedom of services, in a position which was basically "purely domestic".

72 *See* Costello, p. 612.

73 *See* C-540/03. *Parliament v. Council*, Judgment of 18 December 2006. (EBHT 2006, I-5769. o.)

"child-sensitive", it is also apparent that the recent case law of the Strasbourg Court takes the interests of the child more and more into consideration. This development is also reflected in the recent *Nunez v. Norway* Judgment[74] in which the Court – departing from its earlier stance[75] – takes due consideration of the interests of the child when assessing social and individual interests.

According to the facts of the case, a Dominican woman arrived in Norway as a tourist in 1996. She was expelled from the country for theft with the restriction that she may not return to Norway for two years. However, four months after the said decision she nevertheless returned with a fake passport and married a Norwegian citizen. Shortly afterwards the marriage was dissolved. Finally, the woman established a partnership with a Dominican man settled in Norway and the couple had two children.

The applicant pleaded – with reference to Article 8 of the Convention – that the order expelling her from Norway and impeding her reentry into the country for a period of two years infringed her right to family life, since it would effectively result in separating her from her underage children. Notwithstanding the fact that the woman undoubtedly breached Norwegian immigration law and could not reasonably count with acquiring residence rights in the country, the ECHR reached the conclusion that the expulsion of the mother from the territory of the country would be clearly detrimental to the children's interest.[76]

If we were to apply the same reasoning to the *Zambrano* case, it would be obvious that the expulsion order issued by the Belgian authorities infringed Article 8 of the Convention and the fundamental right to the respect for family life which forms part of the general principles of law. Were we to further consider Article 24 paragraph 2 of the Charter according to which "in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration", it would be even more surprising why the Court did not take fundamental rights aspects into account in the aforementioned case.

As far as the outcome of the *Zambrano* case is concerned, this cannot be deemed problematic, since family unity was guaranteed on the basis of residence rights pertaining to Union citizens. It was all the more problematic in the *McCarthy* and *Dereci* cases. As already mentioned above, the *McCarthy* Judgment unfortunately contained no reference to the rights related to the respect for family life. In the *Dereci* case however, the Court – in line

74 *Nunez v. Norway*, ECHR (2011) App. No. 55597/09, Judgment of 28 June 2011.

75 *Darren Omoregie and others v. Norway*, ECHR (2008), App. No. 265/07, Judgment of 31 July 2008.

76 Considering the children's strong and long-term bond to their mother, the decision awarding custody to their father, the stress experienced and the lengthy period of time, while the authorities were rendering decisions about the applicant's expulsion and on the denial of her re-entry, and also taking into account the exceptional circumstances of the case, the Court concluded that expelling the applicant would be unfavourable to the interest of the children. *Mirtha Ledy de Leon Nunez v. Norway* case no. 55597/09, paras 81-84.

with the opinion delivered by Advocate General Mengozzi – advised the national forum to assess as a preliminary point whether or not the facts of the given case fall under the scope of Union law.[77]

Thus, leaving it up to the national courts to decide whether or not the given case comes under the scope of Union law the Court also declares that the fulfilment of the requirements under Article 7 of the Charter may only be examined under the special circumstances where the Zambrano test may be applied, thereby excluding the cases of purely internal situations. Article 7 of the Charter therefore does not bind the member states in the very cases where the possibility of a reference to human rights would be particularly pressing.[78] Whereas in cases where the applicability of Article 7 may be determined, such a reference seems moot, since the infringement of the substance of Union citizenship rights had already been ascertained.[79]

Von Bogdandy and his co-authors offer a remedy to this dogmatically unsound situations and propose the application of the so-called "reverse Solange" doctrine in order to ensure the enforcement of the essence of fundamental rights. According to this proposal, in cases falling outside the scope of application of the Charter of Fundamental Rights, Union citizens could generally not rely on Union fundamental rights as long as the member states in question respect the essence of fundamental rights – the fact that they do, must be presumed. Should this presumption be rebutted, in line with the case law introduced by the Ruiz Zambrano case the substance of Union citizenship rights may be individually enforced before court. The co-authors argue that on the basis of Article 2 TEU the essence of fundamental rights has become a fundamental precondition to the exercise of public power in the European legal space. This approach is based on Article 2 TEU according to which the EU is founded on certain values, among others the "respect for human rights". This requirement sets a standard which applies to all forms of exercise of public power in the European legal space, be it on the side of the EU or the member states.[80] The question arises: what does the "respect for human rights" entail? According to the text, the values protected under Article 2 TEU are said to be "common to the Member States". In the co-authors' view, the best way to find the common denominator is by clinging to the concept of the essence of fundamental rights, as it has become part of the *ordre public* in the European legal space.[81]

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77 *See Dereci* Judgment, para. 72.

78 Anja Lansbergen, 'Case Summary and Comment: Case C-256/11, *Dereci and others v. Bundesministerium für Inneres*', <http://eudo-citizenship.eu/docs/Dereci%20Case%20Summary%20and%20Comment.pdf>.

79 The Court however reminds us, that every member state is signatory of the European Convention of Human Rights, which in its Art. 8 grants everyone the right to respect for private and family life. *See Dereci* Judgment, para.73.

80 Art. 2 TEU does not include any restrictions similar to Art. 51 of the Charter of Fundamental Rights.

81 Von Bogdandy *et al.* 2012, p. 510.

Even if we were to find that in our competence sensitive times such a conclusion would be premature,[82] it is worth deliberating why a "value based" European space which relies so heavily on the protection of fundamental rights and endowing the status of Union citizenship with real substance in order to reinforce its legitimacy should fail to acknowledge the right to family unity in the country of origin as forming part of the substance of Union citizenship and force the Union citizen to choose between family life and the well established life in the country of residence.

Moreover, the Court has *on various occasions overstepped the magic line of demarcation* in order to guarantee the right to family unity. It has done so first in the *Carpenter* case cited above, in order to protect the rights of an economically active citizen, and later, in the *Zambrano* case, for the protection of Union citizens' rights.

Currently, apart from the harmonization of certain aspects of immigration law, it is the prerogative of the member states to decide whether or not third country family members acquire the right of residence in their territory – at least, in cases where the family members of non-dynamic Union citizens are concerned. However, certain commentators find that there is no restriction upon the Union legislator to lay down the rules of family reunification regarding dynamic and non-dynamic Union citizens. This is all the more so, since Art. 79 para. 2 item a) contains an express authorization to regulate the conditions of entry and residence, including the rules of family reunification. According to Kochenov, the fact that the resolution of the reverse discrimination cases cited above is much less a problem of competences than that of a lack of political will, perfectly illustrates that the draft Directive on family reunification was originally intended to include non-dynamic Union citizens as well.[83] Furthermore, the author contends that those opposed to harmonization are particularly wrong, for they assert the autonomy of the member states in the area of immigration law in a period of integration where the latter was significantly constricted due to the reinforcement of the internal market and the institution of Union citizenship.[84]

It is undeniable that its case law on family reunification concerning Union citizens who wish to make use of their rights of free movement the Court, under the motto of free movement, *progresses further and further into areas which previously belonged in national competence*. This development is well illustrated by the *Metock* case[85] in which the Court

82 Therefore, authors emphasize that unlike Art. 6 TEU and the Charter of Fundamental Rights, this approach does not refer to the general *acquis*, and Art. 2 TEU merely underlines the essential content of the fundamental rights.

83 According to Kochenov: "A choice for the illusion of control prevails over the desire to ensure equal treatment for all EU citizens"-regardless if they had exercised their right to free movement." D. Kochenov, 'Rounding up the circle: The mutation of Member States' nationalities under pressure from EU citizenship', *EUI RSCAS Paper* 2010/23, p. 20-22.

84 Wiesbrock, however, emphasizes his severe doubts about extending the scope of the EU law regarding family reunification matters. Wiesbrock 2011, p. 870.

85 C-127/08 *Metock and Others v. Minister for Justice, Equality and Law Reform* case, Judgment of 25 July 2008.

rewrote the requirement of previous lawful residence laid down in the earlier *Akrich* case giving the right to free movement and residence of Union citizens enshrined in Directive 2004/38/EC a very wide interpretation when it comes to them being joined by their third country family members.
Indeed, in a "Citizens' Europe" promoted under the Stockholm Programme[86] the reverse discrimination against own citizens when compared with dynamic Union citizens or third country nationals is hardly arguable. As long as the member states fail to make a political commitment towards harmonization the problem of reverse discrimination as well as the uncertain case law of the Court is bound to prevail.

17.5 Conclusion

The judgments referred to above concern the two most important aspects of the law on Union citizenship, on the one hand, the issue of the division of competences between the Union and its member states, and the division of labour between the Union legislator and those applying the law. Member states have always been very vigilant about the extension of rights related to Union citizenship. As regards the family reunification rights of dynamic Union citizens, *i.e.* citizens who make use of their right to free movement, the member states have in essence lost their regulatory powers. Similarly, more and more areas related to the entry and residence of third country nationals pertain to Union competence, while the corresponding discretionary powers of the member states in the field of migration issues are constantly receding. The competence remaining on the side of the member states is paradoxically the area related to the family reunification rights of their own, non-dynamic citizens. As a last fortress of national autonomy, Member States keep a tight grip on this area – and this puts the Luxembourg court in a difficult position.
With the recent judgments of the Court, the law of the Union has arrived at a new point of development. The possibility is given for the integration project to leave behind the market-oriented perspective and move forward in the direction of the "citizens' Union". A direction where the exercise of family reunification rights of Union citizens is not dependent on the exercise of free movement. With the completion of the internal market and the reinforcement of Union citizenship as main targets of integration, the territorial fragmentation of the application of Union law seems unreasonable. For the main goal of the Union is exactly to overcome such territorial fragmentation and to develop "a substance" of Union citizenship which applies even to purely internal situations as a seminal step of judicial law-making.[87]

86 Council of the European Union, The Stockholm Programme: An open and secure Europe serving and protecting citizens, 5731/10, Brussels, 3 March 2010.
87 Von Bogdandy *et al.* 2012, p. 504.

The judgment rendered by the Court in the *Zambrano* case undoubtedly points towards the above direction, even if the Court may be criticized for the lack of depth in its reasoning. However, with the *McCarthy* and *Dereci* Judgments it became clear that family reunification rights are much rather rights related to the free movement of persons, than elements of the status of Union citizenship. In the above-mentioned cases the judicial protection of the "essence of union citizenship rights" is essentially restricted to the prohibition of involuntary exit from the territory of the Union as a minimum 'crisis' requirement. It is also very telling that residence rights within the territory of the Union are not defined as positive rights by the Court.

It is doubtful therefore that member state nationals may easily invoke Union law against their own state should their right to family life be infringed or should they fall victim to discrimination in the meaning of Article 18 TFEU. Thus, the approach of the Court described above continues to portray a Union based on economic foundations.

The greatest flaw of the judgments cited however, is that they fail to clarify relevant terms in clear breach of the principle of legal certainty.[88] Such fundamental issues as determining the situations where we can speak of purely internal situations may not be dealt with in a few short sentences. Thus, the Luxembourg forum, in clear neglect of the principle of legal certainty, continues to make the outcome of the different cases dependent on the balancing of individual aspects. In her article, Shuibhne issues a stern warning to the Court, which, however, is highly worthy of consideration. She finds that in case an area of law is almost impossible to explain or teach – such as Union citizenship – then that area is highly problematic.[89]

The picture presented by Shuihne is perhaps gloomier than the situation really is. What is certain, is that the case law of the court – as far as the judgments related to Union citizenship are concerned – is heading towards a "fact specific", individualistic direction.[90] This approach is in line with the case law of the Strasbourg court related to the individual claims based on Article 8 of the Convention, however, it is highly questionable in the case of a forum entrusted with the primary task of guaranteeing the unity and coherence of Union law.

88 It would not be the first example in the "history of the Court" for a decision to be ahead of its time, as was the case in the Zambrano ruling. Therefore, based on the above, certain commentators compare the Court's legislation on Union citizenship to a pendulum – sometimes liberal, at other times swinging towards more moderate directions. While this may be very beneficial for some – such as the Zambrano couple – we also have to emphasize, that most of the times, others have to pay the price of the over-liberal decisions of the Court. *See e.g.,* the *Förster*, *McCarthy* and *Dereci* cases. A. Tryfonidou, *Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach*, p. 634.

89 Shuibhne 2011, p. 378.

90 Wiesbrock 2011, p. 873.