Developments

Union Citizenship and the Redefinition of the "Internal Situations" Rule: The Implications of *Zambrano*

By Anja Wiesbrock[*]

A. Introduction

On 8 March 2011, the Grand Chamber of the European Court of Justice issued a significant ruling regarding the interpretation and scope of the concept of European Union citizenship. In an eagerly anticipated judgment, the Court held that Article 20 of the Treaty on the Functioning of the European Union ("TFEU") confers a right of residence and a right to obtain a work permit upon the parents of a minor dependent European Union citizen who has never left the Member State of his or her nationality.[1] The ruling is notable for having redefined the "internal situation" rule and extended the reach of the primary law provisions on Union citizenship beyond Directive 2004/38/EC. Yet, some of the potential implications of *Zambrano* have been qualified by the Court's subsequent rulings in *McCarthy*[2] and *Dereci.*[3] In those cases, the Court restricted the scope for EU citizens who have never exercised their free movement rights to rely on EU law in order to derive rights of residence for their third-country-national family members in their country of nationality. Moreover, the brevity of the *Zambrano* judgment indicates substantial disagreement amongst the judges and has the effect of leaving a number of issues unclear. What are the precise limitations to relying on Article 20 TFEU in a situation that falls outside the scope of Article 2004/38/EC? How does the ruling impact the ongoing discussions on reverse discrimination and the protection of fundamental rights in the E.U.? After briefly describing the factual and legal background of the case, the opinion of Advocate General Sharpston, and the Court's judgment, we will discuss the questions raised above before considering the potential implications of the ruling for Member States' migration and nationality laws.

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[1] Case C-34/09, Zambrano v. Office national de l'emploi (8 Mar. 2011), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0034:EN:HTML (last visited 9 Nov. 2011).

[2] Case C-434/09, Shirley McCarthy v. Sec'y of State for the Home Dep't (5 May 2011), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0434:EN:HTML (last visited 9 Nov. 2011).

[3] Case C-256/11, Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike, Dragica Stevic v. Bundesministerium für Inneres (15 Nov. 2011), *available* at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0256:EN:HTML (last visited 16 Nov. 2011).

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B. Factual and Legal Background

The *Zambrano* case concerns the right of residence of the third-country-national parent of a minor and dependent child when the child holds Union citizenship and has never left the Member State of his or her nationality. Mr. Zambrano, a Colombian national, arrived in Belgium in 1999 holding a valid visa issued by the Belgian authorities. He was joined shortly thereafter by his wife, also Colombian. Their subsequent applications for asylum were refused. Given the civil war in their country of origin, however, they were permitted to remain in Belgium based upon the principle of *non-refoulement*. Over the years, Mr. Zambrano submitted various applications to have his situation regularized and to obtain a residence permit, relying on the deterioration of the situation in Colombia, his integration into Belgian society, and his status as the direct ascendant of a Belgian national. Faced with a succession of negative decisions, Mr. Zambrano applied for an annulment of those decisions before the *Conseil d'Etat*, as well as the suspension of an order requiring him to leave the country. He obtained a residence registration certificate for his stay between September 2005 and February 2006, permitting him to remain in Belgium pending the final determination of his proceedings before the Belgian courts. The entire procedure stretched over a period of ten years, from his first application for asylum in September 2000 to the procedures before the *Conseil d'Etat*, which were still pending when the reference for a preliminary ruling was made in September 2010. In the meantime, and despite not possessing a work permit, Mr. Zambrano obtained full-time employment with a Belgian company and became a father to two children, both of whom were born in Belgium with Belgian nationality. His illegal employment status was discovered after an unsuccessful application for unemployment benefits, which he made after his contract had been terminated. He obtained a certificate proving that contributions and unemployment insurance had been paid, covering his period of employment from October 2001 to October 2006. In April 2009, Mr. Zambrano was granted a provisional and renewable residence permit, as well as a work permit, as a result of government measures to regularize certain situations pertaining to illegal residents. The work permit did not, however, have retroactive effect, and it did not cover his period of illegal employment between 2001 and 2006.

Even though the case originally referred to the Court of Justice concerned a dispute over employment-related rights (namely, the access to unemployment benefits), the main issue became the residence rights held by third-country-national family members of Union citizens who have not left their Member States of nationality. The most important articles in this respect are Articles 18, 20, and 21 TFEU, which establish the status of Union citizenship and grant the right to move and reside freely within the territory of the Member States, as well as provide protection from discrimination on grounds of nationality for all Union citizens. Article 18 TFEU prohibits any discrimination on grounds of nationality, albeit "[w]ithin the scope of application of the Treaties, and without prejudice

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to any special provisions contained therein."[4] Article 20 TFEU establishes Union citizenship, which is to be held by every person holding the nationally of a Member State. It also states that Union citizens shall enjoy the rights (and be subject to the duties) provided for in the Treaties, including the right to move and reside freely within the territory of the Member States.[5] Article 21 TFEU grants every Union citizen "the right to move and reside freely within the territory of the Member States."[6] The rights contained in Articles 20 and 21 are subject to the conditions and limitations laid down in the Treaties and secondary legislation. In addition to these primary provisions of the Treaty, the *Zambrano* case must be read alongside the background of Directive 2004/38/EC,[7] which lays down more detailed provisions concerning the residence and movement rights of Union citizens and their family members. Article 3.1 of that Directive clearly states that it shall apply exclusively to Union citizens "who move to or reside in a Member State other than that of which they are a national" and to their accompanying family members.[8]

The referring court inquired, first, whether the above-mentioned provisions confer a right of residence upon Union citizens in the Member States of their nationality even if they have not previously exercised their free movement rights. This preliminary question was raised in order to come to the major issue in the case at hand, namely, the possible secondary right of residence of a third-country-national parent of a minor dependent Union citizen in the Member State of the child's nationality, without respect to any previous exercise of free movement rights. In this context, the referring court also raised the question of human rights protection, concerning notably Articles 21, 24, and 34 of the Charter of Fundamental Rights. Lastly, the referring court addressed the core question of the dispute arising before it, namely, the exemption from the requirement to hold a work permit for the third-country-national parent of a minor child residing in the Member State of the child's nationality. The underlying claim was that of reverse discrimination facing Belgian nationals who have not exercised their free movement rights vis-à-vis Union

[4] Consolidated Version of the Treaty on the Functioning of the European Union art. 18, 5 Sept. 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[5] TFEU art. 20. The rights listed in Article 20 TFEU are non-exhaustive and also include the right to vote and stand as a candidate in local and European Parliament elections, the right to enjoy the diplomatic protection of any member state in a third country in which one's member state of nationality is not represented, and the right to petition the European Parliament and the Ombudsman.

[6] TFEU art. 21.

[7] Directive 2004/38/EC of the European Parliament and of the Council of 29 Apr. 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 158) 77; 2004 O.J. (L 229) 35 (EU corrigendum); 2005 O.J. (L 197) 34 (EU corrigendum).

[8] Council Directive 2004/38/EC, *supra* note 6, at 88.

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citizens from other Member States and Belgian nationals who had in some way exercised their free movement rights.

C. The Opinion of Advocate General Sharpston

In a controversial opinion,[9] Advocate General Sharpston focused first on the question of whether movement can be required to trigger the Treaty provisions on Union citizenship (Articles 20 and 21 TFEU). Second, she turned to Article 18 TFEU and its ability to protect Union citizens from reverse discrimination created by EU law. Lastly, she considered the role to be played by fundamental rights in determining the scope of application of Articles 20 and 21 TFEU.

Regarding the first issue, Sharpston emphasizes the conceptually different nature of Articles 20 and 21 TFEU, on the one hand, and the provisions embodying economic free movement rights (of workers, self-employed persons, etc.) on the other. Relying on the strand of case law which elevates Union citizenship to be a "fundamental status" of nationals of the Member States,[10] she puts forward the opinion that residence in one's Member State of nationality should be sufficient for a person to rely on the rights attached to Union citizenship. Referring to cases such as *Alpine Investments*,[11] *Carpenter*,[12] and *Metock,*[13] Sharpston highlights the "dilution of the notion that the exercise of rights requires actual physical movement across a frontier."[14] In cases such as *Garcia Avello*,[15]

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[9] Advocate General Kokott openly opposes Sharpston's reasoning, see Case C-434/09, Shirley McCarthy v. Sec'y of State for the Home Dep't (5 May 2011), Op. of Advocate Gen. Kokott, para. 31 (25 Nov. 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0434:EN:HTML (last visited 9 Nov. 2011), whereas Advocate General Trstenjak avoids taking a position on the issue, *see* Case C-325/09, Sec'y of State v. Dias, Op. of Advocate Gen. Trstenjak, para. 72 (17 Feb. 2011) [hereinafter *Trstenjak* opinion], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0325:EN:HTML (last visited 9 Nov. 2011).

[10] *See, e.g.*, Case C-184/99, Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, 2001 E.C.R. I-6193, para. 31; Case C-224/98, D'Hoop v. Office national de l'emploi, 2002 E.C.R. I‑6191, para. 28; Case C‑413/99, Baumbast v. Sec'y of State for the Home Dep't, 2002 E.C.R. I-7091, para. 82; Joined Cases C‑482/01 & C-493/01, Orfanopoulos v. Land Baden-Württemberg, 2004 E.C.R. I-5257, para. 65; Case C-224/02, Pusa v. Osuuspankkien Keskinäinen Vakuutusyhtiö, 2004 E.C.R. I-5763, para. 16; Case C-209/03, Bidar v. London Borough of Ealing, 2005 E.C.R. I-2119, para. 31; Case C‑403/03, Schempp v. Finanzamt München V, 2005 E.C.R. I-6421, para. 15; Case C-524/06, Huber v. Bundesrepublik Deutschland, 2008 E.C.R. I-9705, para. 69.

[11] Case C-384/93, Alpine Investments BV v. Minister van Financiën, 1995 E.C.R. I-1141.

[12] Case C-60/00, Carpenter v. Sec'y of State for the Home Dep't, 2002 E.C.R. I-6279.

[13] Case C-127/08, Metock v. Minister for Justice, Equal., & Law Reform, 2008 E.C.R. I-6241.

[14] Case C-34/09, Zambrano v. Office national de l'emploi (8 Mar. 2011), Op. of Advocate Gen. Sharpston, para. 73 (30 Sept. 2010) [hereinafter *Sharpston Opinion*], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0034:EN:HTML (last visited 9 Nov. 2011).

[15] Case C-148/02, Avello v. Belgian State, 2003 E.C.R. I-11613.

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Zhu and Chen,[16] and *Rottmann*,[17] the element of movement is "barely discernible or frankly non-existent."[18] This leads Sharpston to the conclusion that the exercise of the rights derived from Union citizenship is not necessarily bound up with physical movement.[19] According to her, it would be "paradoxical . . . [and] strange and illogical" if fundamental rights under EU law could only be invoked in situations where either a Union citizen has exercised his or her free movement rights or national law comes within the scope of the Treaty, however accidental or arbitrarily designed the link with EU law may be.[20] Consequently, she urges the Court to recognize that Article 21 TFEU contains a separate, free-standing right of residence in any of the Member States (including the Member State of one's nationality) that is independent of the right of free movement.[21] As an alternative argument, she maintains that even if Article 21 was not considered to contain a free-standing right of residence, the potential interference with the children's right to move and reside would be sufficient to trigger the application of EU law. She draws parallels to the *Rottmann* case, arguing that the situation of Mr. Zambrano's children falls "by reason of its nature and its consequence" within the ambit of EU law due to the potential consequences they face of having to leave Belgium and possibly lose Belgian citizenship.[22]

Turning to the question of reverse discrimination, Sharpston suggests that Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction between EU and national law, provided that three prerequisites are fulfilled: (1) The situation of the Union citizen who is residing in his or her own Member State and has not moved must be comparable to that of other citizens of the Union who are in the same Member State and able to invoke Article 21 TFEU, (2) the reverse discrimination must entail a violation of a fundamental right protected under EU law, which is to be established, inter alia, by reference to Strasbourg case law, and (3) national law does not afford adequate fundamental rights protection.[23]

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[16] Case C-200/02, Zhu & Chen v. Sec'y of State for the Home Dep't, 2004 E.C.R. I-9925.

[17] Case C-135/08, Rottmann v. Freistaat Bayern (2 Mar. 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0135:EN:HTML (last visited 9 Nov. 2011).

[18] *Sharpston Opinion*, *supra* note 13, at para. 77.

[19] *Id*.

[20] *Id*. at paras. 84–86.

[21] *Id*. at para. 100.

[22] *Id*. at paras. 94–95 (referring to Rottmann v. Freistaat Bayern (2 Mar. 2010), at paras. 38–42).

[23] *Sharpston Opinion*, *supra* note 13, at paras. 146–48.

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Finally, Sharpston proposes a change in approach regarding the issue of fundamental rights protection in the E.U. She challenges the fact that the availability of EU fundamental rights protection depends on the direct applicability of a Treaty provision or the enactment of secondary legislation. According to her, individuals should be able to invoke EU fundamental rights in any situation covering an area of law in which the E.U. has shared or exclusive competence, even if such competence has not yet been exercised.[24]

D. The Judgment of the Court

The Court, in a very short judgment, combines the three questions posed by the referring court into one question: Whether the provisions of the TFEU on European Union citizenship are to be interpreted as conferring on the third-country-national parent of a dependent minor child who holds Union citizenship a right of residence and an exemption from having to obtain a work permit in the Member State of the child's nationality and residence. Opposing the views of national governments and the European Commission, according to which the Treaty provisions do not apply to the Zambrano children because they reside in and have never left the territory of the Member State of their nationality, the Court concluded that reliance on the provisions relating to Union citizenship does not necessarily require movement outside one's Member State of nationality. The Court begins by citing Article 3.1 of Directive 2004/38/EC in order to establish that the Directive does not apply to the case at hand. Mentioning the undisputed fact that Mr. Zambrano's second and third children possess Belgian nationality, and therefore Union citizenship, and relying on its "fundamental status" case law, the Court then proceeds to hold 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 . . . ."[25]

Denying Mr. Zambrano a residence permit would consequentially force his children to leave the territory of the Union, rendering them unable to exercise the substance of the rights conferred on them by virtue of their status as Union citizens. The same reasoning applies to the refusal to grant a work permit, which would risk depriving the father of sufficient resources to provide for himself and his family, which would also force the children to leave the territory of the Union. The Court states in more general terms that "[a] refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit,"[26] are precluded by Article 20 TFEU. The Court thus concludes that:

[24] *Id*. at para. 163.

[25] Case C-34/09, Zambrano v. Office national de l'emploi (8 Mar. 2011), at para. 42.

[26] *Id*. at para. [43.]

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> [A]rticle 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.[27]

E. Comments

I. Relying on Article 20 TFEU in an "Internal Situation"?

Since its introduction by the Treaty of Maastricht in 1992, the scopes of *ratione personae* and *ratione materiae* within the concept of European citizenship have gradually widened. In the case of *Grzelczyk*[28] in 2001, the Court elevated the status of Union citizen to be the "fundamental status of nationals of the Member States."[29] In doing so, the Court developed a concept of "social citizenship," abandoning the distinction between

[27] *Id*. at para. 45.

[28] Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, 2001 E.C.R. I-6193, at para. 31. Although the wording of "fundamental status" was mentioned for the first time in *Grzelcyzk*, the Court had already started its approach of extensively interpreting the Treaty provisions on Union citizenship in 1998 with the famous Case C-85/96, Sala v. Freistaat Bayern, 1998 E.C.R. I-2691. The case has been discussed widely, see, for example, Christian Tomuschat, Case Note, *Case C-85/96, Sala v. Freistaat Bayern, 1998 ECR I-2691*, 37 COMMON MKT. L. REV. 449 (2000).

[29] *See generally* Case C‑413/99, Baumbast v. Sec'y of State for the Home Dep't, 2002 E.C.R. I-7091; Case C-148/02, Avello v. Belgian State, 2003 E.C.R. I-11613; Case C-138/02, Collins v. Sec'y of State for Work & Pensions, 2004 E.C.R. I-2703; Case C-456/02, Trojani v. Centre public d'aide sociale de Bruxelles, 2004 E.C.R. I-7573; Bidar v. London Borough of Ealing, 2005 E.C.R. I-2119; Schempp v. Finanzamt München V, 2005 E.C.R. I-6421; Case C-406/04, De Cuyper v. Office national de l'emploi, 2006 E.C.R. I-6947; Case C-192/05, Tas-Hagen v. Raadskamer WUBO van de Pensioen, 2006 E.C.R. I-10451; Joined Cases C-11/06, Morgan v. Bezirksregierung Köln & C-12/06, Bucher v. Landrat des Kreises Düren, 2007 E.C.R. 9161; Case C-127/08, Metock v. Minister for Justice, Equal., & Law Reform, 2008 E.C.R. I-6241; Case C-310/08, London Borough of Harrow v. Ibrahim (23 Feb. 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0310:EN:HTML (last visited 11 Nov. 2011); Case C-480/08, Teixeira v. London Borough of Lambeth (23 Feb. 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0480:EN:HTML (last visited 9 Nov. 2011); Case C-162/09, Sec'y of State for Work & Pensions v. Lassal (7 Oct. 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0162:EN:HTML (last visited 9 Nov. 2011); Case C-145/09, Land Baden-Württemberg v. Tsakouridis (23 Nov. 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0145:EN:HTML (last visited 9 Nov. 2011).

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economically active and non-economically active citizens.[30] On account of the Court's case law, in order to enjoy the right of residence in equal treatment with nationals in other Member States, nationals of a Member State no longer have to be engaged in cross-border economic activities. European citizenship has thus been labeled a "fifth fundamental freedom,"[31] with an "exciting future as the most dynamic of the freedoms."[32]

Yet, for many years the Court continued to apply one major restriction to the reliance on EU free movement provisions: Their non-applicability in internal situations. It is established case law that the Treaty's free movement provisions cannot be applied to situations which are confined in all relevant aspects within a single Member State and in which there is no linking factor to any of the situations governed by EU law.[33] Developed within the context of invoking Article 45 TFEU in a case involving Member State jurisdiction in criminal law,[34] the "internal situation" rule has equally been applied with respect to the free provision of services[35] and the free movement of goods.[36]

However, in its recent pre-*Zambrano* case law, the Court had already largely done away with the requirement to demonstrate a clearly identifiable, physical, cross-border movement in order to rely on the rights derived from Union citizenship. In *Garcia Avello*,[37] the Court held that two children with both Spanish and Belgian citizenship were able to invoke their rights as Union citizens against the Member State of their nationality, from

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[30] *See, e.g.*, Rainer Bauböck, *Why European Citizenship? Normative Approaches to Supranational Union*, 8 THEORETICAL INQUIRIES L. 453 (2007); Sergio Carrera, *What Does Free Movement Mean in Theory and Practice in an Enlarged EU?*, 11 EUR. L.J. 669 (2005); Francis G. Jacobs, *Citizenship of the European Union—A Legal Analysis*, 13 EUR. L.J. 591 (2007); Dora Kostakopoulou, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, 68 MOD. L. REV. 233 (2005).

[31] Editorial Commentary, *Two-Speed European Citizenship? Can the Lisbon Treaty Help Close the Gap?*, 45 COMMON MKT. L. REV. 1 (2008); *see also* Ferdinand Wollenschläger, *A New Fundamental Freedom Beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration*, 17 EUR. L.J. 1 (2010).

[32] Ester Herlin-Karnell, *European Arrest Warrant Cases and the Principles of Non-Discrimination and EU Citizenship*, 73 MOD. L. REV. 824 (2010).

[33] *See, e.g.*, Joined Cases 35 & 36/82, Morson & Jhanjan v. State of the Netherlands, 1982 E.C.R. 3723, para. 16; Case C-153/91, Petit v. Office national des pensions, 1992 E.C.R. I-4973, para. 8; Joined Cases C-64/96 & C-65/96, Land Nordrhein-Westfalen v. Uecker & Jacquet v. Land Nordrhein- Westfalen, 1997 E.C.R. I-3171, para. 16; Joined Cases C-95/99–C-98/99 & C-180/99, Khalil v. Bundesanstalt für Arbeit & Nasser v. Landeshauptstadt Stuttgart & Addou v. Land Nordrhein-Westfalen, 2001 E.C.R. I-7413, para. 69.

[34] Case 175/78, Regina v. Saunders, 1979 E.C.R. 1129.

[35] Case C-41/90, Höfner v. Macrotron GmbH, 1991 E.C.R. I-1979.

[36] Case 20/87, Ministère public v. Gauchard, 1987 E.C.R. 4879.

[37] Case C-148/02, Avello v. Belgian State, 2003 E.C.R. I-11613.

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which they had never moved, in order to challenge restrictive rules governing surnames. The third-country-national parent of a child holding Union citizenship in *Zhu and Chen*[38] relied on her child's movement within the territory of the United Kingdom in order to acquire a derivative right of residence. In *Rottmann*,[39] a German citizen faced with the withdrawal of naturalization invoked his rights as a Union citizen against his country of nationality by relying on the future effect of the withdrawal of German citizenship.

The casuistic approach of the Court and its efforts to find some kind of artificial link to cross-border movement have led to a considerable degree of legal uncertainty. The *Zambrano* case raised even more question. The Court invoked Article 20 TFEU in a situation that did not involve any cross-border movement, but did not elaborate on the possibilities for relying on Article 20 TFEU in such cases. The intervening Member States and the Commission argued that a situation in which Union-citizen children reside in their Member State of nationality and have never left its territory falls outside the scope of Union law. The Court, however, applied Article 20 TFEU to the case at hand even though no cross-border movement was involved. Hence, the ruling potentially had major implications for the Member States, extending the reach of EU law to an area that was thought to be the last realm of national discretion when dealing with the situation of family members of Union citizens. The potential implications of abandoning the restriction against relying on the rights derived from Union citizenship in a purely internal situation were immense, as the percentage of Union citizens who exercise their free movement rights is still marginal. *Zambrano* thus extended the reach of Union law to a large number of potential beneficiaries. With secondary legislation regulating the entry and residence of family members of Union citizens who have moved to other Member States,[40] as well as that of family members of third-country nationals,[41] the rights held in internal situations by dependent family members are relevant mostly for Union citizens with family members who are not nationals of any Member State. This used to be a category of family members excluded from the protection of EU law for the purpose of residence and employment. A broad and universal interpretation of the judgment, rendering it applicable to the family

[38] Case C-200/02, Zhu & Chen v. Sec'y of State for the Home Dep't, 2004 E.C.R. I-9925.

[39] Rottmann v. Freistaat Bayern (2 Mar. 2010).

[40] Council Directive 2004/38/EC, *supra* note 6; *see, e.g.*, Samantha Besson & André Utzinger, *Introduction: Future Challenges of European Citizenship—Facing a Wide-Open Pandora's Box*, 13 EUR. L.J. 573 (2007); Jeremy Bierbach, *European Citizens' Third-Country Family Members and Community Law*, 4 EUR. CONST. L. REV. 344 (2008); Sergio Carrera, *What Does Free Movement Mean in Theory and Practice in an Enlarged EU?*, 11 EUR. L.J. 699 (2005); Clare McGlynn, *Family Reunion and the Free Movement of Persons in European Union Law*, 7 INT'L L. FORUM DU DROIT INTERNATIONAL 159 (2005).

[41] Council Directive 2003/86/EC of 22 Sep. 2003 on the Right to Family Reunification, 2003 O.J. (L 251) 12. *See, e.g.*, Sergio Carrera & Anja Wiesbrock, *Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU*, 12 EUR. J. MIGRATION & L. 337 (2010); Kees Groenendijk, *Family Reunification as a Right Under Community Law*, 8 EUR. J. MIGRATION & L. 215 (2006).

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members of all non-moving Union citizens, would have abandoned the somewhat arbitrary distinction, and in some Member States considerable difference in rights, between the third-country-national family members of moving and non-moving Union citizens. It would also have done away with the necessity to rely on arbitrary constructions, such as using the Belgian or the Swedish route in order to rely on EU law for the purpose of family reunification.

Yet, the scope of application of the *Zambrano* judgment has been substantially limited by the subsequent *McCarthy* ruling of the Court's Third Chamber. In *McCarthy*, the Court was faced with the situation of a dual British-Irish citizen, who was born and had always lived in the U.K. Mrs. McCarthy tried to rely on the provisions on Union citizenship in Directive 2004/38/EC to derive a right of residence in the U.K. for her third-country national spouse. The Court held that Article 21 TFEU was not applicable in the case at hand, since:

> [N]o element of the situation of Mrs McCarthy . . . indicates that the national measure at issue . . . 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 . . . .[42]

Hence, the Court clarified that the "internal situation" rule has not been abandoned, but merely modified. The required link with Union law in a case such as *Zambrano* does not emerge from the link to cross-border movement, but from the Union citizen's deprivation of the genuine enjoyments of the substance of the rights associated with Union citizenship.[43] *McCarthy* thus limits the implications of *Zambrano* for internal situations, by restricting the range of situations to which the judgment can be applied. It follows from a combination of both judgments that a set of requirements have to be fulfilled in order for a situation to fall under the *Zambrano* regime and for a person to enjoy the rights under EU law.

II. What Are the Requirements to Rely on Union Citizenship in an Internal Situation?

In *Zambrano*, the Court establishes a number of additional requirements for reliance upon Article 20 TFEU in an internal situation. First, it establishes that the Union citizen concerned must face a potential deprivation of the "genuine enjoyment of the substance of the rights" conferred by virtue of the status of Union citizenship. The applicant's

[42] Case C-434/09, Shirley McCarthy v. Sec'y of State for the Home Dep't (5 May 2011), at para. 49.

[43] *See also* Anja Wiesbrock, *Disentangling the "Union Citizenship Puzzle": The McCarthy Case*, 36 EUR. L. REV. (forthcoming 2011).

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children in *Zambrano* faced the most far-reaching possible deprivation of their rights as Union citizens: The risk of having to leave the territory of the Union. The question arose whether the judgment could be extended to the deprivation of other fundamental rights of Union citizens, such as the right to family reunification. The Court shed further light on the question how the requirement to be deprived of the genuine enjoyment of the substance of the rights attached to Union citizenship must be interpreted in the recent *Dereci* case. The ruling indicates that the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizenship will only be affected "in situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole". [44]

Moreover, in *Zambrano* the Court relies heavily on the fact that, in order to enjoy their rights as Union citizens, the Zambrano children are dependent upon their parents' rights of residence and employment. *Zambrano* left unclear whether the same reasoning could be applied to other third-country-national family members of Union citizens who have never left the countries of their nationality. If this had been the case, the Court would have opened the possibility of relying on Union law to a large number of third-country nationals previously excluded from its reach. Yet, after *McCarthy* it seems that the application of the *Zambrano* reasoning is limited to the parents of dependent Union-citizen children. The judgment clearly rules out the possibility of applying the case by analogy to third-country-national spouses of Union citizens. There is, however, still a possibility that the ruling equally covers other types of dependency, such as adult children or parents who cannot take care of themselves.

Finally, the Court indicates, but does not elaborate upon, the restrictions inherent in Articles 20 and 21 TFEU. It follows from the Court's case law that Article 21 TFEU, as with the remaining free movement provisions, is not absolute. The rights of movement and residence contained therein may be restricted if the national measure can be objectively justified and is proportionate to the legitimate objective pursued. [45] The same reasoning must apply to Article 20 TFEU. The exclusive reliance on primary law thus does not exempt Union citizens and their family members per se from requirements attached to residence and employment rights in an internal situation that is not covered by Directive 2004/38/EC. Yet, it appears that the validity of national restrictions in cases that are to be decided exclusively on the basis of Article 20 and 21 TFEU must be assessed on a case-by-

[44] Case C-256/11, Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike, Dragica Stevic v. Bundesministerium für Inneres, para. 66 (15 Nov. 2011), *available* at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0256:EN:HTML (last visited 16 Nov. 2011).

[45] Case C-406/04, De Cuyper v. Office national de l'emploi, 2006 E.C.R. I-6947, at para. 40; Case C-76/05, Schwarz v. Finanzamt Bergisch Gladbach, 2007 E.C.R. I-6849, para. 94; Case C-353/06, Grunkin & Paul, 2008 E.C.R. I-7639, para. 29; Case C-544/07, Rüffler v. Dyrektor Izby Skarbowej, 2009 E.C.R. I-3389, para. 74; Case C-208/09, Sayn-Wittgenstein v. Landeshauptmann von Wien, para. 81 (22 Dec. 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0208:EN:HTML (last visited 9 Nov. 2011).

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case basis, which would preclude any categorical application of resource requirements. Such cases would have to be solved along the lines of the proportionality of the potential interference with the non-moving Union citizen's rights.

III. The Differential Application of Citizenship Rights

A most notable outcome of the case is the fact that the reach of Article 20 TFEU extends to cases where the so-called "Citizens Directive" 2004/38/EC is not applicable. Union citizens and their family members relying exclusively on Article 20 or 21 TFEU are not only freed from the requirement to move; they are also not subject to any of the conditions and limitations contained in Directive 2004/38/EC. This means that Union citizens who fall under the scope of Directive 2004/38/EC could find themselves in a less favorable position than those who cannot rely on its provisions and therefore fall under the regime of Article 20 TFEU. At the same time, the family members of non-moving Union citizens may not enjoy all the rights conferred by secondary legislation. The family members of non-movers, and therefore the non-moving Union citizens themselves, may thus be better off in some respects and worse off in others compared to mobile citizens who can rely on Directive 2004/38/EC. This creates the danger of an incoherent application of citizenship rights.

One example of a differential application of citizenship rights is the imposition of resource requirements. The Directive restricts the right of residence for a period of more than three months to Union citizens who are workers or self-employed in the host state or who have sufficient resources for themselves and their family members without having to rely on public funds.[46] The family members of Union citizens falling within the scope of Directive 2004/38/EC only have a right of residence in the host Member State for more than three months if their sponsoring Union citizen satisfies this condition.[47] In such a case, Article 20 or 21 cannot be relied upon in the alternative to circumvent the resource requirement.[48] This is illustrated by the *Chen* case,[49] in which the Court interpreted Article 21 TFEU (ex-Article 18 EC) as being limited by the resource requirement contained in Directive 90/364, the predecessor to Directive 2004/38/EC. In order to be able to rely on the right of residence derived from Article 21 TFEU, the infant Union citizen was required to comply with the resource requirement contained in the Directive, which could, however, be satisfied by relying on the resources of the parents. With respect to cases falling outside the scope of the Directive, the reasoning appears to be different. Since the Directive does not apply, the resource requirement contained in Article 7 cannot be invoked.

[46] Council Directive 2004/38/EC, *supra* note 6, art. 7.1(b).

[47] *Id.* art. 7.2.

[48] Case C-456/02, Trojani v. Centre public d'aide sociale de Bruxelles, 2004 E.C.R. I-7573.

[49] Case C-200/02, Zhu & Chen v. Sec'y of State for the Home Dep't, 2004 E.C.R. I-9925, at paras. 26–28.

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Nonetheless, in *Zambrano*, the Court applies a resource requirement to the parents of the *Zambrano* children within the context of Article 20 TFEU, implying that the dependent children would not be protected from having to leave the Union in case the parents were not able to prove a sufficient amount of resources.[50] However, the reasoning applied is notably different. Family members of moving Union citizens can rely on the prolonged residence and employment rights of Directive 2004/38/EC only if the resource requirement is fulfilled.[51] In cases covered exclusively by primary law, the Court reasons the other way around: The parents have to be granted a work permit in order for the child to have sufficient resources and to be able to reside. The exclusive reliance on primary law does thus not exempt Union citizens and their family members per se from resource requirements, but the right to employment is seen as a necessary precondition to, rather than something that follows from, being able to prove the availability of sufficient funds.

At the same time, it is unclear whether the family members of Union citizens falling outside the scope of Directive 2004/38/EC can rely on the additional rights contained therein. Most rights embodied in the Directive are a mere codification of preceding case law under the free movement provisions and are therefore likely to apply in the same way to movers and non-movers.[52] However, there are a few provisions in the Directive that establish novel rights not previously recognized by the Court, such as the right of permanent residence contained in Chapter IV of the Directive. It is questionable whether such rights equally apply to the third-country-national family members of Union citizens falling outside the scope of Directive 2004/38/EC. In *Dias*,[53] the Commission and the Portuguese government argue that, even if Article 16(1) does not apply, a right of permanent residence springs directly from Article 21, since it would be disproportionate not to grant a right of residence after a period of five years. The UK and Danish governments argue, to the contrary, that a right of permanent residence cannot be claimed on the basis of Article 21, since the right of permanent residence contained in the Directive is new.[54] The Court, however, solves the case by relying exclusively on Article 16 of the Citizens Directive, holding that if the person no longer complies with the qualifying conditions for residence, then periods of residence completed before the Directive came into force and based solely upon the possession of a residence permit do not count

[50] Case C-34/09, Zambrano v. Office national de l'emploi (8 Mar. 2011), at para. 44.

[51] Council Directive 2004/38/EC, *supra* note 6, art. 23.

[52] For example, the right of residence of the parent who is the "primary carer" for a Union-citizen child. *Compare* Council Directive 2004/38/EC, *supra* note 6, art. 12, *with* Case C‑413/99, Baumbast v. Sec'y of State for the Home Dep't, 2002 E.C.R. I-7091, at para. 75.

[53] Case C-325/09, Sec'y of State for Work & Pensions v. Dias (21 July 2011), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0325:EN:HTML (last visited 9 Nov. 2011); *see also* Case C-162/09, Sec'y of State for Work & Pensions v. Lassal (7 Oct. 2010).

[54] *See Trstenjak Opinion*, *supra* note 8, at paras. 47–48.

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towards the required five-year period of residence. The fact that Article 21 is not mentioned seems to imply that the Article cannot provide the basis for a right of permanent residence, even though the Court does not directly articulate this. In any case, even if the Court were eventually to go along with the Commission, recognizing a right of permanent residence under Article 21, it is questionable whether this would equally apply to the third-country-national family members of Union citizens. A reasoning invoking the principle of proportionality would seem to be required for the situation of the family members concerned. This implies that the Court would take an inevitably casuistic approach, which would depend to a large extent on proportionality tests applied by national courts.

IV. What About Reverse Discrimination and Fundamental Rights?

In *Zambrano*, the Court did not make use of the opportunity to address the issue of "reverse discrimination." It failed to address any of the arguments made with respect to a potential violation of Article 18 TFEU in such cases. In her proposal, Advocate General Sharpston suggested interpreting Article 18 TFEU as prohibiting reverse discrimination, but only in situations where discrimination (1) is caused by the interaction of Article 21 TFEU with national law, (2) entails the violation of a fundamental right protected under EU law, and (3) is without equivalent protection under national law. The Court did not even mention Article 18 TFEU, presumably in order to avoid opening a Pandora's box. Departing from the reverse discrimination case law under Article 18 TFEU[55] would obviously go much further than allowing the possibility of relying on Article 21 TFEU in an internal situation, since the application of Article 18 is not limited to residence and movement rights. It is, moreover, disputed whether the possible conclusion that reserve discrimination is prohibited by Article 18 TFEU would be desirable in the light of the division of competences between the E.U. and the Member States.[56] The complete absence of Article 18 from the *Zambrano* judgment indicates a reluctance by the Court to consider reverse discrimination as an issue that can and should be dealt with under EU law. One might or might not agree with this assessment of the scope of Article 18 TFEU. In any case, it is regrettable that the Court does not mention the extent to which Article 18 may be of relevance in cases involving reverse discrimination.[57]

[55] *See, e.g.*, Case 86/78, Peureux v. directeur des Services fiscaux de la Haute Saône, 1979 E.C.R. 897, para. 38; Case 355/85, Driancourt v. Cognet, 1986 E.C.R. 3231, paras. 10–11; Case 98/86, Criminal Proceedings Against Mathot, 1987 E.C.R. 809, para. 7; *see also* ALINA TYRFONIDOU, REVERSE DISCRIMINATION IN EC LAW (2009).

[56] Anne Pieter van der Mei, Stefaan Van den Bogaert and Gerard-René de Groot, De arresten Ruiz Zambrano en McCarthy. Het Hof van Justitie en het effectieve genot van EU-burgerschapsrechten, *Nederlands tijdschrift voor Europees recht*, nr. 6 (2011), at 188–99.

[57] *See also* Anja Lansbergen & Nina Miller, *European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09* Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM), 7 EUR. CONST. L. REV. 287 (2011).

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An even more controversial issue that the Court did not address is the scope of fundamental rights protection within the E.U.[58] Under the current Treaty provisions and case law, fundamental rights under EU law (including the Charter provisions) cannot be invoked as free-standing rights against a Member State in situations where no other link with EU law can be identified. EU fundamental rights may be invoked only when the contested measures come within the scope of application of EU law,[59] measures enacted by EU institutions, implementing acts, or other acts falling within the field of application of EU law by the Member States.[60] The fact that the availability of EU fundamental rights protection depends on the direct applicability of a Treaty provision or the enactment of secondary legislation has been challenged by Advocate General Sharpston in her opinion in *Zambrano*. She argues that individuals should be able to invoke EU fundamental rights in any situation covering an area of law where the E.U. has shared or exclusive competence, even if such competence has not yet been exercised.[61] Even though Sharpston develops her idea within the context of the reach of Union citizenship, such a change in approach would have large implications for third-country nationals. Justice and home affairs being an area where the E.U. has shared competence, most national legislation regulating the entry and residence of third-country nationals would fall within the scope of Union law, even if the Union legislature has not adopted any secondary legislation.

In *Dereci* the Court finally addressed the issue of a right to the protection of family life. According to the Court, Union citizenship cannot be invoked in cases where it merely "appears desirable to a national of a Member State, for economic reasons or in order to keep his family together" to have his third-country national family members live with him in the territory of the Union.[62] Nevertheless, the Court emphasizes that there might be cases where, by virtue of the right to the protection of family life, a right of residence cannot be refused. In situations covered by European Union law, those rights must be interpreted under Article 7 of the Charter of Fundamental Rights, otherwise Article 8(1) ECHR applies. The reasoning of the Court seems to imply that the right to family life has to

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[58] *See also* Wiesbrock, *supra* note 46.

[59] Case 36/75, Rutili v. Ministre de l'intérieur, 1975 E.C.R. 1219, para. 26; Case 222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.R. 1651, paras. 17–19; Case 222/86, UNECTEF v. Heylens, 1987 E.C.R. 4097, paras. 14–15.

[60] Joined Cases 201 & 202/85, Klensch v. Secrétaire d'État à la Viticulture, 1986 E.C.R. 3477, paras. 10–11; Case 5/88, Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, 1989 E.C.R. 2609, para. 22; Case C-2/92, Regina v. Ministry of Agric., Fisheries & Food, ex parte Bostock, 1994 E.C.R. I-955, para. 16; Joined Cases C-20/00 & C-64/00, Booker Aquaculture & Hydro Seafood v. The Scottish Ministers, 2003 E.C.R. I-7411, para. 68.

[61] *Sharpston Opinion*, *supra* note 13, at para. 163.

[62] Case C-256/11, Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike, Dragica Stevic v. Bundesministerium für Inneres, para. 68 (15 Nov. 2011), *available* at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0256:EN:HTML (last visited 16 Nov. 2011).

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be analysed separate from the concept of Union citizenship. However, this approach raises further questions. In particular, the distinction between applying Article 7 of the Charter in some situations and Article 8(1) ECHR in others appears artificial when considering that 1) the meaning and scope of both Articles are the same and 2) Union citizenship cannot be relied upon in internal situations other than those where a citizen will be forced to leave Union territory. Arguably, in cases where Article 20 TFEU can be invoked, reliance on Article 7 of the Charter is not necessary. In all other cases, so it seems, Article 7 can equally not be relied upon for lack of a factor brining the situation within the scope of E.U. law.

V. Likely Implications for Member States' Migration and Nationality Laws

At first sight, the judgment has largely positive implications for third-country nationals residing in the Union, extending the scope of Union law to certain third-country-national family members of non-movers and restricting national discretion in this respect. Yet, the judgment may have unintended consequences for national migration and nationality laws. By extending the scope of rights to be relied upon by Union citizens, the ECJ may have provided Member States with an incentive to render it all the more difficult for individuals to gain access to European citizenship in the first place. In the area of migration law, Member States may be inclined to try to further tighten their conditions for the admission and residence of third-country-national family members, economic migrants, and asylum seekers in order to counteract their loss of control over the admission of family members of non-moving Union citizens. Yet, in this area, national legislators already face significant restraints imposed by EU secondary legislation. A growing body of EU law establishes minimum requirements for the admission and residence of family members (Directive 2003/86/EC), students (Directive 2004/114/EC), researchers (Directive 2005/71/EC), and highly skilled migrants (Directive 2009/50/EC), as well as the reception, processing, and qualification of asylum seekers and refugees (Directives 2003/9/EC, 2005/85/EC, and 2004/83/EC).

It is thus in the sphere of nationality law, which still lies almost exclusively within the sovereignty of the Member States,[63] that the most significant changes can be expected to occur. The facts of the *Zambrano* case could only occur on account of Belgian citizenship legislation, which determined at the moment of the birth of the Zambrano children that any child born in Belgium who was stateless at any time before reaching the age of majority acquired Belgian citizenship.[64] The two Zambrano children fell under the statelessness provision of the Belgian Code since they did not automatically acquire their parents' Columbian nationality at birth. This is due to the fact that Columbian nationality

[63] The Court has, however, restricted national discretion in this area in respect of nationality rules applicable to Union citizens. *See* Rottmann v. Freistaat Bayern (2 Mar. 2010).

[64] Belgian Nationality Code, art. 10(1), MONITEUR BELGE [M.B.] [Official Gazette of Belgium], 12 July 1984, 10095 (in the version applicable at the time of the birth of the Zambrano children).

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law requires the registration of children born abroad to Columbian parents at a diplomatic mission or consulate. It is not unlikely that the *Zambrano* judgment will have an impact on Member States' *ius soli* rules for children, and possibly even for naturalization proceedings. From an ad hoc query on the consequences of the *Zambrano* case requested by the European Commission,[65] it appears that several Member States, including the Czech Republic, Finland, Greece, Hungary, Italy, Lithuania, Luxembourg, Portugal, the Slovak Republic, Slovenia, Spain, and the U.K., grant nationality to a child born in their territories if the child becomes stateless, albeit under varying conditions, including the parents' statelessness, permanent residency, or refugee status. Considering the implications of obtaining Union citizenship, Member States may be inclined to restrict the abilities of children who are stateless or second-generation immigrants to acquire citizenship upon birth in their territory, and to make it more difficult for first-generation migrants to become naturalized.

However, legislative changes to *ius soli* provisions may not always have the desired effect of preventing the occurrence of *Zambrano* scenarios. This appears from the changes made to the Belgian Nationality Code during the *Zambrano* proceedings. The Belgian legislature added a second paragraph to Article 10 of the Code, which precludes the acquisition of Belgian nationality by stateless children born on Belgian territory if the child's acquisition of another citizenship merely depends on an administrative act of the parents at the diplomatic or consular authorities of their country of origin. This provision applies at first sight to cases with facts similar to those in *Zambrano*. However, within the context of the Council of Europe Committee of Ministers on the Nationality of Children,[66] it has been argued that, while states may require parents to comply with the relevant administrative procedures of their country of origin, the acquisition of the nationality of the country of birth cannot be denied if the children or parents face de facto difficulties in complying with the registration requirement, as in the case of refugees or asylum seekers who are awaiting a final decision.[67] The newly-inserted provision into Belgian nationality law thus would not have altered the outcome of the *Zambrano* case. Likewise, Member States may find that their options to tighten *ius soli* and naturalization requirements are restricted by international or domestic constitutional provisions. Be that as it may, the implications of

[65] EUROPEAN MIGRATION NETWORK, AD-HOC QUERY ON THE CONSEQUENCES OF THE ZAMBRANO CASE (C-34/09) (2011), http://www.emnbelgium.be/sites/default/files/publications/312_emn_ad-hoc_query_zambrano_case_14april2011_wider_dissemination.pdf (last visited 6 Nov. 2011).

[66] Recommendation CM/Rec (2009) 13 of the Committee of Ministers to Member States on the Nationality of Children (Adopted by the Committee of Ministers on 9 Dec. 2009 at the 1073rd Meeting of the Ministers' Deputies) (Council of Europe), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=1563529 (last visited 9 Nov. 2011).

[67] Anne Pieter van der Mei, Stefaan Van den Bogaert & Gerard-René de Groot, *De arresten Ruiz Zambrano en McCarthy: Het Hof van Justitie en het effectieve genot van EU-burgerschapsrechten*, NEDERLANDS TIJDSCHRIFT VOOR EUROPEES RECHT, June 2011, at 188–99.

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Zambrano might not be entirely positive for those finding themselves at the margins of EU law. Whereas the rights of Union citizens have been extended, the judgment is likely to render access to this privileged status more difficult and to exacerbate the distinction between "insiders" and "outsiders" in the E.U. In any case, the judgment is sure to trigger lively discussions about the future of EU law and the demarcation of competences between the Union and the Member States.

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