



EU citizenship and the European Court of Justice's 'stone-by-stone' approach



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ARTICLE INFO

Available online 19 October 2015

Keywords:

EU citizenship
Article 20 TFEU
Article 21 TFEU
Directive 2004/38
Directive 2003/86
'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'

ABSTRACT

Examining the seminal judgment of the European Court of Justice (the 'ECJ') in the *Ruiz Zambrano* case (C-34/09, EU:C:2011:124) and its progeny, this paper is to illustrate the fact that in hard cases of constitutional importance the ECJ follows an incremental approach. This means, in essence, that the ECJ does not take 'long jumps' when expounding the rationale underpinning the solution given to novel questions of constitutional importance. On the contrary, the persuasiveness of its argumentative discourse is built up progressively, i.e., 'stone-by-stone'.

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1. Introduction

The European Court of Justice (the 'ECJ') operates under the principle of collegiality, which means that reaching an outcome based on consensus is of paramount importance for the daily inner workings of the ECJ (Lenaerts, 2013). Accordingly, for the sake of consensus, in hard cases the discourse of the ECJ cannot be as profuse as it would be if dissenting opinions were allowed (Lasser, 2009).

As consensus-building requires bringing on board as many opinions as possible, the argumentative discourse of the ECJ is limited to the very essential. In order to preserve consensus, the ECJ does not take 'long jumps' when expounding the rationale underpinning the solution given to novel questions of constitutional importance. On the contrary, the persuasiveness of its argumentative discourse is built up progressively, i.e., 'stone-by-stone' (Skouris, 2014). It follows that, in order to fully apprehend the approach of the ECJ in an area of EU law, a critical observer should not limit him- or herself to studying the 'groundbreaking' case, but he or she should also read the relevant case law predating as well as postdating that case.

The purpose of this article is to illustrate that idea by looking at the recent developments in the case law relating to the Treaty provisions on EU citizenship, in particular at *Ruiz Zambrano* (2011) and its progeny.²

Ruiz Zambrano is a landmark case in the law on EU citizenship. In that case, the referring court asked, in essence, whether Mr Ruiz Zambrano—a Colombian national staying illegally in Belgium—could rely on the Treaty provisions on EU citizenship

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² The case law relating to the Charter of Fundamental Rights of the European Union may also illustrate this point. See generally Peers, Hervey, Kenner, and Ward, (2014).

Peer review under responsibility of Mykolas Romeris University.

with a view to obtaining a derivative right of residence as the father of two Belgian children who had never left that Member State. Through such a derivative right, Mr Ruiz Zambrano also sought to obtain a work permit to which, as an illegal immigrant, he was not entitled under Belgian law.

At the outset, the ECJ noted that Article 3 of the Citizens' Rights Directive (the 'CRD'), which defines the persons benefiting from the rights contained therein, was not applicable to the case at hand, since that provision applies to EU citizens 'who move to or reside in a Member State other than that of which they are a national, and to their family members' (Ruiz Zambrano, 2011, para 39). Next, the ECJ held that, since the son and daughter of Mr Ruiz Zambrano were Belgian nationals, Article 20 TFEU conferred the status of a citizen of the Union on them (Ruiz Zambrano, 2011, para 40). After stressing that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States,' (Ruiz Zambrano, 2011, para 41) the ECJ ruled, in the key passage of the judgment, that

'Article 20 TFEU precludes national measures that 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' (Ruiz Zambrano, 2011, para 42).

In so doing, the ECJ was sending a clear message: the Treaty provisions on EU citizenship are not limited to being a 'fifth freedom' which operates under the dynamics of free movement law. The rights attaching to the status of citizen of the Union may be relied upon, even in the absence of a cross-border element, against any national measure causing the deprivation of those rights.

For the case at hand, this meant that Mr Ruiz Zambrano had, as the father of two Belgian minors, a derivative right to reside and to work in Belgium, in spite of the fact that his children had never left that Member State. The ECJ reasoned that if Mr Ruiz Zambrano were to leave the territory of the Union because of his irregular immigration status (or because a work permit was not issued to him), his children would be obliged to do the same. As a result, those citizens of the Union would ... be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union (Ruiz Zambrano, 2011, para 44).

Interestingly, in contrast to the extensive Opinion of AG Sharpston,³ the ECJ's legal reasoning is contained in 10 paragraphs (Ruiz Zambrano, 2011, paras 36–45), out of which only six concerned Article 20 TFEU.⁴ Explaining such an important development in only six paragraphs may, for some, show that the argumentative discourse of the ECJ is laconic, cryptic and even minimalist (Hailbronner and Thym, 2011, p. 1253, 1259; Šadl, 2013, p. 205, 208).⁵ However, the ruling of the ECJ in *Ruiz Zambrano* did not come 'out of the blue', but it draws on the previous ruling of the ECJ in *Rottmann*. As a matter of fact, in the key passage of *Ruiz Zambrano*, i.e., paragraph 42, the ECJ itself refers to *Rottmann*.

2. The founding stone

Rottmann thus set the founding stone that paved the way towards the emancipation of EU citizenship from the limits inherent in its free movement origins. The facts of the case are as follows. While being the subject of judicial investigations in Austria, Dr Rottmann, an Austrian national, moved to Germany in 1995. Two years later, Austria issued an arrest warrant against him. In February 1999, he acquired German nationality by naturalisation triggering the loss of his Austrian nationality. However, in August 1999, Austria informed Germany of the arrest warrant issued against Dr Rottmann. Taking the view that by withholding that information Dr Rottmann had obtained German nationality by deception, Germany revoked that nationality and, since the original nationality did not revive, Dr Rottmann became stateless. Dr Rottmann challenged that decision before the German courts. In essence, the referring court asked the ECJ whether, in a situation such as that of Dr Rottmann, it was contrary to Article 20 TFEU for a Member State to withdraw from a citizen of the Union the nationality of that state acquired by naturalisation and obtained by deception inasmuch as that withdrawal deprived the person concerned of the status of citizen of the Union and of the benefit of the rights attaching thereto by rendering him stateless, acquisition of that nationality having caused that person to lose the nationality of his Member State of origin. In the key passage of the judgment, the ECJ held that

[i]t is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article [20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of [EU] law (Rottmann, 2010, para 42).

In reaching that conclusion, the ECJ stressed once again that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States' (Rottmann, 2010, para 43). In order to transform this postulate into a living truth,

³ Opinion of Advocate General Sharpston in *Ruiz Zambrano*, C-34/09, EU:C:2010:560, which contains 178 paragraphs. E.g., unlike the Opinion of AG Sharpston, the ECJ did not address the issue of reverse discrimination.

⁴ The other four concern the reformulation of the questions referred by the Belgian court (para 36), the observations of the parties (paras 37 and 38) and an explanation as to why Directive 2004/38, [2004] OJ L158/77, does not apply to the situation of Mr Ruiz Zambrano (para 39).

⁵ Hailbronner and Thym argue that '[g]iven the novelty of the "substance of rights" doctrine, one could have expected the [ECJ] to provide the legal community with some basic explanations. Instead the [ECJ] restricts itself to apodictic declarations of result.' In the same way, Šadl posits that 'can one reasonably claim that the *Ruiz Zambrano* decision is poorly reasoned? The short answer is yes'.

the ECJ places weight on the status of a citizen of the Union as such rather than on free movement. Thus, even in the absence of any physical movement between Member States, national measures which deprive an individual of his or her status of citizen of the Union, and thereby of the rights attaching to that status, fall within the scope of application of the Treaty provisions on EU citizenship.

Accordingly, reading *Ruiz Zambrano* jointly with *Rottmann*, one may conclude that the former is actually endorsing and developing the approach followed in the latter: even in the absence of a cross-border element, Article 20 TFEU opposes a national measure which does not formally deprive an individual of the rights attaching to his or her status as an EU citizen but, in practical terms, produces the same effect.

3. The Three Unsolved Questions after *Ruiz Zambrano*

After *Ruiz Zambrano*, three important questions arose. First, the ECJ did not clarify how, in the absence of a cross-border element, Articles 20 and 21 TFEU interact. Second, neither did it specify under which circumstances a national measure may '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' (*Ruiz Zambrano*, 2011, para 42), or when does a national measure produce a 'deprivation effect'? It was left to future cases to decide whether the ECJ would opt for a strict or broad interpretation. Under a strict interpretation, a national measure would only produce a 'deprivation effect' when it brings about, de jure or de facto, the loss of the rights attaching to the status of citizen of the Union, meaning that the national measure at issue would have to cause more than a mere hindrance to the exercise of the rights attaching to the status of citizen of the Union. Under a broad interpretation, a measure producing a 'deprivation effect' would be tantamount to a measure which is 'liable to hinder or make less attractive the exercise of [rights attaching to the status of citizen of the Union] guaranteed by the Treaty'.⁶ Third, the ECJ had to clarify whether fundamental rights, especially the right to respect for a person's private and family life, had to be taken into account for the purposes of determining the existence of a deprivation effect.

Those three questions were not addressed right away but were left to future cases, where they would be decisive. Did *Ruiz Zambrano*, as a consequence, suffer a lack of reasoning? In my view, it did not. First, providing answers to those three questions was not necessary to solve the case at hand. The ruling of the ECJ in *Ruiz Zambrano* gave sufficient guidance to the referring court. It made crystal clear that Mr Ruiz Zambrano had a derivative right to reside with his children and to have access to employment in Belgium. Second, under the preliminary reference procedure laid down in Article 267 TFEU, the ECJ operates as the court of both first and last resort. This means that the ECJ cannot benefit from the 'percolation' effect known in relation to the US federal judiciary (*Arizona v. Evans*, 1995).⁷ There are no EU Circuit Courts of Appeals that could adopt diverging approaches on an important question of EU law, after which the ECJ would settle the matter by undertaking a comparative study of the advantages and disadvantages of each approach. The preliminary reference procedure does not operate in such a way, as there are no EU lower courts that can be used as 'laboratories' until the discussion among these courts is mature enough for the ECJ to decide. Hence, in cases such as *Ruiz Zambrano*, where the ECJ is drawing the external contours of the Treaty provisions on EU citizenship, it must be sure of the steps taken, of the direction in which it goes and of the consequences of its decisions. In the procedural setting of preliminary references, judicial prudence counsels in favour of limiting the argumentative discourse of the ECJ to the questions that are really to be answered in order to solve the case at hand. A concise ruling is then preferable to one that rests on assumptions of an excessively general and abstract nature which are likely to be subsequently reconsidered in view of concrete questions raised by new cases. It would undoubtedly be more damaging to the legitimacy of the ECJ as a supreme court to send 'mixed signals' than to design an argumentative discourse that, though not as extensive as some would like it to be, appears to be sound and likely to gain momentum and strength as the case law develops.

4. The 'stone-by-stone' approach

It should be clear by now that in *Ruiz Zambrano* the ECJ left important questions unanswered as a matter of judicial prudence, not because it decided to avoid answering difficult, complex and politically sensitive questions; on the contrary, those questions would be addressed when the cases at hand required to do so. This is actually what the ECJ did in *McCarthy* (2011) and subsequently in *Dereci et al.* (2011).

4.1. *McCarthy*: drawing the line between the 'impeding effect' and the 'deprivation effect'

Mrs McCarthy, a dual Irish and UK national, was born and had always lived in the UK; i.e., she had never exercised her right of free movement. She married a Jamaican national who lacked leave to remain in the UK in accordance with that

⁶ That expression is commonly used by the ECJ in the context of the Treaty provisions on free movement. See e.g. judgment in *Kraus*, C-19/92, EU: C:1993:125, para 32.

⁷ Ginsburg, J. dissenting: '[w]e have in many instances recognised that when frontier legal problems are presented, periods of "percolation" in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.'

Member State's immigration laws. In order to prevent his deportation, she and her husband applied to the Secretary of State for a residence permit and residence document under European Union law as, respectively, a Union citizen and the spouse of a Union citizen. However, their application was rejected because Mrs McCarthy was neither economically active nor self-sufficient, as she was a recipient of state benefits. The referring court asked, in essence, whether Article 21 TFEU applied to a situation such as that of Mrs McCarthy. To this effect, **the ECJ held that**

no element of the situation of Mrs McCarthy, as described by the national court, 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 [attaching to] 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 (McCarthy, 2011, para 49).

Indeed, the failure by UK authorities to take into account Mrs McCarthy's Irish nationality had in no way affected her right to move and reside freely within the EU.

Next, the ECJ went on to distinguish the facts of the case at hand from those in *Ruiz Zambrano* and *Garcia Avello*. In contrast to *Ruiz Zambrano*, the ECJ observed that the national measure at issue in the main proceedings did not have the effect of obliging Mrs McCarthy to leave the territory of the Union (McCarthy, 2011, para 50). As to *Garcia Avello*, the ECJ explained that what mattered, in that case, was not whether the discrepancy in surnames was the result of the dual nationality of the persons concerned, but the fact that that discrepancy was liable to cause serious inconvenience for the Union citizens concerned that constituted an obstacle to freedom of movement that could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued (McCarthy, 2011, para 52, referring to Grunkin and Paul, 2008, paras 23, 24 and 29). The ECJ thereby in effect ruled that dual nationality is not in itself a sufficient connecting factor with EU law (McCarthy, 2011, para 54).

Accordingly, **the ECJ decided that the situation of a person such as Mrs McCarthy had no factor linking it with any of the situations governed by EU law and was thus confined in all relevant respects within a single Member State.**

After *McCarthy*, one may argue that a combined reading of Articles 20 and 21 TFEU suggests that in order for a national measure to fall within the scope of EU law, the latter must produce either a 'deprivation effect' or an 'impeding effect'. The 'impeding effect' refers to the traditional line of case law according to which the application of the Treaty provisions on EU citizenship requires the existence of a cross-border link, not however that the national measure in question causes the loss, in practice, of the rights attaching to the status of citizen of the Union. As *Garcia Avello* shows, it **suffices that the national measure at issue is liable to cause 'serious inconveniences' to a right attaching to the status of a citizen of the Union.** By contrast, as *Ruiz Zambrano* made clear, the 'deprivation effect' does not depend on the existence of a cross-border link but focuses on the rights attaching to the status of EU citizen. In other words, the 'deprivation effect' does not require a cross-border link but **requires the national measure to cause more than 'serious inconveniences'.** That effect requires a de facto loss of one of the rights attaching to the status of a citizen of the Union.

It follows from the foregoing that the 'impeding' and 'deprivation' effect are subject to different requirements that are not, however, mutually exclusive: it is still possible for a national measure that applies in a cross-border context to cause the loss of the rights attaching to the status of EU citizen, thus producing both types of effect. Hence, the ECJ opted for a strict interpretation when defining a national measure capable of producing a 'deprivation effect'.

4.2. *Dereci*: the scope of application of fundamental rights

In *Ruiz Zambrano*, the referring court asked, **as a third question, whether fundamental rights, in particular Articles 21, 24 and 34 of the Charter of Fundamental Rights of the European Union (the 'Charter'), had to be taken into account for the purposes of determining the compatibility of the national measure in question with the Treaty provisions on EU citizenship.** However, since Article 20 TFEU by itself opposed that national measure, there was no need for the ECJ to answer the delicate question concerning fundamental rights. By contrast, **in *Dereci*, the ECJ considered that it needed to address that question directly.**

The facts of that case are as follows. Just as in the case of Mr Ruiz Zambrano, Mr Dereci is a third-country national (of Turkish nationality) residing illegally in a Member State of which his children are nationals, namely Austria. Just as the children of Mr Ruiz Zambrano, those of Mr Dereci are still minors and have never exercised their right to free movement. After recalling its main findings in *Ruiz Zambrano*, the ECJ clarified what is to be understood by a national measure producing **a 'deprivation effect'.** Such effect **may only take place where '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' (Dereci et al., 2011, para 66).** Consequently, the impact that the deportation of family members of an EU citizen who does not have the nationality of a Member State may have on the family life or on the economic well-being of that EU citizen 'is not sufficient in itself to support the view that [the EU] citizen [concerned] will be forced to leave [the] territory [of the EU] if [a derivative right of residence] is not granted' (Dereci et al., 2011, para 68). **Fundamental rights are thus not taken into account for the purposes of determining the existence or absence of a 'deprivation effect'; i.e., they are not relevant for the purposes of determining the scope of application of the Treaty provisions on EU citizenship in situations such as those of Mr Ruiz Zambrano or Mr Dereci.** Otherwise, the ECJ would be relying on fundamental rights in order to expand the substantive scope of application of EU law beyond the competences conferred on the EU, contrary to Articles 6(1) TEU and 51(2) of the Charter. Only after having established that the national measure in question produces, in the factual circumstances of the case, a 'deprivation effect' may the restriction brought about by that measure be examined in light of the Charter, in particular

Article 7 thereof.⁸ Conversely, if the national measure in question does not produce such an effect, then that measure does not fall within the substantive scope of application of EU law (Lenaerts, 2012, p. 569). This does not mean, however, that the fundamental rights of the persons concerned are deprived of any protection. As the ECJ clearly stated, in such cases it is for the national courts and, as the case may be, for the European Court of Human Rights (ECtHR) to judicially enforce their national constitutional standards and/or Article 8 of the European Convention on Human Rights (ECHR) (Dereci et al., 2011, paras 72 and 73).

4.3. *lida*: purely hypothetical impediments to free movement

In the aftermath of *McCarthy* and *Dereci*, some scholars criticised the fact that the ECJ failed to take into account 'the impediments to prospective movements' (Nic Shuibhne, 2012, p. 349, 366). They posited that the deportation of Mr McCarthy was liable to 'deter' or 'dissuade' Mrs McCarthy from exercising her right of free movement. Paraphrasing *Carpenter* (2002),⁹ they explained that as the mother of three children and the primary carer of her disabled son, Mrs McCarthy would have no prospects of exercising her right to move if her husband were deported (Nic Shuibhne, 2012, p. 370). However, those criticisms appear to be grounded in a set of facts which differ from those submitted by the referring court.¹⁰ The factual scenario of the case, as described by the ECJ and the Advocate General, does not suggest that Mrs McCarthy sought to exercise her right to move. Thus, in my view, *Carpenter* is not the appropriate comparator.¹¹ Of course, had the referring court stated that Mrs McCarthy envisaged to work in (or to move to) a different Member State and that Mr McCarthy would be in charge of taking care of the children in her absence, then the ECJ would have undoubtedly followed the same rationale as that endorsed in *Carpenter*.¹² However, as mentioned above, the prospects of Mrs McCarthy exercising her right to move were not mentioned at all by the referring court. Thus, in *McCarthy*, there were no 'prospective impediments to the right to move'. Those impediments were if anything, purely hypothetical and as such, fell outside the scope of the Treaty provisions on EU citizenship (Adam and Van Elswege, 2012, p. 176, 183). This was made clear by the ECJ in *lida* (2012).

In that case, Mr *lida*, a third-country national residing legally in Germany, sought to obtain a residence permit as the spouse and father of two EU citizens. The purpose behind such a request was to improve his immigration status as his residence permit was to expire on 2 November 2012, the subsequent extension being discretionary. However, German authorities rejected his application on the ground that his spouse and daughter, two German nationals, no longer lived with him in Germany but had moved to Austria. Before determining whether the Treaty provisions on EU citizenship applied to a situation such as that of Mr *lida*, the ECJ examined whether Directive 2003/109 and the CRD applied to the case at hand.

At the outset, the ECJ noted that Mr *lida* was, in principle, entitled to a residence permit as provided for by Directive 2003/109.¹³ However, since Mr *lida* had voluntarily withdrawn his application, a residence permit could not be granted on the basis of that Directive (*lida*, 2012, para 48). As to the CRD, its provisions apply to 'beneficiaries' who are defined as 'all [EU] citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in Article 2(2) who accompany or join them' (*lida*, 2012, para 49). In this regard, the ECJ examined whether Mr *lida* could be regarded as a 'family member' for the purposes of Article 2(2) thereof. Regarding direct relatives in the ascending line, the CRD limits the concept of 'family members' to those who are dependent on the EU citizen concerned. For Mr *lida*, this meant that he could not be considered to be a family member of his daughter within the meaning of that provision, as he did not depend on her (*lida*, 2012, para 56). In addition, whilst qualifying as a 'family member' of his spouse, Mr *lida* could not be regarded as a 'beneficiary' for the purposes of the CRD owing to the fact that 'Article 3(1) [thereof] requires that the family member of the [EU] citizen moving to or residing in a Member State other than that of which [she] is

⁸ The following hypothetical variant of the *Ruiz Zambrano* case may clarify this. Suppose Belgium tried, in spite of the 'deprivation effect' it produced, to maintain its national measure expelling Mr Ruiz Zambrano, this time on 'public policy' grounds. Then, these grounds for the measure would have to be reviewed in light of Article 7 of the Charter.

⁹ See also judgment in *Jia*, C-1/05, EU:C:2007:1.

¹⁰ According to settled case law, it is for the referring court to describe the factual scenario of the case at hand. In that regard, the ECJ has consistently held that Art 267 TFEU 'is based on a clear separation of functions between the national courts and the [ECJ], the latter is empowered only to give rulings on the interpretation or the validity of [an EU] provision on the basis of the facts which the national court puts before it'. See, inter alia, judgments in *Oehlschläger*, 104/77, EU:C:1978:69, para 4, and *WWF and Others*, C-435/97, EU:C:1999:418, para 31. Logically, this means that factual lacunas are not for the ECJ to fill. Moreover, at the hearing, parties may, if they deem it necessary, complete the factual scenario described by the referring court. Hence, *Kochenov and Plender* (2012), who argue that the ECJ 'closed its eyes to the essential elements of the McCarthy family situation which were able to shed some light on what was actually going on. Three children, one of them severely disabled and in need of constant care, went unreported', are not accounting for a proper functioning of the preliminary reference procedure. In addition, even assuming that in the factual setting of the case at hand, a real issue of protecting the fundamental right to family life of the persons concerned arises, this does not automatically turn that issue into a matter of EU law. This will only be so if a substantive nexus to the latter law is present, such as the 'impeding effect' or the 'deprivation effect' of the national measure in question.

¹¹ For a recent application of the *Carpenter* line of case law, see judgment in *S*, C-457/12, EU:C:2014:136.

¹² *Ibid.*, para 40 (holding that 'the [ECJ]'s interpretation of Article 56 TFEU in *Carpenter* is transposable to Article 45 TFEU. The effectiveness of the right to freedom of movement of workers may require that a derived right of residence be granted to a third-country national who is a family member of the worker – a Union citizen – in the Member State of which the latter is a national').

¹³ First, the ECJ found that none of the cases mentioned in Article 3(2) of Directive 2003/109 was applicable to the case at hand. Second, Mr *lida* was a third-country national who had resided legally and continuously in Germany for five years prior to the submission of the relevant application. Third, because of his employment, he was able to provide for himself and had sickness insurance in respect of all risks normally covered in Germany. Lastly, he was not a threat to public policy or public security. See *lida*, 2012, paras 41 et seq.

a national should accompany or join [her]' (Iida, 2012, para 61). Stated simply, in order to benefit from the provisions of the CRD, Mr Iida should have moved with his wife to Austria. Thus, neither Directive 2003/109 nor the CRD was applicable to the case at hand.

Regarding the Treaty provisions on EU citizenship, the ECJ went on to examine whether the refusal to grant Mr Iida a residence permit could be liable to deny his spouse and daughter 'the genuine enjoyment of the substance of the rights associated with their status of Union citizen or to impede the exercise of their right to move and reside freely within the territory of the Member States' (Iida, 2012, para 76; McCarthy, para 49). The ECJ replied in the negative. First, it observed that, unlike the situation of Mr Ruiz Zambrano, Mr Iida did not seek to obtain a residence permit in the Member State where his spouse and daughter lived. Second, the refusal of German authorities to grant a right of residence under EU law to Mr Iida had not discouraged his spouse or daughter from exercising their right to free movement, as the fact that they had moved from Germany to Austria demonstrated. Finally, the ECJ found that Mr Iida enjoyed a right of residence in Germany which was, *prima facie*, renewable and, in any event, he was entitled to a residence permit as a long-term resident within the meaning of Directive 2003/109. Most importantly, the ECJ recalled that purely hypothetical prospects of exercising the right of free movement do not fall within the scope of the Treaty provisions on EU citizenship. Accordingly, '[t]he same applies to purely hypothetical prospects of that right being obstructed' (Iida, 2012, para 77).

Furthermore, Iida confirmed the approach developed by the ECJ in Dereci. The compatibility of the national legislation at issue with fundamental rights could not be examined as a matter of EU law, given that, as applied to Mr Iida, such legislation was not intended to implement a provision of EU law. Indeed, as mentioned above, neither the Treaty provisions on EU citizenship nor Directive 2003/109 nor the CRD were applicable to the case at hand.

4.4. O and S: exploring the notion of dependency

O and S concerned two joined cases with a similar factual background. The facts of the first case are as follows. In 2008, Mr O, a national of Côte d'Ivoire, married Ms S, a national of Ghana, who held a residence permit and was the mother of an EU citizen of minor age from a previous marriage. In 2009, Mr O and Ms S had a child of Ghanaian nationality in respect of whom they enjoyed joint custody. Mr O applied for a residence permit in Finland on the basis of marriage. However, his application was denied by Finnish authorities on the ground that he did not have sufficient means to provide for himself. Mr O and Ms S challenged that decision before the Finnish courts.

As to the second case, Mr M and Ms L, two Algerian nationals, got married in 2006. Just like Ms S, Ms L held a residence permit and was the mother of an EU citizen of minor age from a previous marriage. In 2007, Mr M and Ms L had a child of Algerian nationality in respect of whom they enjoyed joint custody. Mr M applied for asylum, but his application was unsuccessful. As a result, he was returned to his country of origin in 2006. Ms L then applied for her spouse to be granted a residence permit in Finland on the basis of marriage. However, Finnish authorities rejected her application on the ground that Mr M did not have sufficient means to provide for himself. She then challenged that decision before the Finnish courts.

Accordingly, the referring court asked the ECJ,

whether the [Treaty] provisions [...] on citizenship [...] must be interpreted as precluding a Member State from refusing to grant a third-country national a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third-country national and resides lawfully in that Member State and is the mother of a child from a previous marriage who is a Union citizen, and with the child of their own marriage, who is also a third-country national (O et al., 2012, para 35).

It follows from the foregoing that the factual scenario in O and S differs significantly from that in Ruiz Zambrano. Unlike Mr Ruiz Zambrano, neither Mr O nor Mr M was the biological father of the EU citizen concerned. Nor did they have the custody of the child.

At the outset, the ECJ observed that the CRD was not applicable to the case at hand, since the EU citizens concerned, both of whom were minors, had never made use of their right of free movement and had always resided in the Member State of which they were nationals, namely Finland (O et al., 2012, para 42). Next, the ECJ went on to examine whether the Treaty provisions on EU citizenship were applicable to the case at hand, i.e., whether the national measure in question produced a 'deprivation effect'. In this regard, after recalling its main findings in Ruiz Zambrano and Dereci, the ECJ provided new guidance relating to the concept of 'dependency', which was implicitly taken into account in those two judgments for the purposes of determining the existence (or absence) of a 'deprivation effect'. To begin with, the ECJ stated that the question whether a national measure may produce such an effect must be examined by reference to both the law and the facts of the case at hand. Given that both Ms S and Ms L held permanent residence permits in Finland, the ECJ noted that, 'in law, there [was] no obligation either for them or for the [EU] citizens dependent on them to leave the territory of that Member State or the European Union as a whole' (O et al., 2012, para 50). Regarding the facts of the case, 'it is the relationship of dependency between the [EU] citizen who is a minor and the third-country national who is refused a right of residence', the ECJ wrote, 'that is liable to jeopardise the effectiveness of [EU] citizenship, since it is that dependency that would lead to the [EU] citizen being obliged, in fact, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal' (O et al., 2012, para 56). That dependency can be of a legal, financial or emotional nature (O et al., 2012, para 56). In addition, the ECJ rejected that the new approach set out in Ruiz Zambrano was limited to situations in which there is a blood relationship between the third-country national who seeks to obtain a residence permit and the EU citizen concerned (O et al., 2012, para 55). As to the situation of Mr O and Mr M, the

ECJ held, in light of the information available to it and subject to verification by the referring court, that there was no such dependency (O et al., 2012, para 57). The Treaty provisions on EU citizenship did not therefore preclude Finland from refusing them a residence permit.

However, the ECJ noted that Directive 2003/86 was, in principle, applicable to the case at hand. As Ms S and Ms L were two third-country nationals who held residence permits in Finland, they could be recognised as ‘sponsors’ within the meaning of Article 2(c) of Directive 2003/86 and apply for family reunification. In this regard, the ECJ held that, subject to compliance with the conditions laid down in Chapter IV of Directive 2003/86—notably, Article 7(1)(c) thereof which states that the sponsor is required to have stable and regular resources that are sufficient to maintain himself and the members of his family without recourse to social assistance—Finland had the ‘positive obligation’ to authorise Mr O and Mr M to join their spouses (O et al., 2012, para 70). Whilst in implementing Article 7 (1)(c) of Directive 2003/86 Member States enjoy a ‘margin of appreciation’, such a margin ‘must [...] not be used by them in a manner which would undermine the objective and the effectiveness of that [D]irective’ (O et al., 2012, para 74). Nor may it be exercised ‘in such a manner that its application would disregard the fundamental rights set out in [the] provisions of the Charter’ (O et al., 2012, para 77), notably Articles 7 and 24(2) and (3) thereof. This meant, in essence, that the Member States are required to strike a balance between the interests of the children concerned and the promotion of family life, and the margin of appreciation enjoyed by national authorities (O et al., 2012, para 80).

O and S is an interesting development in the case law of the ECJ, which has two direct implications for the law on EU citizenship. First, it provides further guidance as to what is to be understood by a national measure producing a ‘deprivation effect’. Such a national measure must, either in law or in fact, force the EU citizen concerned to leave the territory of the EU as a whole. Second, unlike the national measure at issue in *Iida*, in O and S the refusal to grant a residence permit to Mr S and Mr M was covered by secondary EU legislation, namely by Directive 2003/86. This meant that the compatibility of those measures with fundamental rights could be examined in light of the Charter. Stated differently, a national measure that neither falls within the scope of the CRD nor produces a ‘deprivation effect’ but implements other EU measures must pass muster under the Charter.

4.5. *Ymeraga*: drawing on precedent

In *Ymeraga et al.* (2013), the ECJ drew on its previous case law to answer the question referred by the national court. Unlike in the cases examined so far, in *Ymeraga*, the ECJ decided to proceed to judgment without an Opinion from the Advocate General. This shows that the *Ymeraga* case raised no new point of law¹⁴ and thus that the *Ruiz Zambrano* line of case law had begun to settle.

The facts of the case are as follows. The parents and brothers of Mr Kreshnik Ymeraga—a Luxembourg national—, all of whom were from Kosovo, applied for a residence permit in Luxembourg as family members of an EU citizen. However, Luxembourg authorities rejected their application and ordered their expulsion. The referring court asked, in essence, whether Mr Kreshnik Ymeraga would be deprived of the genuine enjoyment of the substance of the rights attaching to his status as a Union citizen, if Luxembourg authorities refuse to allow his parents and brothers to reside in that Member State. In this regard, the referring court drew the attention of the ECJ to the fact that ‘the only factor which could justify a right of residence being conferred on the family members of the [EU] citizen concerned is Mr Kreshnik Ymeraga’s intention to bring about, in the Member State in which he resides and of which he holds the nationality, reunification with those family members’ (*Ymeraga et al.*, 2013, para 39).

At the outset, the ECJ held that neither Directive 2003/86 nor the CRD was applicable to the case at hand. This was so because Directive 2003/86 does not apply to family members of an EU citizen (Article 3(3)). As to the CRD, by recalling its previous findings in *McCarthy* (paras 31, 39 and 42) and *Dereci* (paras 54 and 55), the ECJ held that an EU ‘citizen [who] has never exercised his right of freedom of movement and has always resided, as a Union citizen, in the Member State of which he holds the nationality, [...] is not covered by the concept of ‘beneficiary’ for the purposes of Article 3(1) of [the CRD], so that that directive is applicable neither to him nor to his family members’ (*Ymeraga et al.*, 2013, para 32). Next, the ECJ noted, in line with paragraph 68 of *Dereci*, that Mr Kreshnik Ymeraga’s intention to bring about reunification with his parents and brothers was not sufficient to support the view that a refusal to grant a residence permit to those family members may deprive him of the genuine enjoyment of the substance of the rights attaching to his status as a Union citizen (*Ymeraga et al.*, 2013, para 39). Referring to *Dereci* (para 71) and *Iida* (paras 78 and 79), the ECJ once again held that, since neither Directive 2003/86 nor the CRD nor Article 20 TFEU (subject to final confirmation by the referring court) applied to the situation of Mr Kreshnik Ymeraga, the Luxembourg authorities’ refusal to grant Mr Kreshnik Ymeraga’s family members a right of residence did not ‘implement’ EU law within the meaning of Article 51 of the Charter (*Ymeraga et al.*, 2013, paras 40 and 41). Finally, as it did in *Dereci* (paras 72 and 73), the ECJ also pointed out that the non-application of the Charter to the case at hand was without prejudice to the question whether a residence permit could be granted on the basis of the relevant provisions of national constitutional law or the ECHR (*Ymeraga et al.*, 2013, para 44).

¹⁴ See Article 20 of Protocol (No 3) on the Statute of the Court of Justice of the European Union: ‘[w]here it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.’

4.6. *Alokpa: Zhu and Chen revisited*

Alokpa et al. (2013) is an interesting case that clarified two aspects of the *Ruiz Zambrano* case law. First, it made clear that the ruling of the ECJ in *Zhu and Chen* (2004) remains good law, and second, it suggested that the rationale underpinning *Ruiz Zambrano* concerns primarily the Member states of which the EU citizen of minor age is a national.

Before looking at the first aspect of the *Alokpa* case, it is worth recalling the main findings of the ECJ in *Zhu and Chen*. In that case, UK authorities refused to grant a long-term residence permit to Catherine Zhu — an Irish national of minor age — and to her mother — Mrs Chen, a Chinese national — on the grounds that the former was too young to exercise any of the rights arising from the Treaties and that the latter was not entitled to reside in the UK under EU law. However, the ECJ took a different view. As to Catherine Zhu's right of residence, the ECJ held that she had, on the basis of ex Article 18 EC (now Article 20 TFEU), a right to reside in the UK, subject to the limitations and conditions laid down in Article 1(1) of Directive 90/364 (now repealed by the CRD). In the case at hand, those conditions were met as Catherine Zhu had both sickness insurance and sufficient resources. The fact that those conditions were satisfied because of Catherine's mother was irrelevant. 'According to the very terms of Article 1(1) of Directive 90/364', the ECJ wrote, 'it is sufficient for the nationals of Member States to "have" the necessary resources, and that provision lays down no requirement whatsoever as to their origin' (*Zhu and Chen*, 2004, para 30).

Next, it found that Directive 90/364 did not by itself confer on Mrs Chen a right of residence given that she could not qualify as a 'dependent' member of the family of a holder of a right of residence within the meaning of Article 1(2)(b) of Directive 90/364. Indeed, she was not dependent on her daughter, but her daughter was dependent on her. That being said, the ECJ found that it was simply impossible for Catherine Zhu to exercise her right to reside in the UK without the support of her mother. In order to preserve the 'useful effect' of Catherine Zhu's right of residence, the ECJ ruled that Mrs Chen was, on the basis of ex Article 18 EC, entitled to a derivative right of residence in the UK (*Zhu and Chen*, 2004, para 45). As a consequence, the ECJ ruled that Mrs Chen was entitled to a derivative right of residence in the UK as long as she and her daughter both satisfied the conditions of Article 1(1) of Directive 90/364.

Zhu and Chen were decided before the deadline for transposing the CRD (Article 40). Thus, the question was whether Article 20 TFEU and the CRD would lead to the same outcome in a case with a factual setting similar to that of *Zhu and Chen*. The ECJ replied in the affirmative as the wording of Article 1(1) of Directive 90/364 was, in essence, reproduced by Article 7(1)(b) of the CRD.

Just like the mother of Catherine Zhu, the ECJ ruled, Mrs Alokpa — a Togolese national residing illegally in Luxembourg and mother of two French minors — was, as the minors' primary carer, entitled to a residence permit in the host Member State, provided that she complied with the conditions of Article 7(1)(b) of the CRD. Referring to *Zhu and Chen*, it held that 'while Article 21 TFEU and [the CRD] grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions of Article 7(1)(b) of that directive, the same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State' (*Alokpa et al.*, 2013, para 29). The question whether Mrs Alokpa satisfied those conditions was for the referring court to ascertain (*Alokpa et al.*, 2013, para 30).

As to the second aspect of the *Alokpa* case, the ECJ examined whether, in the event of Mrs Alokpa not satisfying the conditions of Article 7(1)(b) of the CRD, the refusal by the Luxembourg authorities to grant her a right of residence would have the effect of depriving the two minors of the genuine enjoyment of the substance of the rights attaching to their status as Union citizens. In this regard, the ECJ concurred with AG Mengozzi in that it was unlikely that such refusal would have the effect of obliging the children to leave the territory of the Union altogether, given that Mrs Alokpa could benefit from a derivative right to reside in France.¹⁵ However, the ECJ did not provide a definitive answer in this respect but found that it was for the referring court to examine whether that was, in fact, the case (*Alokpa et al.*, 2013, para 35).

A joint reading of *Ruiz Zambrano* and *Alokpa* would, in principle, suggest that a third-country national who is the primary carer of an EU citizen of minor age is entitled to a residence and work permit in the Member State of which such an EU citizen is a national. This is so because a refusal to grant a residence permit to that third-country national would have the effect of forcing the EU citizen of minor age to leave the territory of the Union altogether.

That is the reason why Article 20 TFEU does not, in principle, prevent the host Member State from refusing to grant a residence permit to such a third-country national, in so far as the latter may move to the Member State of which the EU citizen of minor age is national with a view to obtaining a derivative right to reside in that Member State, like in *Ruiz Zambrano*. However, where the conditions of Article 7(1)(b) of the CRD are met, Article 21 TFEU obliges the host Member State to grant a residence permit both to the EU citizen of minor age and to his or her primary carer.

It follows from *Alokpa* that the rationale underpinning *Ruiz Zambrano* concerns primarily the Member states of which the EU citizen of minor age is a national, whilst the line of case law stemming from *Zhu and Chen* is directed to the host Member State. Moreover, unlike a residence permit granted on the basis of Article 21 TFEU, a residence permit granted on the basis of Article 20 TFEU is not subject to the conditions of Article 7(1)(b) of the CRD.

¹⁵ This amounts to an application *sensu stricto* of *Ruiz Zambrano*: *ibid.*, para 34 (referring to paras 55 and 56 of Opinion of Advocate General Mengozzi in *Alokpa et al.*, C-86/12, EU:C:2013:197).

5. Concluding remarks

A joint reading of *Rottmann*, *Ruiz Zambrano*, *McCarthy*, *Dereci*, *lida*, *O and S*, *Ymeraga* and *Alokpa* shows that the legal reasoning of the ECJ is far from being laconic or cryptic. The sequence of these cases demonstrates that the new approach set out in *Ruiz Zambrano* has been built up progressively, i.e., on a 'stone-by-stone' basis. Indeed, *Dereci*, *lida*, *Ymeraga* and *Alokpa* make clear that the new approach only operates under exceptional circumstances,¹⁶ namely in so far as the contested national measure forces EU citizens to leave the territory of the Union, depriving them of 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union' (*Ruiz Zambrano*, 2011, para 42).

If *Ruiz Zambrano* is examined in a vacuum, the discourse of the ECJ, in that case, was arguable, as Weiler suggests, too Cartesian (*Weiler* (2001), p. 215). However, if those eight cases are examined together, the same does not hold true. On the contrary, the way in which the ECJ built up its legal reasoning is rather similar to the way a common law court operates. Indeed, *Rottmann*, *Ruiz Zambrano*, *McCarthy*, *Dereci*, *lida*, *O and S*, *Ymeraga* and *Alokpa* show that 'the life of the law [on EU citizenship] has not been logic: it has been experiencing' (*Holmes*, 2009, p. 3).

At the outset, the ECJ did not dig up of its own motion all the important questions to which the new approach set out in *Ruiz Zambrano* could give rise, as there was no need to do so in that very case. This is a matter of judicial prudence. Those questions were instead answered as and when new cases required them to be answered. The experience gained through the deliberations in *Rottmann* shed light on how to address the issues raised in *Ruiz Zambrano*, in the same way as the latter case did to address the issues raised in *McCarthy*, and then in *Dereci*, *lida*, *O and S*, *Ymeraga* and *Alokpa* and in cases to come (*Rendón Martín*, pending case and *CS*, pending case).

Moreover, the 'stone-by-stone' approach followed by the ECJ is not only the right way of building a solid edifice to the rights attaching to the status of citizen of the Union, but it is also entirely consistent with the dynamics of Article 267 TFEU. The legitimacy of the ECJ requires the latter to honour the role played by national courts during the preliminary reference procedure. The inter-judicial dialogue that takes place under Article 267 TFEU is deeply intertwined with the way in which the ECJ builds up its argumentative discourse. Accordingly, if the ECJ were to follow a model based on 'expository justice' where it would provide exhaustive, albeit abstract, answers based on logic to the points of law raised by the questions referred, it would actually prevent national courts from engaging in a constructive dialogue. When putting forward its legal discourse, the ECJ must strike the appropriate balance between different levels of specificity and generality in its reasoning. It must not be laconic and cryptic, or too abstract since this would deter national courts from making a reference. In essence, the preliminary reference procedure laid down in Article 267 TFEU being a mechanism of dialogue between courts, the quality of the order for reference will largely determine the drafting style of the answer given in the ECJ's ruling. The latter must indeed constitute, first and foremost, a real contribution to the solution of the case pending before the referring court. Also, for this reason, it is best for the ECJ in hard cases of constitutional importance to follow an incremental approach.

References

- Adam, S., & Van Elsuwege, P. (2012). Citizenship rights and the federal balance between the European Union and its Member States: comment on *Dereci*. *European Law Journal*, 37.
- Alokpa et al., C-86/12, EU:C:2013:645.
- Arizona v. Evans, 514 U.S. 1, 23 n.1 1995.
- Carpenter, C-60/00, EU:C:2002:434.
- Council Directive 90/364/EEC of 28 June 1990 on the right of residence, [1990] OJ L 180/26.
- Council Directive 2003/86/EC on the right to family reunification, [2003] OJ L251/12.
- Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, [2003] OJ L16/44.
- CS, C-304/14 (pending case).
- Dereci et al., C-256/11, EU:C:2011:734.
- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 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, OJ [2004] L 158/77.
- Grunkin and Paul, C-353/06, EU:C:2008:559.
- Hailbronner, K., & Thym, D. (2011). Case note on *Ruiz Zambrano*. *Common Market Law Review*, 48(4), 1253–1270.
- Holmes, O. W. (2009). *The common law*. Massachusetts: John Harvard Library.
- lida, C-40/11, EU:C:2012:691.
- Jia , C-1/05, EU:C:2007:1.
- Kochenov, D., & Plender, R. (2012). EU citizenship: from an incipient form to an incipient substance? The discovery of the treaty text. *European Law Review*, 37, 369–396.
- Kraus , C-19/92, EU:C:1993:125.
- Lasser, M. E. (2009). *Judicial deliberations: a comparative analysis of judicial transparency and legitimacy*. Oxford: Oxford University Press.
- Lenaerts, K. (2012). The concept of EU citizenship in the case law of the European Court of justice. *ERA Forum*, 13(4), 569–583.
- Lenaerts, K. (2013). How the ECJ thinks: a study on judicial legitimacy. *Fordham International Law Journal*, 36(5), 1302–1371.
- McCarthy, C-434/09, EU:C:2011:277.
- Nic Shuibhne, N. (2012). (Some of) The kids are all right: comment on McCarthy and Dereci. *Common Market Law Review*, 49(1), 349–379.
- O et al., C-356/11 and C-357/11, EU:C:2012:776.
- Oehlschläger, 104/77, EU:C:1978:69.
- The EU Charter of Fundamental Rights: A Commentary. In S. Peers, T. Hervej, J. Kenner, & A. Ward (Eds.), Oxford: Hart Publishing.

¹⁶ The adverb 'exceptionally' can be found in *lida*, 2012, para 71; *Ymeraga et al.*, 2013, para 36, and *Alokpa et al.*, 2013, para 32.

Rendón Martín, C-165/14 (pending case).

Rottmann, C-135/08, EU:C:2010:104.

Ruiz Zambrano, C-34/09, EU:C:2011:124.

S, C-457/12, EU:C:2014:136.

Šadl, U. (2013). Case – Case-Law – Law: *Ruiz Zambrano* as an illustration of how the court of justice of the European Union constructs its legal arguments. *European Constitutional Law Review*, 9(02), 205–209.

Skouris, V., 2014. The Influence of Common Lawyers on European Union Law. 40th Centre of European Law Annual Lecture, King's College London. *Il diritto dell'Unione europea*, Anno XIX, no. 4, 685–698.

Weiler, J. H. H. (2001). *Epilogue: the judicial Après Nice*. In G. de Búrca, & J. H. H. Weiler (Eds.), *The European Court of justice*. Oxford: Oxford University Press.

WWF et al., C-435/97, EU:C:1999:418.

Ymeraga et al., C-87/12, EU:C:2013:291.

Zhu and Chen, C-200/02, EU:C:2004:639.