Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 4 February 2016 [1]

Case C-165/14

Alfredo Rendón Marín

v

Administración del Estado

(Request for a preliminary ruling

from the Tribunal Supremo (Supreme Court, Spain))

(Citizenship of the Union — Articles 20 TFEU and 21 TFEU — Directive 2004/38/EC — Right of residence of a national of a non-member State who has a criminal record — Father having sole custody of two minor children who are Union citizens — First child a national of the Member State of residence — Second child a national of a different Member State but having always resided in the Member State of residence — National legislation precluding the grant of a residence permit to the relative in the ascending line on account of his criminal record — Denial of the right of residence potentially entailing the removal of the minor children from the territory of the European Union — Lawfulness — Existence of a right of residence in accordance with the judgments in Zhu and Chen (C-200/02, EU:C:2004:639) and Ruiz Zambrano (C-34/09, EU:C:2011:124))

and

Case C-304/14

Secretary of State for the Home Department

v

CS

(Request for a preliminary ruling from the Upper Tribunal (Immigration and Asylum Chamber) London (United Kingdom))

(Citizenship of the Union — Article 20 TFEU — National of a non-member State having custody of a minor child who is a citizen of the Union — Permanent right of residence in the Member State of which the child is a national — Criminal convictions of the parent — Order for the expulsion of the parent entailing the constructive removal of the child — Imperative reasons relating to public security)

1 — Original language: French.

Table of contents

I – Introduction ... 3

II – Legal framework ... 4

A – The ECHR ... 4

B – EU law ... 4

1. The Charter ... 4

2. The Treaty on the Functioning of the European Union ... 4

3. Directive 2004/38 ... 5

C – United Kingdom legislation ... 6

D – Spanish law ... 7

III – The facts giving rise to the cases in the main proceedings and the questions referred for a preliminary ruling ... 8

A – Case C-165/14 ... 8

B – Case C-304/14 ... 10

IV – The procedures before the Court ... 11

V – Analysis ... 11

A – The Court's jurisdiction in Case C-165/14 ... 11

B – The substance of Cases C-165/14 and C-304/14 ... 13

1. The particular features of the cases ... 14

2. Preliminary observations ... 16

a) The principle of the conferral of powers in the field of immigration law ... 16

b) The types of right of residence which the Court has recognised for members of the family of a citizen of the Union ... 16

3. The right of residence of the members of the family of a citizen of the Union in the host Member State: analysis of the situation of Mr Rendón Marín and his daughter in the context of Directive 2004/38 ... 17

a) Applicability of Directive 2004/38 to the situation of Mr Rendón Marín and his daughter ... 18

b) The effect of a criminal record on the recognition of a derived right of residence in the light of Articles 27 and 28 of Directive 2004/38 ... 19

c) Interim conclusion in Case C-165/14 21

4. The right of residence conferred on members of the family of a citizen of the Union in the Member State of which the citizen of the Union is a national: analysis of the situation of Mr Rendón Marín and his children and the situation of CS and her child ... 22

a) Citizenship of the Union in the case-law of the Court 22

b) Whether the national legislation is compatible with the right of residence of citizens of the Union 27

5. Whether limits may be imposed upon a derived right of residence flowing directly from Article 20 TFEU 30

a) The implications of the concept of public policy and public security in relation to the right of residence flowing from Article 20 TFEU 31

b) Assessment of the public policy or public security exception invoked by the United Kingdom Government 34

c) Interim conclusion in Case C-165/14 36

d) Interim conclusion in Case C-304/14 37

VI – Conclusion 37

I – Introduction

1. The questions raised by the Tribunal Supremo (Supreme Court, Spain) and the Upper Tribunal (Immigration and Asylum Chamber) London (United Kingdom) concern, essentially, the interpretation of Article 20 TFEU and the scope of that provision, either in the light of the judgments in *Zhu and Chen* (C-200/02, EU:C:2004:639) and *Ruiz Zambrano* (C-34/09, EU:C:2011:124), or in the light of the judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124) alone. The factual background to these cases involves third-country nationals who have been refused a residence permit by, or against whom an expulsion order has been made, by the Member State in which their minor dependent children reside and of which those children, citizens of the Union, for whom they are responsible, are nationals. The decisions just mentioned could potentially deprive the children in question of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. The risk of that happening is the result of the adoption of national measures against the parents, who are third-country nationals, on grounds of their criminal records.

2. The present requests for a preliminary ruling will therefore require the Court to consider, first of all, whether the situations at issue in the main proceedings fall within the scope of EU law. If that question is answered in the affirmative, the Court will then have to determine what effect a criminal record might have on the recognition of a derived right of residence arising under Directive 2004/38/EC. [2]

2 — Directive 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, p. 77).

Finally, the Court will have an opportunity to rule on the possibility of imposing limitations on the right of residence flowing directly from Article 20 TFEU and, therefore, on the implications of the terms 'public order' and 'public security' in situations such as those at issue in the cases in the main proceedings.

II – Legal framework

A – *The ECHR*

3. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), provides:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

B – *EU law*

1. The Charter

4. Under Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), entitled 'Respect for private and family life':

'Everyone has the right to respect for his or her private and family life, home and communications.'

5. Paragraph 1 of Article 52 of the Charter, which is entitled 'Scope and interpretation of rights and principles', states:

'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

2. The Treaty on the Functioning of the European Union

6. Article 20(1) TFEU establishes EU citizenship and provides that 'every person holding the nationality of a Member State' is an EU citizen. In accordance with Article 20(2)(a) TFEU, EU citizens have 'the right to move and reside freely within the territory of the Member States'.

7. Article 21(1) TFEU adds that this right is 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

3. Directive 2004/38

8. Under the heading ‘Definitions’, Article 2 of Directive 2004/38 states:

‘For the purpose of this Directive:

(1) “Union citizen” means any person having the nationality of a Member State;

(2) “family member” means:

...

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

(3) “host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.’

9. Article 3 of Directive 2004/38, headed ‘Beneficiaries’, provides:

‘1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they came, are dependants or members of the household of the Union citizen having the primary right of residence …;

...

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.’

10. Paragraphs 1 and 2 of Article 7 of Directive 2004/38, which is entitled ‘Right of residence for more than three months’, provide:

‘1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) ...

— have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority … that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).'

11. Article 27(1) and (2) of Directive 2004/38 provides:

'1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.'

12. Article 28 of Directive 2004/38 provides:

'1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.'

C – *United Kingdom legislation*

13. Under section 32(5) of the UK Borders Act 2007 ('the Borders Act'), where a person who is not a British citizen is convicted in the United Kingdom of an offence and is sentenced to a period of imprisonment of at least 12 months, the Secretary of State for the Home Department ('the Home Secretary') must make a deportation order. This is a mandatory obligation.

14. Under section 33 of the Borders Act, this obligation does not arise where the removal of the convicted person pursuant to a deportation order would:

‘(a) breach a person’s rights under the ECHR, or

(b) would breach the United Kingdom’s obligations under the ‘Refugee Convention’, [3] or

(c) breach the rights of the convicted offender under the EU Treaties.’

15. According to the United Kingdom of Great Britain and Northern Ireland, certain provisions of the Immigration (European Economic Area) Regulations 2006, as amended in 2012 (‘the Immigration Regulations’) are relevant to the present case.

16. Paragraph 4(a) of regulation 15A of the Immigration Regulations gives effect to the judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124). A person who satisfies the criteria mentioned in that paragraph is entitled to a ‘derived right to reside in the United Kingdom’. However, paragraph 9 of regulation 15A provides that a person who would otherwise be entitled to a derived right of residence under the provisions of, inter alia, paragraph 4(a) will not be entitled to that right ‘where the [Home] Secretary … has made a decision under regulation 19(3)(b), 20(1) or 20A(1)’.

17. Under regulation 20(1) of the Immigration Regulations, the Home Secretary may refuse to issue, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card ‘if the refusal or revocation is justified on grounds of public policy, public security or public health’.

18. Under regulation 20(6) of the Immigration Regulations, such a decision must be taken in accordance with regulation 21.

19. Regulation 21A applies a modified version of Part 4 of the Immigration Regulations to decisions made in relation, in particular, to derived rights of residence. Regulation 21A(3)(a) applies Part 4 as if ‘references to a matter being “justified on grounds of public policy, public security or public health in accordance with regulation 21” referred instead to a matter being “conducive to the public good”’.

20. The effect of those provisions is, according to the United Kingdom, that it is possible to refuse to grant a derived right of residence to a person who could otherwise claim a right of residence under Article 20 TFEU, as applied by the Court in its judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124), if that would be conducive to the public good.

D – *Spanish law*

21. Basic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration (Ley Orgánica sobre derechos y libertades de los extranjeros en España y su integración social) of 11 January 2000 (*BOE* No 10 of 12 January 2000, p. 1139), as amended by Basic Law 2/2009 amending Basic Law 4/2000 (Ley Orgánica 2/2009 de reforma de la Ley Orgánica 4/2000) of 11 December 2009 (*BOE* No 299 of 12 December 2009, p. 104986), in force from 13 December 2009 onwards, (‘the Law on Foreigners’) provides, in Article 31(3) thereof, for the possibility of granting a temporary residence permit for exceptional reasons, without it being necessary for the third-country national already to be in possession of a visa.

3 — Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, vol. 189, p. 137).

22. Article 31(5) and (7) of the Law on Foreigners provides:

‘5. In order for an alien to be granted temporary residence, he must have no criminal record in Spain, or in any other country in which he previously resided, relating to an offence which exists in Spanish law and must not have been proscribed from the territory of any State with which Spain has concluded an agreement to that effect.

...

7. In order for a temporary residence permit to be renewed, the following shall be assessed, where appropriate:

(a) any criminal record, account being taken of any pardon or conditional suspension of a sentence or any suspension of a custodial sentence;

(b) any failure on the foreign national’s part to fulfil obligations in matters of taxation or social security.

For the purposes of such renewal, particular account shall be taken of any efforts at integration which the foreign national has made which militate in favour of renewal, such efforts to be demonstrated by means of a positive report from the autonomous community confirming the individual’s attendance at the training sessions referred to in Article 2b of this law.’

23. Royal Decree 2393/2004 approving the rules for the implementation of the Law on Aliens (Real Decreto 2393/2004 por el que se aprueba el Reglamento de la Ley Orgánica 4/2000) of 30 December 2004 (*BOE* No 6 of 7 January 2005, p. 485) provides, in paragraph 4 *in fine* of the First Additional Provision thereof, that ‘the Secretary of State for Immigration and Migration may, acting on a report from the Secretary of State for the Home Department, issue an individual temporary residence permit where exceptional circumstances not provided for in these rules pertain’.

III – The facts giving rise to the cases in the main proceedings and the questions referred for a preliminary ruling

24. The relevant facts of the disputes in the main proceedings, as they appear from the order for reference, may be summarised as follows.

A – *Case C-165/14*

25. Mr Rendón Marín, a Colombian national, is the father of two minor children born in Malaga (Spain), a boy of Spanish nationality and a girl of Polish nationality. Both children have always lived in Spain.

26. It is apparent from the documents before the Court that, by decision of the Juzgado de Primera Instancia de Málaga (Court of First Instance, Malaga (Spain)) of 13 May 2009, Mr Rendón Marín was granted sole care and custody of his children. The whereabouts of the children’s mother, a Polish national, are unknown. According to the order for reference, the two children are receiving proper care and schooling.

27. Mr Rendón Marín has a criminal record. Specifically, he was sentenced in Spain to a term of nine months’ imprisonment. However, a provisional two-year suspension of that sentence was granted with effect from 13 February 2009. On the date of the order for reference, 20 March 2014, he was awaiting a decision on his application for his conviction to be removed from the record.

28. On 18 February 2010, Mr Rendón Marín lodged an application with the Director-General of Immigration of the Ministry of Labour and Immigration (Director General de Inmigración del Ministerio de Trabajo e Inmigración, 'the Directorate-General for Immigration') for a temporary residence permit on grounds of exceptional circumstances, pursuant to paragraph 4 *in fine* of the First Additional Provision of the rules for the implementation of the Law on Aliens. [4]

29. It is apparent from the documents before the Court that, by decision of 13 July 2010, Mr Rendón Marín's application was rejected on the ground of his criminal record, in accordance with the provisions of Article 31(5) of the Law on Aliens.

30. Mr Rendón Marín's appeal against that decision was dismissed by judgment of the Audiencia Nacional (National Court (Spain)) of 21 March 2012, whereupon he brought an appeal against that judgment before the Tribunal Supremo (Supreme Court).

31. Mr Rendón Marín based that appeal on a single point of law, namely, incorrect interpretation of the judgments in *Zhu and Chen* (C-200/02, EU:C:2004:639) and *Ruiz Zambrano* (C-34/09, EU:C:2011:124), in accordance with which he ought, he alleges, to have been granted the residence permit he seeks, on infringement of Article 31(3) and (7) of the Law on Foreigners as well.

32. The referring court states that, leaving aside the specific circumstances of each case, in the case in the main proceedings, as in the cases which led to the judgments in *Zhu and Chen* (C-200/02, EU:C:2004:639) and *Ruiz Zambrano* (C-34/09, EU:C:2011:124), the refusal to grant Mr Rendón Marín a permit to reside in Spain would result in his removal from the country and, therefore, from the European Union, which would also result in the departure from the territory of the European Union of his two children, one of whom is a Spanish national minor dependent on his father, the whereabouts of his mother being unknown. [5] Nevertheless, it points out that, by contrast with the situations examined in the abovementioned judgments of the Court, there is in the present case a statutory prohibition of the granting of a residence permit when the applicant has a criminal record in Spain. Consequently, the referring court questions whether national law, which prohibits, whatever the circumstances and with no possibility of variation in any given case, the grant of a residence permit when the applicant has a criminal record in the country where the permit is requested, even though that entails the unavoidable consequence of depriving a minor dependent child of the applicant who is a citizen of the Union of his or her right to remain in the territory of the Union, is consistent with the case-law of the Court interpreting Article 20 TFEU upon which the appellant relies.

33. It was in those circumstances that, by judgment of 20 March 2014, received at the Court Registry on 7 April 2014, the Tribunal Supremo decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is national legislation which excludes the possibility of granting a residence permit to the parent of a European Union citizen who is a minor and a dependent of that parent on the ground that the parent has a criminal record in the country in which the application is made consistent with Article 20 [TFEU], interpreted in the light of the judgments in [*Zhu and Chen* (C-200/02, EU:C:2004:639)] and [*Ruiz Zambrano* (C-34/09, EU:C:2011:124)] even if this results in the removal of the child from the territory of the European Union, inasmuch as the child will have to leave with its parent?'

4 — For the content of that provision, see point 23 of this Opinion.

5 — I should point out that Mr Rendón Marín's daughter, a Polish national, is mentioned only in the context of the factual background given in the order for reference, whereas his son, a Spanish national, is alone mentioned in the context of the reasons which led the Tribunal Supremo to refer a question to the Court.

B – *Case C-304/14*

34. CS is a Moroccan national. In 2002, she married a British citizen in Morocco. In September 2003, she was granted a visa on the basis of her marriage and entered the United Kingdom lawfully, with leave to remain until 20 August 2005. On 31 October 2005, she was granted indefinite leave to remain in the United Kingdom.

35. In 2007, CS divorced her husband. The couple were later reconciled and remarried in 2010. In 2011, a son of the marriage was born in the United Kingdom. The child is a British citizen. CS has sole care and custody of the child.

36. On 21 March 2012, CS was convicted of a criminal offence. On 4 May 2012, she was sentenced to a term of imprisonment of twelve months.

37. On 2 August 2012, CS was notified that, by reason of her criminal conviction, she was liable to be deported from the United Kingdom. On 30 August 2012, CS applied for asylum. Her application was considered by the appropriate United Kingdom authority, the Home Secretary.

38. On 2 November 2012, CS was released from prison, having served the custodial element of her sentence. On 9 January 2013, the Home Secretary rejected her application for asylum.[6] The order deporting CS from the United Kingdom was made under section 32(5) of the Borders Act. CS challenged the Home Secretary's decision by exercising her right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber). On 3 September 2013 her appeal was allowed on the ground that her deportation would lead to a breach of the Refugee Convention, of Articles 3 and 8 ECHR and of the EU Treaties.

39. In its decision, the First-tier Tribunal (Immigration and Asylum Chamber) found that there were no other family members in the United Kingdom who could care for the child if CS were deported and so, if she were deported, the child would have to go with her to Morocco. Referring to CS's child's rights linked to citizenship of the Union under Article 20 TFEU and the judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124), the First-tier Tribunal (Immigration and Asylum Chamber) held that ' … a citizen of the European Union simply cannot be constructively expelled from the territory of the European Union in any circumstances whatsoever … The obligation permits of no derogation at all, including where … the parents had a criminal history … The deportation order in this case is therefore not in accordance with the law because it violates the child's rights under Article 20 TFEU'.

40. The Home Secretary was granted permission to appeal to the Upper Tribunal (Immigration and Asylum Chamber) London. It was argued on behalf of the Home Secretary that the First-tier Tribunal (Immigration and Asylum Chamber) had erred in law in its assessment and conclusions on all the grounds upon which it had allowed CS's appeal, including in its assessment and conclusions relating to the child's rights under Article 20 TFEU, the judgment in *Zambrano* (C-34/09, EU:C:2011:124) and CS's derived rights. The Home Secretary submitted, in particular, that EU law did not preclude the deportation of CS from the United Kingdom to Morocco even if that would deprive CS's child, a Union citizen, of the genuine enjoyment of the substance of his rights attaching to his status as a Union citizen.

6 — The final element of the decision was a determination that, because of her criminal conviction, a deportation order should be made against CS.

41. It was in those circumstances that, by judgment of 4 June 2014, received at the Court Registry on 24 June 2014, the Upper Tribunal (Immigration and Asylum Chamber) London decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Does EU law, and in particular Article 20 TFEU, preclude a Member State from expelling from its territory to a non-Union country a non-Union national who is the parent and primary carer of a child who is a citizen of that Member State (and, consequently, a citizen of the Union) where to do so would deprive the Union citizen child of the genuine enjoyment of the substance of his or her rights as a … Union citizen?

(2) If the answer to Question 1 is "no", in what circumstances would such an expulsion be permitted under European Union Law?

(3) If the answer to Question 1 is "no", to what extent, if any, do Articles 27 and 28 of Directive [2004/38] … inform the answer to Question 2?'

IV – The procedures before the Court

42. In Case C-165/14, written observations were lodged by Mr Rendón Marín, the Spanish, Greek, French, Italian, Netherlands, Polish and United Kingdom Governments and by the European Commission. In Case C-304/14, written observations were lodged by CS, by the United Kingdom, French and Polish Governments and by the Commission.

43. By decision of 2 June 2015, pursuant to Article 29(1) of its Rules of Procedure, the Court referred the two cases to the same formation of the court, the Grand Chamber, and, pursuant to Article 77 of its Rules of Procedure, arranged for the cases to be heard jointly.

44. At the hearing on 30 June 2015, oral submissions were made on behalf of Mr Rendón Marín, CS, the Spanish, United Kingdom, Danish and Polish Governments and the Commission.

V – Analysis

A – *The Court's jurisdiction in Case C-165/14*

45. It is apparent from the documents before the Court and from the submissions made at the hearing by Mr Rendón Marín and the Spanish Government that, after Mr Rendón Marín had brought before the Tribunal Supremo his appeal against the judgment of 21 March 2012 dismissing his appeal against the decision refusing him a residence permit, in which context the Tribunal Supremo made the present request for a preliminary ruling, the applicant made two new applications to the Representation of the Spanish Government in Malaga for a temporary residence permit on grounds of exceptional circumstances. However, both of those applications were based on a new legal ground, namely, that of family ties, as provided for in Article 124(3)[7] of the new rules for the implementation of the Law on Foreigners.[8]

7 — This new provision stipulates the conditions for the grant of a residence permit on grounds of family ties. It expressly provides for the possibility of granting a residence permit to the parent of a minor child who is a Spanish national when the parent has care and custody of the child and lives with the child.

8 — Approved by Royal Decree 557/2011 approving the rules for the implementation of Framework Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration, as amended by Framework Law 2/2009 (Real Decreto 557/2011 por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009) of 20 April 2011 (BOE No 103 of 30 April 2011, p. 43821).

46. As regards the first of those applications, it is apparent from the documents before the Court that, by decision of 17 February 2014, the Representation of the Spanish Government in Malaga rejected the application because of the existence of a criminal record, in accordance with Article 31(5) of the Law on Foreigners and Article 128 of the new rules for the implementation of the Law on Foreigners. [9]

47. As regards the second application, the Spanish Government indicated at the hearing that, on 18 February 2015, a temporary residence permit was granted to the applicant in the main proceedings by the Representation of the Spanish Government in Malaga. It is clear from the oral submissions made by Mr Rendón Marín that he was granted the temporary residence permit on grounds of exceptional circumstances connected with family ties *as a result of the removal of his conviction from the record* by the competent Spanish authority.

48. It therefore seems that Mr Rendón Marín has now obtained the temporary residence permit he was seeking. While that does not affect the admissibility of the request for a preliminary ruling, since all the conditions for making such a request were satisfied at the time when it was made, [10] the question now arising is whether or not the matter has since been resolved and whether it is still necessary to answer the question referred for a preliminary ruling. The issue is not, therefore, whether the Tribunal Supremo's request for a preliminary ruling is inadmissible, [11] but whether or not the Court has jurisdiction. [12]

49. It is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal has no power to bring a matter before the Court of Justice by way of a reference for a preliminary ruling unless a case is pending before it in which it is called upon to give a decision capable of taking account of the preliminary ruling. [13] The Court's jurisdiction is thus dependent on the existence of a dispute in the main proceedings and the Court may, or indeed must, verify that of its own motion. [14]

50. In the present case, as was stated in point 45 of this Opinion, the residence permit was not granted until after an appeal had been brought before the Tribunal Supremo against the judgment dismissing the action against the decision refusing the residence permit, in which context the Tribunal Supremo requested a preliminary ruling from the Court. If it should prove that Mr Rendón Marín has indeed obtained the residence permit he was seeking, [15] then the necessary conclusion is that the action in the main proceedings no longer serves any purpose, for Mr Rendón Marín's request has been satisfied. Nevertheless, even if it appears unlikely that an answer from the Court is necessary in order to enable

9 — See point 22 of this Opinion.

10 — See, to that effect, the Opinion of Advocate General Jacobs in *Djabali* (C-314/96, EU:C:1997:248, point 16). See also the judgment in *Djabali* (C-314/96, EU:C:1998:104, paragraphs 17 to 23). In the present case, the description of the legal framework of and factual background to the request for a preliminary ruling *enables* the Court to provide a useful interpretation of EU law. See Article 94 of the Rules of Procedure.

11 — On the difference between these two procedural issues, see the Opinion of Advocate General Wahl in *Gullotta and Farmacia di Gullotta Davide & C.* (C-497/12, EU:C:2015:168, points 16 and 22). See also Naômé, C., *Le renvoi préjudiciel en droit européen — Guide pratique*, Larcier, Brussels, 2010 (2nd edition), pp. 85 and 86.

12 — See the Opinion of Advocate General Wahl in *Gullotta and Farmacia di Gullotta Davide & C.* (C-497/12, EU:C:2015:168, point 17 and the case-law cited): 'the Court's jurisdiction is framed by the system of judicial remedies established by the Treaties, which are available only when the conditions set out in the relevant provisions are fulfilled'.

13 — Judgment in *UGT-Rioja and Others* (C-428/06 to C-434/06, EU:C:2008:488, paragraph 39 and the case-law cited).

14 — Ibidem (paragraph 40).

15 — I would recall that the conditions to which Article 267 TFEU makes the jurisdiction of the Court subject must be fulfilled not only at the moment when the Court is seised by the national court, but also throughout the proceedings. See the Opinion of Advocate General Wahl in *Gullotta and Farmacia di Gullotta Davide & C.* (C-497/12, EU:C:2015:168, point 19). See Article 100 of the Rules of Procedure of the Court of Justice, which states:

'1. The Court shall remain seised of a request for a preliminary ruling for as long as it is not withdrawn by the court or tribunal which made that request to the Court. …
2. However, the Court may at any time declare that the conditions of its jurisdiction are no longer fulfilled.'

the Tribunal Supremo to give judgment, as is required by Article 267 TFUE, I think that the Court is not in a position to establish conclusively, solely on the basis of the information provided at the hearing, that there is no need for the Tribunal Supremo to continue with the proceedings before it. Indeed, it may need to do so for a reason not apparent from the documents before the Court.

51. In this connection, it seems to me appropriate to ask the referring court whether it means to maintain its request for a preliminary ruling, and whether there are any reasons to consider that an answer from the Court is still necessary to enable it to give judgment. To do so would be consistent with the case-law of the Court according to which the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute. [16]

52. In case the Court of Justice should, after contacting the referring court, decide that an answer is still necessary, I shall examine the question referred, inasmuch as it has not been withdrawn by the referring court.

B – *The substance of Cases C-165/14 and C-304/14*

53. The two requests for a preliminary ruling, made, respectively, by the Tribunal Supremo and the Upper Tribunal (Immigration and Asylum Chamber) London concern, essentially, the interpretation of Article 20 TFEU and the scope of that provision, either in the light of the judgments in *Zhu and Chen* [17] (Case C-165/14) and *Ruiz Zambrano* [18] (Cases C-165/14 and C-304/14), or in the light of the latter judgment alone, when, in particular, the applicants in the main proceedings have a criminal record.

54. I would recall at the outset that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts. [19]

55. Consequently, even if, formally, the referring court has limited its questions to the interpretation of Article 20 TFEU, that does not prevent the Court from providing the national court with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case pending before it, whether or not the national court has referred to them in the wording of its questions. It is, in this context, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation, in view of the subject-matter of the dispute. [20]

56. In the present case, the referring court in Case C-165/14 seeks to establish, essentially, on the one hand, whether it is contrary to Directive 2004/38 for national legislation to require the automatic refusal of a residence permit for a third-country national, the parent of a minor child who is a citizen of the Union and a dependent of that parent and lives with that parent in the host Member State, when the parent has a criminal record and, on the other, whether it is contrary to Article 20 TFEU,

16 — See, inter alia, the judgments in *Zabala Erasun and Others* (C-422/93 to C-424/93, EU:C:1995:183, paragraph 29), *Djabali* (C-314/96, EU:C:1998:104, paragraph 19) and *García Blanco* (C-225/02, EU:C:2005:34, paragraph 28).

17 — C-200/02, EU:C:2004:639.

18 — C-34/09, EU:C:2011:124.

19 — See, inter alia, the judgment in *Betriu Montull* (C-5/12, EU:C:2013:571, paragraph 40 and the case-law cited).

20 — Ibidem (paragraph 41 and the case-law cited).

interpreted in the light of the judgments in *Zhu and Chen* [21] and *Ruiz Zambrano*, [22] for that national legislation to require the automatic refusal of a residence permit for a third-country national, the parent of minor children who are citizens of the Union and of whom the parent has sole care and custody, when the parent has a criminal record and when the consequence of such a refusal is that those children must leave the territory of the European Union.

57. The referring court in Case C-304/14 asks, essentially, whether it is contrary to Article 20 TFEU for a Member State to expel from its territory to a non-Union country a third-country national, the parent of a child who is a national of that Member State and of whom the parent has sole care and custody, when to do so would deprive the child, a citizen of the Union, of genuine enjoyment of the substance of his or her rights as a Union citizen.

58. Inasmuch as the two cases raise similar issues, I propose to address them in a common Opinion. However, I would note that, despite the similarities between these two cases, they are in some respects different and consequently the questions referred to the Court by the Tribunal Supremo and by the Upper Tribunal (Immigration and Asylum Chamber) London are different too. It therefore seems to me appropriate to examine, as a preliminary step, the particular features of the cases in the main proceedings before analysing the crucial aspects of the questions referred by the national courts.

1. The particular features of the cases

59. The situations at issue in the main proceedings have in common, first of all, the fact that the parties to those proceedings are third-country nationals and parents of minor children who are citizens of the Union, residing in their own respective Member States, of whom they have sole care and custody. Next, the children, who are citizens of the Union, have always resided in their respective Member States. Finally, Mr Rendón Marín and CS have both been sentenced to terms of imprisonment, of nine and twelve months respectively.

60. There are, nevertheless, a certain number of differences between the two cases in the main proceedings. Specifically, these consist in the fact that one of the children concerned, Mr Rendón Marín's daughter, resides in a Member State other than that of which she is a national, in the different types of national legislation at issue (involving the refusal of a residence permit in Spain and an expulsion order in the United Kingdom) [23] and in the severity of the offences committed by Mr Rendón Marín and by CS (entailing the suspension of the nine-month prison sentence imposed on Mr Rendón Marín, whereas SC has served her term of twelve months' imprisonment).

61. As regards, first of all, the *situation of Mr Rendón Marín's daughter* (a Polish national), who was born in Spain and has never left that Member State, it must as a preliminary matter be established whether such a situation falls within the ambit of Directive 2004/38, as maintained by the Greek, Italian and Polish Governments, and by the Commission too. I shall analyse that question subsequently. [24]

62. Next, in so far as concerns *the type of national legislation at issue*, I should wish to point to certain particular features of the present cases.

21 — C-200/02, EU:C:2004:639.

22 — C-34/09, EU:C:2011:124.

23 — As for CS's situation, it should be noted that she entered the United Kingdom legally as the wife of a British citizen with leave to remain for a fixed term. She was later granted indefinite leave to remain in that Member State.

24 — See points 81 to 88 of this Opinion.

63. In Case C-165/14, it is clear from the documents before the Court and from the statements made by Mr Rendón Marín and the Spanish Government at the hearing that the decision of 17 February 2014 of the Representation of the Spanish Government in Malaga refusing a residence permit indicates that, in accordance with Article 28(3) of the Law on Foreigners, read together with Article 24 of the rules for the implementation of that law, Mr Rendón Marín was 'required to leave Spain within fifteen days of notification of [the decision rejecting the application]'.

64. In its written observations and oral submissions, the Spanish Government has maintained that the application of the Spanish legislation at issue, and consequently the order to leave the territory, do not automatically entail the expulsion of a third-country national on account of his criminal record. Indeed, the competent authority must first of all prove that the person concerned has committed an infringement of the Law on Foreigners, as provided for in Article 53(1)(a) of that law and, then, initiate the procedure imposing penalties, which may possibly lead to the penalty of expulsion.

65. Nevertheless, in this connection, Mr Rendón Marín emphasised at the hearing that a person residing in Spain without a residence permit is guilty of an administrative offence that may be punished by an expulsion order.

66. At all events, it is clear from the information provided in the order for reference that refusal to grant Mr Rendón Marín a permit to reside in Spain on account of his criminal record would entail his removal from the national territory and therefore from the European Union, which would also entail the departure of his two children from the European Union.

67. In Case C-304/15, it must be noted that, as the referring court states, under the United Kingdom legislation at issue, if a person who is not a British citizen is convicted of an offence and is sentenced to a period of imprisonment of at least 12 months, it is compulsory for the Home Secretary to make a deportation order. [25]

68. Lastly, in so far as concerns the *seriousness of the offences* committed by Mr Rendón Marín and by CS, I think it helpful to mention the following aspects.

69. In Case C-165/14, it is apparent from the order for reference that the application for a temporary residence permit on grounds of exceptional circumstances lodged by Mr Rendón Marín was rejected by the Directorate-General for Immigration *on the grounds of his criminal record*, in accordance with the provisions of Article 31(5) of the Law on Aliens. However, as was stated in point 27 of this Opinion, Mr Rendón Marín's sentence of nine months' imprisonment was provisionally suspended and he will not serve the term of imprisonment. In addition, on the date of the order for reference, he was awaiting a decision from the relevant authority on his application for his conviction to be removed from the record. [26]

70. In Case C-304/14, by contrast with Mr Rendón Marín's situation, CS was convicted of a criminal offence for which she was sentenced to a term of twelve months' imprisonment, which she has effectively served. Moreover, because of that conviction and the fact that she is not a British citizen, she has been ordered to leave the United Kingdom. [27]

71. Given the particular features of these cases, it is necessary, as a preliminary step, to clarify whether the situation in which Mr Rendón Marín and his children find themselves, and the situation in which CS and her child find themselves, fall within the scope of EU law. If that question is answered in the affirmative, I shall examine the specific issues raised by the national courts, that is to say, the effect of the criminal records of Mr Rendón Marín and CS on the recognition of their right of residence.

25 — See also point 13 of this Opinion.

26 — See, in this connection, points 46 and 47 of this Opinion.

27 — On the binding nature of the expulsion decision, see points 13 and 67 of this Opinion.

2. Preliminary observations

72. In the cases in the main proceedings, the Court is asked to interpret EU law so as to verify whether the national legislation at issue is consistent with EU law with regard to situations involving, on the one hand, the right of citizens of the Union who are minor children and have always resided in their respective Member States to remain in the territory of the European Union and the consequential right of residence of their third-country national parents who have sole care and custody of them and, on the other, the right of Member States to refuse to grant a residence permit to such third-country nationals, or to expel them, on grounds of their criminal record.

73. In that context it is necessary briefly to examine the principle of the conferral of powers in the field of immigration law and then to examine the types of right of residence which the Court has recognised for family members of Union citizens.

a) The principle of the conferral of powers in the field of immigration law

74. With regard to the area of freedom, security and justice, the competence of the European Union is shared with the Member States, pursuant to Article 4(2)(j) TFEU. The objectives of this competence and the manner in which it is to be exercised are set out in Title V of Part Three of the FEU Treaty. Article 67 TFEU provides that the Union must frame a common policy on, inter alia, immigration that is based on solidarity between Member States and is fair towards third-country nationals. Accordingly, the ordinary legislative procedure applies to the adoption of all of the measures referred to in Article 79(2) TFEU.[28] The exercise of the Union's competence, once subsidiarity has been checked, has a pre-emptive effect on the Member States, whose competence will be diminished to the extent of the Union's intervention. The EU's competence in migration matters is a power to undertake harmonisation and this pre-emptive effect will therefore vary depending on the precise scope and intensity of the EU's intervention.[29] Common rules are therefore adopted in directives which the Member States are obliged to transpose. The latter may, however, legislate on matters not covered by such directives. They are also free to derogate from common rules, in so far as that is permitted by the directives. Subject to these conditions, the Member States retain, in principle, their competence in the area of immigration law.

75. On the other hand, in a situation in which rights of free movement and residence under EU law are at issue, the Member States' discretion in immigration matters is not to affect the application of provisions concerning citizenship of the Union or freedom of movement, even if those provisions concern not only the position of a citizen of the Union but also that of a member of his family who is a third-country national.

b) The types of right of residence which the Court has recognised for members of the family of a citizen of the Union

76. It is important to state that, on the basis of the Treaties in particular, the Court has recognised in its case-law three types of right of residence for members of the family of a citizen of the Union.

28 — Article 79 TFEU covers both legal and illegal immigration.

29 — Protocol No 25 on the exercise of shared competence states that, 'when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area'.

77. In so far as concerns the first two types of residence, the right of residence which is recognised for the members of the family of a Union citizen exists *in the State of which the citizen of the Union is a national*.[30] The first type relates to the right to family reunification granted to the citizen of the Union upon the prior or simultaneous exercise of freedom of movement and is based on the prohibition of obstacles.[31] The second flows from the practical effect of Article 20 TFEU and is intended to prevent citizens being deprived of enjoyment of the substance of the rights conferred on them by citizenship of the Union.[32] Such cases remain exceptional.[33]

78. As for the third type of right of residence, this is recognised for the members of the family of a citizen of the Union *in the host Member State*.[34] Indeed, the Court has stated that a Union citizen who has never left the territory of a Member State may take advantage of the rights flowing from the Treaty provided that he or she is a national of another Member State.[35] It based that right of residence on the *effet utile* of the right of residence of the citizen of the Union.[36]

79. It must be emphasised that the present cases involve only the second and third types of right of residence mentioned above.[37]

80. Against the background of that case-law I shall first of all examine whether the situation in which Mr Rendón Marín and his two children find themselves and the situation in which CS and her child find themselves fall within the scope of EU law and, in particular, of the Treaty provisions relating to citizenship of the Union.

3. The right of residence of the members of the family of a citizen of the Union in the host Member State: analysis of the situation of Mr Rendón Marín and his daughter in the context of Directive 2004/38

81. The free movement of persons constitutes one of the fundamental freedoms of the internal market, which means an area without internal frontiers in which freedom is ensured in accordance with the provisions of the Treaty.[38]

82. The free movement of persons takes the form of the departure of nationals of a Member State, who are therefore citizens of the Union, from their own Member State. However, in the present cases, neither Mr Rendón Marín's children, a Spanish national and a Polish national, nor CS's child, a British citizen, have crossed any border. Consequently, these cases do not, in principle, involve the right of Union citizens to move freely from one Member State to another. Indeed, Directive 2004/38 applies to all Union citizens who 'move to or reside in a Member State other than that of which they are a national and to their family members'. Consequently, Directive 2004/38 does not apply, in principle, to situations such as those in which Mr Rendón Marín and his son, a Spanish national, find themselves or to that in which CS and her child, a British citizen, find themselves.

30 — See my Opinion in *McCarthy and Others* (C-202/13, EU:C:2014:345).

31 — See the judgments in *Singh* (C-370/90, EU:C:1992:296), *Carpenter* (C-60/00, EU:C:2002:434), *Eind* (C-291/05, EU:C:2007:771) and *McCarthy and Others* (C-202/13, EU:C:2014:2450).

32 — Judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124).

33 — On the exceptional nature of this type of situation, see the judgments in *McCarthy* (C-434/09, EU:C:2011:277, paragraph 47), *Iida* (C-40/11, EU:C:2012:691, paragraph 71), *Dereci and Others* (C-256/11, EU:C:2011:734, paragraph 64) and *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 32).

34 — This right of residence has been recognised for the parents of a citizen of the Union who is a minor child when they were, in principle, unable to claim to be dependent relatives in the ascending line since they did not fulfil the conditions for the right of residence provided for by Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26) (which has been repealed and replaced by Directive 2004/38). See the judgment in *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraphs 43 to 46).

35 — See the judgment in *Zhu and Chen* (C-200/02, EU:C:2004:639). See also the judgment in *Garcia Avello* (C-148/02, EU:C:2003:539).

36 — See the judgment in *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 45). See also the judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 28).

37 — See points 77 and 78 of this Opinion.

38 — See recital 2 of Directive 2004/38.

83. However, the Spanish, Greek, Italian and Polish Governments, and the Commission too, consider that the situation in which Mr Rendón Marín's daughter, a Polish national and a minor child residing in a Member State of which she is not a national, finds herself does fall within the ambit of Directive 2004/38. Indeed, her situation might be compared with that which led to the judgment in *Zhu and Chen*.[39]

84. It is consequently necessary to consider whether, having regard to the facts of Case C-165/14, a minor child, who is a citizen of the Union residing in a Member State of which he is not a national, satisfies the conditions laid down in Directive 2004/38.

a) Applicability of Directive 2004/38 to the situation of Mr Rendón Marín and his daughter

85. According to recital 3 of Directive 2004/38, the purpose of that directive is to simplify and strengthen the right of free movement and residence of all Union citizens. The starting point for determining whether a right of residence can be established on the basis of Directive 2004/38 is Article 3 thereof. Paragraph 1 of Article 3, which is entitled 'Beneficiaries', provides that the directive applies to all Union citizens who '… reside in a Member State other than that of which they are a national, and to their family members …'. That is clearly the situation in which Mr Rendón Marín's daughter, who resides in Spain, a Member State of which she is not a national, finds herself.

86. In its judgment in *Zhu and Chen*,[40] the Court held that the situation of a minor child, who is a citizen of the Union residing in a Member State other than that of which he or she is a national and who has not exercised the right to free movement nevertheless falls within the scope of the provisions of EU law on the free movement of persons[41] and, in particular, the provisions of Directive 90/364, which was repealed and replaced by Directive 2004/38. In its reasoning, the Court emphasised that the situation of a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement is not, for that reason alone, to be assimilated to a purely internal situation, thereby depriving that national of the benefit in the host Member State of the provisions of EU law on freedom of movement and of residence.[42] The Court also pointed out that the right to reside in the territory of the Member States provided for in Article 21(1) TFEU is granted directly to every citizen of the Union by a clear and precise provision of the Treaty.[43]

87. In short, simply as a national of a Member State, and therefore as a citizen of the Union, Mr Rendón Marín's daughter is entitled to rely upon Article 21(1) TFEU. However, according to the Court, the right of citizens of the Union to reside in another Member State is recognised subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect,[44] those limitations and conditions having to be applied in compliance with the limits imposed by EU law and in accordance with the general principles of that law, in particular the principle of proportionality.[45]

39 — C-200/02, EU:C:2004:639.

40 — C-200/02, EU:C:2004:639.

41 — Ibidem (paragraphs 19, 20 and 25 to 27). I would point out that the Court had already recognised, in its judgment in *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 75) that 'where children have the right to reside in a host Member State in order to attend general educational courses pursuant to Article 12 of Regulation No 1612/68, that provision must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his nationality, to reside with them in order to facilitate the exercise of that right notwithstanding the fact that the parents have meanwhile divorced or that the parent who has the status of citizen of the European Union has ceased to be a migrant worker in the host Member State'.

42 — Judgment in *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 19).

43 — Ibidem (paragraph 26).

44 — Ibidem (paragraph 26).

45 — See, inter alia, the judgment in *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 91).

88. That being so, I am of the opinion that, in the present case, Article 21(1) TFEU and Directive 2004/38 confer, in principle, a right of residence in Spain on Mr Rendón Marín's daughter. It nevertheless remains to be established whether Mr Rendón Marín, as a direct relative in the ascending line and a third-country national, may claim a right of residence.

89. Indeed, a derived right of residence might be conferred on Mr Rendón Marín only if his daughter, who is a minor child and a citizen of the Union, satisfies the conditions laid down in Article 7(1)(b) of Directive 2004/38.[46] In particular, that provision requires citizens of the Union to have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and to have comprehensive sickness insurance cover in the host Member State, which it is for the national court to ascertain.

90. In this connection I would observe, first of all, that the Court has previously held that, while the citizen of the Union must have sufficient resources, EU law nevertheless lays down no requirement whatsoever as to their origin, so that they may be provided by, inter alia, a third-country national who is the parent of the citizen of the Union and minor child in question.[47] In consequence, the Court has held that 'a refusal to allow a parent, whether a national of a Member State or of a third country, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since *enjoyment* by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence'.[48] Thus, the Court has held that, if Article 21 TFEU and Directive 2004/38 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.[49]

91. In the present case, it is apparent from the order for reference that the children are receiving proper care and schooling. It therefore appears that their father is supporting them properly. Moreover, the Spanish Government stated at the hearing that, under Spanish law, Mr Rendón Marín is entitled to sickness insurance for himself and his children. That being said, it is for the national court to establish whether Mr Rendón Marín's daughter has, in her own right or through her father, sufficient resources and comprehensive sickness insurance, for the purposes of Article 7(1)(b) of Directive 2004/38.

92. In those circumstances, I believe that the situation in which Mr Rendón Marín and his daughter find themselves falls, in principle, within the ambit of Article 21 TFEU and Directive 2004/38.

b) The effect of a criminal record on the recognition of a derived right of residence in the light of Articles 27 and 28 of Directive 2004/38

93. Next, it is necessary to consider whether the derived right of residence which Mr Rendón Marín enjoys may be restricted pursuant to a provision, such as that at issue in the main proceedings, which makes the grant of a residence permit *automatically* subject to the condition of his having no criminal record in Spain or in any other country in which he has previously resided.

46 — It is apparent from the documents before the Court that Mr Rendón Marín's daughter was born in Spain in 2003. I cannot, therefore, rule out the possibility of her having acquired a permanent right of residence in that State in accordance with Article 16(1) of Directive 2004/38. If that is the case, as the Polish Government rightly observes, her right of residence will not be subject to the conditions laid down in Chapter III of that directive, and in particular those of Article 7(1)(b) thereof.

47 — Judgments in *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 30) and *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 27).

48 — Judgments in *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 45) and in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 28); emphasis added.

49 — Judgments in *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraphs 46 and 47) and *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 29).

94. I think not, for the following reasons.

95. It is settled case-law that any limitation of the right of free movement and residence constitutes a derogation from the fundamental principle of freedom of movement for persons, which must be interpreted strictly and the scope of which may not be determined unilaterally by the Member States.[50] Consequently, if EU law is not to preclude refusal of the residence permit sought by Mr Rendón Marín, the provision at issue in the main proceedings must be consistent with the limitations and conditions established by the EU legislature.

96. As regards, in the first place, the derogations from Mr Rendón Marín's right of residence, the Court has systematically referred to the rules contained in Article 27 of Directive 2004/38.[51] Paragraph 1 of Article 27 provides that a Member State may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy and public security. However, such derogations are heavily circumscribed. As is clear from the first subparagraph of Article 27(2) of Directive 2004/38, in order to be justified, measures restricting the freedom of movement and residence of Union citizens and their family members, in particular, measures taken on grounds of public policy, must observe the principle of proportionality and be based exclusively on the personal conduct of the individual concerned.[52] That provision also stipulates that previous criminal convictions cannot in themselves constitute grounds for taking such measures. The second subparagraph of Article 27(2) of the directive provides that the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society[53] and stipulates that justification isolated from the particulars of the case or relying upon considerations of general prevention may not be accepted.[54]

97. Mr Rendón Marín's situation, however, does not appear to me to satisfy the conditions referred to in points 95 and 96 of this Opinion. It must be noted in this connection that the legislation at issue in the main proceedings makes the grant of an initial residence permit *automatically* subject, with no possibility of variation, to the condition that the person concerned has no criminal record in Spain or in any other country in which he has previously resided.

98. In the present case, as was stated in point 69 of this Opinion, the order for reference indicates that, under this legislation, Mr Rendón Marín's application for a temporary residence permit on grounds of exceptional circumstances was rejected because of his criminal record. The residence permit was therefore refused automatically, with no account being taken of the particular situation of the applicant in the main proceedings, that is to say, without any assessment of his personal conduct or of the possible present threat he might pose to public order or public security. The Polish Government also pointed out in its written observations that there is nothing in the order for reference to indicate that such circumstances were examined and assessed.

50 — See, inter alia, the judgments in *van Duyn* (41/74, EU:C:1974:133, paragraph 18), *Bonsignore* (67/74, EU:C:1975:34, paragraph 6), *Rutili* (36/75, EU:C:1975:137, paragraph 27), *Bouchereau* (30/77, EU:C:1977:172, paragraph 33), *Calfa* (C-348/96, EU:C:1999:6, paragraph 23), *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraphs 64 and 65), *Commission* v *Spain* (C-503/03, EU:C:2006:74, paragraph 45), *Commission* v *Germany* (C-441/02, EU:C:2006:253, paragraph 34) and *Commission* v *Netherlands* (C-50/06, EU:C:2007:325, paragraph 42).

51 — See section 3.8 of the Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2008) 840 final): 'Chapter VI of the Directive provides for the right of Member States to deny entry or expel EU citizens and their family members but makes this subject to rigorous material and procedural safeguards that ensure that there is a fair balance between the interests of Member States and EU citizens'. As regards, in particular, the refusal of leave to enter a Member State for Union citizens and their third-country national family members, see the judgment in *Commission* v *Spain* (C-503/03, EU:C:2006:74, paragraphs 43 and 45).

52 — See, in this connection, inter alia, the judgments in *Bonsignore* (67/74, EU:C:1975:34, paragraph 6) and *Commission* v *Germany* (C-441/02, EU:C:2006:253, paragraph 93).

53 — See, inter alia, the judgments in *Rutili* (36/75, EU:C:1975:137, paragraph 28), *Bouchereau* (30/77, EU:C:1977:172, paragraph 35), *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraph 66) and *Jipa* (C-33/07, EU:C:2008:396, paragraph 23).

54 — See, in this connection, the judgment in *Bonsignore* (67/74, EU:C:1975:34, paragraph 7).

99. In so far as concerns assessment of the relevant circumstances, I would observe that it is apparent from the documents before the Court that Mr Rendón Marín was convicted of an offence committed in 2005. That past criminal conviction may, of itself, provide grounds for the refusal of a residence permit only if, 'in addition to the perturbation of the social order which any infringement of the law involves', his personal conduct creates 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. [55]

100. Moreover, the Court has held that the condition relating to the existence of a present threat must, in principle, be satisfied at the time when the measure in question is adopted, [56] which, in the present case, does not appear to be the case. Indeed, the fact that Mr Rendón Marín's sentence was suspended leads me to think that he has not served time in custody.

101. In the second place, in so far as concerns the possible removal of Rendón Marín, I would recall that it is necessary, on the one hand, to take account of the fundamental rights whose observance the Court ensures, in particular, the right to respect for private and family life, as stated in Article 7 of the Charter and Article 8 ECHR [57] and, on the other, to observe the principle of proportionality.

102. Thus, in order to determine whether an expulsion measure is proportionate to the legitimate aim pursued, which in this case is the safeguarding of public order and public security, account must be taken of the considerations mentioned in Article 28(1) of Directive 2004/38, namely the period for which the individual concerned has resided in the host State, his age, state of health, family and economic situation, his social and cultural integration into the host Member State and the extent of his links with his country of origin. I think it important that the seriousness of the offence be assessed too when proportionality is considered.

103. Lastly, it is important to note that recital 23 [58] of Directive 2004/38 mentions the special need to protect people who have become genuinely integrated into the host Member State.

104. In light of the foregoing, I am inclined to conclude that the conditions for applying the public policy or public security exception laid down in Directive 2004/38, as interpreted by the Court, have not been satisfied and that the exception cannot, in this case, provide the basis for a restriction of the right of residence of the kind which flows from the legislation at issue in the main proceedings. It is, at all events, for the national court to verify that, taking into consideration all of the abovementioned factors.

c) Interim conclusion in Case C-165/14

105. On the basis of all the foregoing considerations, I propose that the Court should rule that Directive 2004/38 applies to the situation in which Mr Rendón Marín and his daughter, a Polish national, find themselves. Consequently, Article 21 TFEU and Directive 2004/38 should be interpreted as precluding national legislation which requires the automatic refusal of a residence permit for a third-country national who is the parent of a minor child who is a citizen of the Union and a dependent of that parent and lives with that parent in the host Member State, when that parent has a criminal record.

55 — See, in particular, the judgments in *Rutili* (36/75, EU:C:1975:137, paragraph 28), *Bouchereau* (30/77, EU:C:1977:172, paragraph 35), *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraph 66) and *Jipa* (C-33/07, EU:C:2008:396, paragraph 23). I would point out that all these criteria are cumulative. See section 3 of the Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38 (COM(2009) 313 final).

56 — See, in particular, the judgments in *Bouchereau* (30/77, EU:C:1977:172, paragraph 28) and *Commission* v *Spain* (C-503/03, EU:C:2006:74, paragraph 44).

57 — See, to that effect, the judgment in *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 52).

58 — Recital 23 of Directive 2004/38 states that 'expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. …'

4. The right of residence conferred on members of the family of a citizen of the Union in the Member State of which the citizen of the Union is a national: analysis of the situation of Mr Rendón Marín and his children and the situation of CS and her child

106. In my view, the situation in which Mr Rendón Marín and his daughter, a Polish national, find themselves falls within the ambit of Directive 2004/38. However, in case the national court should, when ascertaining whether the conditions laid down in that directive have been met, reach the conclusion that they have not, I shall analyse, with reference to the principle established in the judgment in *Ruiz Zambrano*,[59] the situation of Mr Rendón Marín and his children together with the situation of CS and her child.

a) Citizenship of the Union in the case-law of the Court

107. Article 20 TFEU, which confers citizenship of the Union on every person holding the nationality of a Member State,[60] means that nationality of a Member State is the prerequisite for enjoyment of the status of citizen of the Union. Since it was introduced into the Treaties,[61] that status has been enjoyed by all nationals of the Member States.[62] It has thus conferred legitimacy on the process of European integration by reinforcing the participation of citizens.[63] As the Court has ruled on numerous occasions, citizenship of the Union is destined to be the fundamental status of nationals of the Member States.[64]

108. The fundamental freedom to move throughout the Union and to reside anywhere in the Union attaches to the status of citizen of the Union.[65] Thus, as a 'personal status having transnational implications', it has created the necessary conditions for mutual recognition, and so for mutual knowledge, among the societies of the Member States and their citizens.[66] That recognition and knowledge have developed in the particular context of the actual relationships between nationals of the Member States and national authorities.[67] It is precisely those relationships that have enabled the

59 — C-34/09, EU:C:2011:124.

60 — Judgments in *D'Hoop* (C-224/98, EU:C:2002:432, paragraph 27) and *Ruiz Zambrano* (C-34/09, EU:C:2011:124, paragraph 40).

61 — As regards the statement made by the Court in its judgment in *Grzelczyk* (C-184/99, EU:C:2001:458, paragraph 31), Advocate General Sharpston concluded that 'the consequences of that statement are … as important and far-reaching as those of earlier milestones in the Court's case-law. Indeed, I regard the Court's description of citizenship of the Union in *Gryzelczyk* [(C-184/99, EU:C:2001:458)] as being potentially of similar significance to its seminal statement in *Van Gend en Loos* [(26/62, EU:C:1963:1)] that "the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights ... and the subjects of which comprise not only Member States but also their nationals"' (see the Opinion of Advocate General Sharpston in *Ruiz Zambrano* (C-34/09, EU:C:2010:560, point 68).

62 — On the significance of citizenship of the Union after the Maastricht Treaty, see O'Leary, S., *The evolving Concept of Community Citizenship — From the Free Movement of Persons to Union Citizenship*, The Hague/Boston (Kluwer Law International), 1996.

63 — See my Opinion in *McCarthy and Others* (C-202/13, EU:C:2014:345, points 39 and 40).

64 — See, inter alia, the judgments in *Grzelczyk* (C-184/99, EU:C:2001:458, paragraph 31), *D'Hoop* (C-224/98, EU:C:2002:432, paragraph 28), *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 82), *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 22), *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraph 65), *Pusa* (C-224/02, EU:C:2004:273, paragraph 16), *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 25), *Bidar* (C-209/03, EU:C:2005:169, paragraph 31), *Commission* v *Austria* (C-147/03, EU:C:2005:427, paragraph 45), *Schempp* (C-403/03, EU:C:2005:446, paragraph 15), *Spain* v *United Kingdom* (C-145/04, EU:C:2006:543, paragraph 74), *Commission* v *Netherlands* (C-50/06, EU:C:2007:325, paragraph 32), *Huber* (C-524/06, EU:C:2008:724, paragraph 69), *Rottmann* (C-135/08, EU:C:2010:104, paragraph 43), *Prinz and Seeberger* (C-523/11 and C-585/11, EU:C:2013:524, paragraph 24) and *Martens* (C-359/13, EU:C:2015:118, paragraph 21).

65 — See, to that effect, Lenaerts, K. and Gutièrrez-Fons, J.A., 'Ruiz-Zambrano (C-34/09) o de la emancipación de la Ciudadanía de la Unión de los límites inherentes a la libre circulación in *Revista española de derecho europeo*, No 40, 2011, pp. 493 to 521, p. 518.

66 — Citizenship of the Union 'presupposes the existence of a political relationship between European citizens, although it is not a relationship of belonging to a people. On the contrary, that political relationship unites the peoples of Europe. It is based on their mutual commitment to open their respective bodies' politics to other European citizens and to construct a new form of civic and political allegiance on a European scale. It does not require the existence of a people, but is founded on the existence of a European political area from which rights and duties emerge.' See the Opinion of Advocate General Poiares Maduro in *Rottmann* (C-135/08, EU:C:2009:588, point 23).

67 — See, to that effect, Azoulai, L., 'La citoyenneté européenne, un statut d'intégration sociale' in *Chemins d'Europe — Mélanges en l'honneur de Jean Paul Jacqué*, Dalloz, 2010, pp. 2 to 28.

nationals concerned to claim rights on the basis of their status as citizens of the Union. The fact that those rights have been recognised in the case-law of the Court has played a major, even a decisive, role in the construction of this fundamental status which, today, forms an essential part of the European identity enjoyed by citizens. [68]

109. In particular, among the rights which it has recognised that citizens of the Union enjoy, [69] the Court first identified the right to equal treatment, above and beyond the provisions on the freedom of movement of workers. [70] Next, in the context of the right to move freely throughout the territory of the European Union, the Court recognised the right of residence of citizens of the Union and their right to equal treatment with the nationals of a host Member State. [71] Finally, it has interpreted the Treaty provisions on freedom of movement for workers in the light of citizenship of the Union. [72]

110. This vast jurisprudential endeavour, by means of which the Court has made citizenship of the Union an effective reality, has been, and continues to be, carried out progressively and in close cooperation with national courts in the context of references for a preliminary ruling. Throughout that process of cooperation, the Court has maintained a coherent approach in its case-law which has made a notable contribution to cementing the fundamental status of citizen of the Union.

111. In the context of the present cases, three developments in the case-law of the Court are of particular relevance, namely, the judgments in *Zhu and Chen*, [73] *Rottmann* [74] and *Ruiz Zambrano*. [75]

112. In its judgment in *Zhu and Chen*, [76] to which I have already referred, in points 86 and 87 of this Opinion, the Court held, in a case in which a child, who was a citizen of the Union, had never left the United Kingdom, [77] that the child would not be able to exercise the rights which she enjoyed as a citizen of the Union fully and effectively without the presence and assistance of her parents.

68 — See my Opinion in *McCarthy and Others* (C-202/13, EU:C:2014:345, points 39 and 40).

69 — See, in this connection, Azoulai, L., op. cit., p. 6.

70 — See, in particular, the judgment in *Martínez Sala* (C-85/96, EU:C:1998:217).

71 — See, inter alia, the judgments in *Baumbast and R* (C-413/99, EU:C:2002:493); *Trojani* (C-456/02, EU:C:2004:488) and *Bidar* (C-209/03, EU:C:2005:169).

72 — See, in particular, the judgments in *Collins* (C-138/02, EU:C:2004:172), *Ioannidis* (C-258/04, EU:C:2005:559) and *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344).

73 — C-200/02, EU:C:2004:639.

74 — C-135/08, EU:C:2010:104.

75 — C-34/09, EU:C:2011:124.

76 — C-200/02, EU:C:2004:639.

77 — In the case of *Zhu and Chen* (C-200/02, EU:C:2004:639), the child had been born in one part of the United Kingdom, Northern Ireland, and, by moving to Cardiff in Wales, she was merely moving within that country.

113. In its judgment in *Rottmann*,[78] the Court made it clear that the applicability of EU law was not dependent on the presence of a cross-border element.[79] After confirming that the Member States retained competence as regards the acquisition and loss of nationality,[80] the Court nevertheless pointed out that 'the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by EU law, the national rules concerned must have due regard to the latter'.[81] It relied in this connection upon settled case-law to that effect relating to situations in which legislation adopted in an area falling within the sphere of national competence had been assessed in the light of EU law.[82] Thus, if a situation falls within the scope of EU law, the national rules must be consistent with that law and are subject to review by the Court. Indeed, the status of Union citizen must not be deprived of its *effet utile* and the rights which that status confers must therefore not be violated by the adoption of State measures.[83] That does not mean, of course, that the Member States no longer have competence in the sphere of nationality! However, the case-law mentioned emphasises that the Member States 'must, when exercising their powers in the sphere of nationality, have due regard to EU law'.[84] In other words, it is precisely when they are exercising their powers that the Member States must take care to ensure that EU law is not deprived of its effectiveness.

114. In its judgment in *Rottmann*,[85] the Court accordingly stated that the status of citizen of the Union conferred by Article 20 TFEU is so fundamental that a situation involving a citizen of the Union and liable to lead to the *loss* of that status and the rights attaching thereto 'falls, *by reason of its nature and its consequences*, within the ambit of EU law'.[86] That last sentence[87] makes me think of the principle established by the Court in its judgment in *Ruiz Zambrano*,[88] in which it stated that EU law precludes measures which have the effect of *depriving* citizens of the Union of the *genuine enjoyment of*

78 — C-135/08, EU:C:2010:104, paragraphs 38 to 42. In that judgment, the Court ruled on a measure whereby a Member State (the Federal Republic of Germany), and Freistaat Bayern in particular, proposed to revoke the German nationality which Mr Rottmann had acquired, fraudulently, by naturalisation after leaving Austria for Germany. Nevertheless, the German and Austrian Governments and the Commission argued that 'the fact that, in a situation such as that in the main proceedings, the person concerned exercised his right to freedom of movement before his naturalisation cannot of itself constitute a cross-border element capable of playing a part with regard to the withdrawal of that naturalisation'. On examining that argument, the Court accepted that it need not take into consideration Mr Rottmann's earlier exercise of his right to freedom of movement, and looked to the future, rather than the past. See, to that same effect, the Opinion of Advocate General Sharpston in *Ruiz Zambrano* (C-34/09, EU:C:2010:560, point 94).

79 — Judgment in *Rottmann* (C-135/08, EU:C:2010:104, paragraph 48). This was not the first case involving citizenship of the Union in which the element of actual movement across a border was barely discernible or simply inexistent. Indeed, the earlier case of *Garcia Avello* (C-148/02, EU:C:2003:539) involved parents, a Spanish national and a Belgian national, resident in Belgium, whose two children, who had dual nationality, Spanish and Belgian, and whose family name was at issue in the proceedings, had been born in Belgium and had never left that Member State. In similar fashion, in the case in *Zhu and Chen* (C-200/02, EU:C:2004:639), the child had never left the United Kingdom. See, on this point, the Opinion of Advocate General in *Ruiz Zambrano* (C-34/09, EU:C:2010:560, point 77). See also the judgments in *Garcia Avello* (C-148/02, EU:C:2003:539) and *Zhu and Chen* (C-200/02, EU:C:2004:639).

80 — Judgments in *Micheletti and Others* (C-369/90, EU:C:1992:295, paragraph 10), *Mesbah* (C-179/98, EU:C:1999:549, paragraph 29), *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 37) and *Rottmann* (C-135/08, EU:C:2010:104, paragraph 39).

81 — Judgment in *Rottmann* (C-135/08, EU:C:2010:104, paragraph 41).

82 — See, to that effect, the judgments in *Bickel and Franz* (C-274/96, EU:C:1998:563, paragraph 17) (which concerned national criminal laws and rules of criminal procedure), *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 25) (which concerned national rules relating to a person's surname), *Schempp* (C-403/03, EU:C:2005:446, paragraph 19) (which concerned national rules on direct taxation), *Spain* v *United Kingdom* (C-145/04, EU:C:2006:543, paragraph 78) (which concerned national rules determining the persons entitled to vote and to stand as a candidate in elections to the European Parliament). The judgment in *Kaur* (C-192/99, EU:C:2001:106), which concerned the definition of the term 'national', has been commented on in the following terms: 'the significance of the additional observation made by the Court in *Kaur* that, when exercising their powers in the sphere of nationality, the Member states must have due regard to EU law. The significance of this observation can be seen in the seminal case of *Rottmann* [(C-135/08, EU:C:2010:104)]', see Barnard, C., *The Substantive Law of the EU — The Four Freedoms*, Oxford, Oxford University Press, 2010, 4th ed., p. 476.

83 — See, on this judgment, Mengozzi, P., 'Complementarity and cooperation between the Court of Justice of the European Union and national courts as regards third-country nationals' right to reside in the EU' in *Il Diritto dell'Unione Europea*, 1/2013, pp. 29 to 48, p. 34.

84 — Judgment in *Rottmann* (C-135/08, EU:C:2010:104, paragraph 45 and the case-law cited). See also, for a legal theoretical analysis of the case-law on this point, Pudzianowska, D., 'Warunki nabycia i utraty obywatelstwa Unii Europejskiej. Czy dochodzi do autonomizacji pojęcie obywatelstwa Unii?' in *Ochrona praw obywatelek i obywateli Unii Europejskiej*, ed. Baranowska, G., Bodnar, A., Gliszczyńska-Grabias, A., Varsovy, 2015, pp. 141 to 154.

85 — C-135/08, EU:C:2010:104.

86 — Emphasis added. Judgment in *Rottmann* (C-135/08, EU:C:2010:104, paragraphs 39 to 46). See also, in this connection, Mengozzi, P., op. cit., p. 33.

87 — C-135/08, EU:C:2010:104, paragraph 42.

88 — C-34/09, EU:C:2011:124, paragraph 42.

the substance of the rights conferred by the Treaty. In my view, 'depriving citizens of the genuine enjoyment of the substance of the rights conferred by their status as Union citizens' corresponds to 'the nature and consequences of the loss of the status of citizen'. Indeed, the former concept fits perfectly with the latter. I shall come back to the similarity between these two concepts. [89]

115. The extent of the protection of citizenship of the Union confirmed in the judgment in *Rottmann* [90] was clarified in the judgment in *Ruiz Zambrano*, [91] in which the Court acknowledged the right of residence of third-country national family members of Union citizens never having exercised their right of free movement.

116. The judgment in *Ruiz Zambrano* [92] is part of a line of cases involving recognition of the rights claimed by nationals of the Member States who, [93] as Union citizens, give voice to their need for legal protection and their desire for integration not only within host Member States [94] but also within their own Member States. Indeed, the conferral on nationals of the Member States of a status as fundamental as that of citizen of the Union implies, according to the Court, that EU law precludes national measures the effect of which is to deprive those nationals of the genuine enjoyment of the substance of the rights which they derive from that status. That would occur if a third-country national who has assumed sole responsibility for his minor children, who are citizens of the Union, were to be refused the right to reside in the Member State in which those children reside and of which they are nationals, since such a measure would also compel the children to leave the territory of the European Union. [95]

117. That finding by the Court, which has been the object of numerous and varying appraisals in legal literature, is clearly not a mere accident. I would only emphasise in this connection that that ruling was the outcome of a major development in the case-law [96] which provided a basis [97] for the Court's decision in *Ruiz Zambrano*. [98] In my opinion, this development in the case-law is the result of close cooperation between the Court of Justice and the national courts and of advances, both fortunate and logical, within the societies of the Member States and within European society taken as a whole, whose members are merely integrating into their everyday life the status of citizens of the Union conferred upon them by the Treaty. That status binds them together as peoples of a Europe that, on the basis of a civil and political allegiance still being built, but also necessary in the context of political, economic

89 — See point 125 et seq. of this Opinion.

90 — C-135/08, EU:C:2010:104. On this judgment, see Kochenov, D., and Plender, R., 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' in *European Law Review*, Vol. 37, No 4, pp. 369 to 396.

91 — C-34/09, EU:C:2011:124.

92 — C-34/09, EU:C:2011:124.

93 — See point 109 of this Opinion.

94 — See recital 18 of Directive 2004/38.

95 — See paragraphs 42 to 45 of the judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124).

96 — See, in particular, the judgments in *Micheletti and Others* (C-369/90, EU:C:1992:295), *Singh* (C-370/90, EU:C:1992:296), *Bickel and Franz* (C-274/96, EU:C:1998:563), *D'Hoop* (C-224/98, EU:C:2002:432), *Kaur* (C-192/99, EU:C:2001:106), *Baumbast and R* (C-413/99, EU:C:2002:493), *Garcia Avello* (C-148/02, EU:C:2003:539), *Zhu and Chen* (C-200/02, EU:C:2004:639), *Schempp* (C-403/03, EU:C:2005:446), *Spain* v *United Kingdom* (C-145/04, EU:C:2006:543) and *Rottmann* (C-135/08, EU:C:2010:104).

97 — Regarding the judgment in *Rottmann* (C-135/08, EU:C:2010:104), see Lenaerts, K., 'The concept of EU citizenship in the case law of the European Court of Justice' in *ERA Forum*, 2013, pp. 369 to 583, and in particular p. 575: 'That case prepared the ground for the ruling of the European Court of Justice in *Ruiz Zambrano* [(C-34/09, EU:C:2011:124)]'. See also Barnard, C., op. cit, p. 424: 'Certainly the decision, and particularly the Court's remarks in paragraph 42 in particular, paved the way for the momentous and highly controversial judgment in *Ruiz Zambrano* [(C-34/09, EU:C:2011:124)]'.

98 — C-34/09, EU:C:2011:124.

and social globalisation. It gives them rights and duties that may not be restricted by national authorities without proper justification.[99] To declare to nationals of the Member States that they are citizens of the Union is not merely a matter of defining rights and duties; it also creates expectations.[100]

118. In particular, in this development in the case-law, the principle established in the judgment in *Ruiz Zambrano*,[101] that Article 20 TFEU precludes national measures having the effect of depriving citizens of the Union of genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union, has been confirmed by the Court in later judgments.[102] The Court clarified the scope of that principle by holding that it applied to 'very specific situations in which, exceptionally, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the citizen of the Union concerned has not made use of his freedom of movement, a third-country national who is a member of the family of that citizen may not, unless the effectiveness of the citizenship of the Union that citizen enjoys is to be disregarded, be refused a right of residence if, as a consequence of such refusal, that citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status'.[103]

119. Given the background of case-law which I have outlined, in points 111 to 118 of this Opinion, the question arising in the present cases is the following: is it possible to regard the situation in which Mr Rendón Marín and his children find themselves,[104] and the situation in which CS and her child find themselves, as special or exceptional situations of the kind referred to by the Court in the judgments just mentioned? In other words, can it be confirmed that the situations in the present cases fall within the ambit of EU law?

99 — For example, it may be recalled that, according to the Court, what mattered in the case which gave rise to the judgment in *García Avello* (C-148/02, EU:C:2003:539) 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'. See the judgments in *McCarthy* (C-434/09, EU:C:2011:277, paragraph 52) and, to that effect, *Grunkin and Paul* (C-353/06, EU:C:2008:559, paragraphs 23, 24 and 29. Emphasis added.

100 — Sarmiento, D., and Sharpston, E., 'European Citizenship and its New Union: time to move on?' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge University Press (to be published).

101 — C-34/09, EU:C:2011:124.

102 — See the judgments in *McCarthy* (C-434/09, EU:C:2011:277, paragraph 47), *Dereci and Others* (C-256/11, EU:C:2011:734, paragraph 64), *Iida* (C-40/11, EU:C:2012:691, paragraph 71) and *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 32), albeit that, in those judgments, as I emphasised in my Opinion in *McCarthy and Others* (C-202/13, EU:C:2014:345, point 98), the Court held that the situations at issue fell outside the scope of EU law. Indeed, the Union citizens in question in those cases had either (i) never exercised their right to freedom of movement, having always resided in the Member State of which they were nationals and, in principle, the measures at issue did not deprive them of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (specifically, Mrs McCarthy, a British citizen, had always resided in the United Kingdom and was therefore entitled to remain there, even though her husband, a Jamaican national, had been denied a right of residence as a third-country national family member), or (ii) not been either joined or accompanied when they travelled to another Member State by the third-country national family member and did not satisfy the conditions laid down in Article 3(1) of Directive 2004/38 (specifically, the Court noted that Mr Iida was not seeking a right to reside with his wife and daughter in the host Member State, Austria, but in Germany, their Member State of origin, that the two Union citizens had not been dissuaded from exercising their right of freedom of movement and that Mr Iida himself had, in any event, certain rights of residence under national law and EU law, judgment in *Iida*, C-40/11, EU:C:2012:691, paragraphs 73 to 75).

103 — Judgments in *Dereci and Others* (C-256/11, EU:C:2011:734, paragraph 64), *Iida* (C-40/11, EU:C:2012:691, paragraph 71), *Ymeraga and Others* (C-87/12, EU:C:2013:291, paragraph 36) and *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 32). Mr Dereci was a Turkish national whose wife and three children were Austrian and had always resided in Austria, where he wished to live with them. In that situation, neither the three children nor the mother were deprived of the enjoyment of the substance of their rights because, by contrast with the case in *Ruiz Zambrano*, the children were not dependent on their father for support and could, therefore, remain in Austria.

104 — See point 106 of this Opinion.

120. I am convinced that it can. The fact that Mr Rendon Marín's children and CS's child hold the nationality of a Member State, namely, Spanish, Polish and UK nationality, respectively, the conditions for acquiring which very clearly fall within the sphere of competence of the Member States in question,[105] means that they enjoy the status of citizens of the Union.[106] Therefore, as citizens of the Union, those children have the right to move and reside freely throughout the territory of the European Union and any restriction of that right falls within the ambit of EU law.[107]

121. It is precisely a potential restriction of that right, in particular of the right of residence, that emerges from the information given in the orders for reference. The protection afforded by EU law therefore applies, since Mr Rendón Marín's children and CS's child might, as a result of the expulsion of their respective parents, into whose sole care they have been entrusted, be compelled as a matter of fact to accompany their parents and so leave the territory of the European Union 'altogether'. The expulsion of the parents would indeed deprive the children of genuine enjoyment of the substance of the rights conferred on them by their status as Union citizens.[108] It cannot be disputed that, in principle, refusing Mr Rendón Marín a permit to reside in Spain[109] or deporting CS from the United Kingdom could frustrate the *effet utile* of the status of citizens of the Union enjoyed by their respective children. Consequently, as the Commission has rightly asserted, the situations at issue are exceptional situations within the meaning of the case-law confirming the judgment in *Ruiz Zambrano*.[110]

122. I am therefore of the opinion that, in the light of the case-law mentioned, these situations fall within the ambit of EU law.

b) Whether the national legislation is compatible with the right of residence of citizens of the Union

123. The Court has made it clear that EU law does not confer any autonomous rights upon third-country nationals: any rights conferred upon third-country nationals by the Treaty provisions on citizenship of the Union are not autonomous rights but rights derived from the exercise of freedom of movement by a citizen of the Union.[111] Accordingly, derived rights of residence, in principle, exist only when they are necessary to ensure that citizens of the Union can effectively exercise their rights of free movement and residence.[112] Consequently, according to the case-law of the Court, it is the 'denial of the genuine enjoyment of the substance of the rights' attaching to the status of citizen of the Union enjoyed by the children in question that makes it necessary to protect their parents' derived rights.

124. For CS and the Commission, as the latter has argued in its written observations and oral submissions, the question that lies at the heart of this case is whether the right of a child, who is a citizen of the Union, not to be compelled to leave the European Union, which flows directly from Article 20 TFEU, is an absolute right or whether a Member State is justified in weighing primary EU law against its own interest in expelling a third-country national whose conduct, under national law, justifies his removal to a non-member State.

105 — Judgments in *Micheletti* and Others (C-369/90, EU:C:1992:295, paragraph 10) and *Rottmann* (C-135/08, EU:C:2010:104, paragraph 39).

106 — Judgments in *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 21), *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 25). See also the Opinion of Advocate General Tizzano in *Zhu and Chen* (C-200/02, EU:C:2004:307, points 47 to 52).

107 — See points 107 to 122 of this Opinion. The fact that the children have not exercised their right of free movement and residence in the European Union does not mean that they do not, as Union citizens, enjoy that right.

108 — See, to that effect, the judgments in *Dereci and Others* (C-256/11, EU:C:2011:734, paragraph 67), *Iida* (C-40/11, EU:C:2012:691, paragraph 71), *Ymeraga and Others* (C-87/12, EU:C:2013:291, paragraph 36) and *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 32).

109 — The option for Mr Rendón Marín and his children of moving to Poland, the Member State of which his daughter is a national, to which several of the intervening Member States have referred, exists only in the abstract. Mr Rendón Marín stated at the hearing that he has no ties with the family of his daughter's mother (who, so far as he is aware, does not reside in Poland) and he does not speak Polish.

110 — See, on this point, the judgments in *Dereci and Others* (C-256/11, EU:C:2011:734, paragraph 67), *Iida* (C-40/11, EU:C:2012:691, paragraph 71), *Ymeraga and Others* (C-87/12, EU:C:2013:291, paragraph 36) and *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 32).

111 — See, to that effect, the judgment in *O. and B.* (C-456/12, EU:C:2014:135, paragraph 36 and the case-law cited).

112 — See, to that effect, the Opinion of Advocate General Sharpston in *O. and B.* (C-456/12 and C-457/12, EU:C:2013:842, point 49).

125. In order to analyse that question, I should like to come back to the similarity of the solutions proposed in the judgments in *Rottmann* (C-135/08, EU:C:2010:104) and *Ruiz Zambrano* (C-34/09, EU:C:2011:124). [113]

126. The resemblance of Mr Rottmann's situation, 'capable of causing him to lose the status conferred by [Article 20 TFEU] and the rights attaching thereto', [114] to that of the children of Mr Ruiz Zambrano, capable of 'depriving [them] of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union', [115] is clearly not a mere coincidence. [116] Suffice it to observe that paragraph 42 of the judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124) is based on paragraph 42 of the judgment in *Rottmann* (C-135/08, EU:C:2010:104). At all events, the two concepts are, in my view, similar in their implications.

127. I shall now clarify that position.

128. The term 'the substance of the rights' employed by the Court inevitably calls to mind the concept of 'the essential content of the rights' or 'the essence of the rights', particularly of fundamental rights, [117] well known in the constitutional traditions of the Member States [118] and in EU law as well. [119] Moreover, EU law provides, in Article 52(1) of the Charter, as interpreted in the case-law of the Court of Justice, that limitations may be imposed on the exercise of rights, as long as those limitations are provided for by law, observe the essence of those rights and freedoms and, observing the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the necessity of protecting the rights and freedoms of others.

129. It could be argued that, observance of the principle of proportionality being one criterion in the examination of limitations that may be imposed upon the exercise of fundamental rights, [120] from the point of view of a conception of the guarantees of the essential content of fundamental rights in relative terms, [121] observance of that principle must also be verified with regard to potential limitations of the rights attaching to the fundamental status of citizen of the Union, which include the right to move and reside freely in the territory of the Member States. Pursuant to Article 45(1) of the Charter, 'every citizen of the Union has the right to move and reside freely within the territory of the Member States'.

113 — See point 114 of this Opinion.

114 — Judgment in *Rottmann* (C-135/08, EU:C:2010:104, paragraph 42).

115 — Judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124, paragraph 42).

116 — See the Opinion of Advocate General Sharpston in *Ruiz Zambrano* (C-34/09, EU:C:2010:560, point 95).

117 — Regarding this concept, whose origins are to be found in German law, see, inter alia, Häberle, P., *Die Wesensgehaltsgarantie des Art. 19 Abs. 2 GG*, 3rd ed., C.F. Müller, Karlsruhe, 1983, and Schneider, L., *Der Schutz des Wesensgehalts von Grundrechten nach Art. 19 Abs. 2 GG*, Duncker & Humblot, Berlin, 1983. In Spanish legal literature, see, in particular, De Otto, I., 'La regulación del ejercicio de los derechos fundamentales. La garantía de su contenido esencial en el artículo 53.1 de la Constitución' in *Obras Completas*, Université d'Oviedo et Centre d'Études politiques et constitutionnelles, Oviedo, 2010, p. 1471, Cruz Villalón, P., 'Derechos Fundamentales y Legislación (1991)' in *La curiosidad del jurista persa, y otros estudios sobre la Constitución*, CEPC, 2nd ed., Madrid, 2006, and Jiménez Campo, J., *Derechos fundamentales. Concepto y garantías*, 1999, Ed. Trotta, 1999.

118 — See Article 4(4) of the Czech Charter of Fundamental Rights, Article 8(2) of the Hungarian Constitution, Article 31(3) of the Polish Constitution, Article 18(3) of the Portuguese Constitution, Article 49(2) of the Romanian Constitution and Article 13(4) of the Slovak Constitution.

119 — See, inter alia, the judgment in *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraph 50). See also Wróbel, A., 'Art. 52' in *Karta Praw podstawowych Unii Europejskiej. Komenstarz*, Wróbel, A., ed. Wydawnictwo C.H. Beck, 2013, pp. 1343 to 1384, especially p. 1352.

120 — Regarding a definitive deprivation of the right to vote arising from a criminal conviction, see the judgment in *Delvigne* (C-650/13, EU:C:2015:648, paragraphs 46 to 48). Regarding restrictions on the exercise of the right to property, see the judgments in *Hauer* (44/79, EU:C:1979:290, paragraphs 23 and 30), *Schräder HS Kraftfutter* (265/87, EU:C:1989:303, paragraph 15), *Standley and Others* (C-293/97, EU:C:1999:215, paragraph 54) and *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 355).

121 — On the other hand, according to a conception of the guarantees of the essential content of fundamental rights in absolute terms, that content can in no case be limited. Regarding assessments in relative and absolute terms of the guarantees of the essential content of fundamental rights, see, in particular, Alexy, R., *A Theory of Constitutional Rights*, Oxford, 2010, pp. 192 to 196. It is maintained in Polish legal literature that the essential content of rights may, in any case, be identified only in a specific situation. See Łabno, A., 'Ograniczenia wolności i praw człowieka na podstawie art. 31 Konstytucji III RP' in *Prawa i wolności obywatelskie w Konstytucji RP*, ed. Banaszak, B., Preisner, A., Varsovie, 2002, p. 708.

130. If that approach were to be accepted, it would then be appropriate to consider that observance of the essence of the rights deriving from the fundamental status of citizen of the Union operates, as in the case of observance of the essence of fundamental rights, 'as an absolute, insuperable limit' to any possible limitation of the rights attaching thereto, that is to say, as a 'limit to limits'.[122] Indeed, failure to observe the essence of the rights conferred on citizens of the Union leads to those rights becoming 'unrecognisable as such', so that it would not then be possible to speak of a 'limitation' of the exercise of those rights but rather, purely and simply, of the 'abolition' of those rights.[123] In short, loss of citizenship of the Union (in Mr Rottmann's case, as a result of his loss of the nationality of a Member State pursuant to an administrative decision) and denial of the genuine enjoyment of the substance of the rights attaching to the status of citizen of the Union (for the children of Mr Ruiz Zambrano, as a result of their being compelled, as a matter of fact, to leave the territory of the European Union) have the same grave consequences for the right of residence of citizens of the Union. Whether the effect is final or long-term,[124] the right will, *in principle*, be stripped of its essential content, in this case, the freedom to reside in the territory of the European Union. Consequently, it must be established whether this limitation of the right of residence is proportionate, for, if it is not, it will overstep the limit set to any limitation of the rights attaching to the status of citizen of the Union, which is observance of the essential content of those rights.[125]

131. Admittedly, it could also be argued that the meaning of 'the substance of the rights', employed by the Court, is not necessarily the same as the meaning of 'the essence of the rights', referred to in Article 52(1) of the Charter.[126] However, even if it is concluded that the two terms are not equivalent,[127] given that the national measures at issue entail a limitation of the right of residence of citizens of the Union, it is still necessary to examine their proportionality if the Member State concerned invokes the public policy or public security exception.

132. It is precisely the issue of the principle of proportionality that marked an important difference in the way in which the Court examined these two cases. In the case giving rise to the judgment in *Rottmann* (C-135/08, EU:C:2010:104), the Court had to consider whether the justification, put forward by several governments, for the decision withdrawing naturalisation on account of the deception that had been practised, corresponded to a reason relating to the public interest, including one of public policy or of public security. However, in the case which led to the judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124), the Belgian Government did not invoke the public interest, or public policy or public security: Mr Ruiz Zambrano was not considered to pose a threat to public order or public security in Belgium.[128] In other words, the Court of Justice was merely asked whether it was necessary to grant Mr Ruiz Zambrano a right of residence, and the Belgian Government did not invoke the

122 — See, by analogy, the Opinion of Advocate General Cruz Villalón in *Delvigne* (C-650/13, EU:C:2015:363, points 115 and 116). Regarding this concept, whose origins are to be found in German law, see, inter alia, Häberle, P., op. cit., and Schneider, L., op. cit. In Spanish legal literature, see, in particular, De Otto, I., op. cit., p. 1471.

123 — Ibidem.

124 — In the case of minor children, the limitation on the right of residence is likely to persist for several years, until they are old enough to exercise that right independently from their parents.

125 — See, by analogy, the Opinion of Advocate General Cruz Villalón in *Delvigne* (C-650/13, EU:C:2015:363, points 115 and 116). See also the Opinion of Advocate General Bot in *Schrems* (C-362/14, EU:C:2015:627, points 175 to 177 and 185).

126 — In so far as concerns the terminology used by the Court in the judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124), compared with the terminology used by the Union legislature in the Charter, see, for example, the Spanish version (*la esencia de los derechosde los derechos (vinculados al estatuto de ciudadano de la Unión)* cf. *el contenido esencial de esos derechos (y libertades)*), the German version (*der Kernbestand der Rechte, (die der Unionsbürgerstatus verleiht)* cf. *der Wesensgehalt dieser Rechte (und Freiheiten)*), the English version (*the substance of the rights (attaching to the status of European Union citizen)* cf. *the essence of those rights (and freedoms)*), the Italian version (*diritti connessi (allo status di cittadino dell'Unione)* cf. *il contenuto essenziale di detti diritti* (*e libertà*)) and the Polish version (*istota praw (związanych ze statusem obywatela Unii) cf. istota praw i wolnościv(uznanych w Karcie)*).

127 — I would, however, note that, on examining the proportionality of limitations on the right to property, the Court has also used the expression 'the very substance of the right(s)'. See, on restrictions on the exercise of the right to property, the judgments in *Hauer* (44/79, EU:C:1979:290, paragraphs 23 and 30), *Schräder HS Kraftfutter* (265/87, EU:C:1989:303, paragraph 15), *Standley and Others* (C-293/97, EU:C:1999:215, paragraph 54) and *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 355).

128 — See, on this point, the judgment in *Carpenter* (C-60/00, EU:C:2002:434, paragraph 44).

public policy or public security exception. Consequently, the Court did not conduct an assessment of the national measure with reference to the principle of proportionality. Nevertheless, the fact that the Court did not examine the proportionality of the national measure at issue in that case does not mean that such an examination may not be appropriate in other circumstances. [129]

133. At all events, in Mr Rottmann's case, which involved the withdrawal of his German nationality and therefore the definitive loss of his citizenship of the Union, the Court acknowledged that it was for the national court to ascertain whether the withdrawal decision at issue observed the principle of proportionality with regard to the consequences it entailed for the situation of the person concerned in the light of EU law. [130] Thus, such an analysis of the principle of proportionality in the context of a public policy or public security exception would be equally appropriate in the situations in the present cases. I would note in this connection that the Court has held that, 'having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union'. [131]

134. I shall now address the question of the consequences a criminal record may have for the recognition of a derived right of residence for Mr Rendón Marín and for CS. In that context I shall also analyse the public policy or public security exception invoked by the United Kingdom, after outlining the scope of that exception.

5. Whether limits may be imposed upon a derived right of residence flowing directly from Article 20 TFEU

135. The United Kingdom Government considers that the commission of a criminal offence may cause a case to escape the ambit of the principle established in *Ruiz Zambrano*. [132]

136. Accordingly, the question arising is the following: must the fact that a party to the main proceedings has a criminal record be regarded as calling into question, as a matter of principle, the recognition of a derived right of residence which that party derives from the criterion of the 'denial of the genuine enjoyment of the substance of the rights attaching to the status of citizen of the Union' of the children of that party?

137. I think not.

138. In my opinion, the mere existence of a criminal record cannot, in itself, justify the national decisions in the cases in the main proceedings or call into question the test of 'denial of the genuine enjoyment of the substance of the rights attaching to the status of citizen of the Union' unless the national court ascertains whether those decisions are compatible with the principle of proportionality, in particular in so far as concerns their consequences for the situation in which Mr Rendón Marín and CS and their respective children, who are citizens of the Union, find themselves, in the light of EU law. [133]

129 — See, to that effect, Lenaerts, K., '"*Civis Europaeus Sum*": From the Cross-border Link to the Status of Citizen of the Union' in *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, Cardonnel, P., Rosas, A. and Wahl, N. (ed.), Hart, Oxford, 2012, pp. 213 to 232.

130 — Judgment in *Rottmann* (C-135/08, EU:C:2010:104, paragraphs 54 and 55).

131 — Ibidem (paragraph 56).

132 — C-34/09, EU:C:2011:124.

133 — See point 130 of this Opinion.

139. In this connection, I shall now examine, first of all, the implications of 'public policy' and 'public security' with reference to the national decisions at issue, which entail the 'denial of the genuine enjoyment of the substance of the rights attaching to the status of citizen of the Union'. Secondly, on the basis of that examination, I shall study the reasons which the United Kingdom has put forward for invoking an exception founded on those concepts.

a) The implications of the concept of public policy and public security in relation to the right of residence flowing from Article 20 TFEU

140. First, it should be noted that, in its judgment in *Ruiz Zambrano* [134] and in its subsequent case-law confirming that judgment, the Court gave a broad interpretation of Article 20 TFEU consistent with the fundamental nature of the status of citizen of the Union. It therefore appears appropriate, in exceptional situations involving the maintenance of public order or public security, to introduce, exceptionally, certain limitations.

141. Secondly, it should be noted that the jurisdiction of the European Union in the sphere of the free movement of persons does not impinge upon the Member States' freedom to invoke an exception relating, in particular, to the maintenance of law and order and the safeguarding of internal security. In its judgment in *van Duyn*, [135] the Court declared that 'the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty'. [136] Accordingly, it is still the Member States that are best placed to assess the threats to public order or public security in their own territory.

142. Having said that, it seems appropriate to recall that, as justifications for a derogation from the fundamental principle of freedom of movement of persons, the concepts of public order and public security must be interpreted strictly, so that their implications are not to be determined unilaterally by the Member States. [137] In other words, the discretion enjoyed by the Member States does not mean exclusion of all review by the Court, which has jurisdiction to ensure that a right as fundamental as the right to remain in the territory of a Member State is observed. In particular, the Court has stated that a 'particularly restrictive interpretation' of the derogations is 'required by virtue of a person's status as citizen of the Union'. [138]

143. In accordance with the principle of sincere cooperation, [139] the Member States are obliged to exercise their competence in the sphere of the maintenance of public order and public security in such a way as not to compromise the full effectiveness of the provisions of the Treaties. Thus, the Court has held that 'an appraisal as to whether measures designed to safeguard public policy are justified must have regard to all rules of [EU] law which are designed to limit the discretion of

134 — C-34/09, EU:C:2011:124.

135 — 41/74, EU:C:1974:133.

136 — On the principle that safeguard clauses in EU law are to be interpreted narrowly, see the judgment in *van Duyn* (41/74, EU:C:1974:133, paragraph 18).

137 — See, inter alia, the judgments in *van Duyn* (41/74, EU:C:1974:133, paragraph 18), *Bonsignore* (67/74, EU:C:1975:34, paragraph 6), *Rutili* (36/75, EU:C:1975:137, paragraph 27), *Bouchereau* (30/77, EU:C:1977:172, paragraph 33), *Calfa* (C-348/96, EU:C:1999:6, paragraph 23), *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraphs 64 and 65), *Commission* v *Spain* (C-503/03, EU:C:2006:74, paragraph 45), *Commission* v *Germany* (C-441/02, EU:C:2006:253, paragraph 34) and *Commission* v *Netherlands* (C-50/06, EU:C:2007:325, paragraph 42).

138 — Judgment in *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraph 65). The approach thus taken in the case-law accords with Directive 2004/38, recital 1 of which states that the right to move and reside freely within the territory of the Member States is 'a primary and individual right' conferred on every citizen of the Union by citizenship of the Union.

139 — See Article 4(3) TEU.

Member States in that respect and to ensure that the rights of persons subject to restrictive measures under such legislation are protected'.[140] Indeed, excessive or arbitrary recourse to the public policy or public security exception in dealings with Union citizens would create a risk of rendering their rights wholly ineffective, in particular their rights of free movement and residence.[141]

144. Thirdly, in its case-law relating to the situation of Union citizens who have a criminal conviction,[142] the Court has specified what the public policy and public security exceptions consist in. That clarification provided a basis for the identification in Directive 2004/38 of matters identified as reasons relating to public policy and public security. That directive thus provides a framework for limitations imposed, in particular, upon free movement and residence, and preserves the applicability of the case-law of the Court.

145. However, in so far as Directive 2004/38 may not apply to the situations at issue in the main proceedings,[143] in particular, to the situation of CS, the question that arises is the following.

146. To what extent is the case-law relating to expulsion measures taken against nationals of a Member State who have been convicted of a criminal offence relevant when the person having a criminal record is not himself a citizen of the Union but a third-country national who is a member of the family of a citizen of the Union?

147. I think that that case-law is relevant in the circumstances of the present cases, for the following reasons.

148. First of all, as I have just pointed out, Directive 2004/38 sets out criteria identified in the case-law in relation, in particular, to limitations of the right of residence for reasons relating to public policy and public security.

149. Secondly, those criteria apply, by virtue of Article 27(1) of Directive 2004/38, not only to citizens residing in a Member State other than that of which they are nationals, but also to members of their family, irrespective of their nationality.

150. Admittedly, Mr Rendón Marín[144] and CS do not derive from Directive 2004/38[145] their derived right of residence. However, that right does arise, in line with the judgment in *Ruiz Zambrano*,[146] from the fact that they are parents of children who are citizens of the Union and of whom they have sole care and custody and the fact that their expulsion would deprive their respective children of the 'genuine enjoyment of the substance of the rights' which they have as citizens of the Union.

151. Consequently, I see no reason why the case-law relating to expulsion measures taken against nationals of a Member State who have been convicted of a criminal offence should not apply equally to them, by analogy, provided that their situations fall within the ambit of EU law.

140 — Judgments in *Rutili* (36/75, EU:C:1975:137, paragraph 51) and *Oteiza Olazabal* (C-100/01, EU:C:2002:712, paragraph 30).

141 — See, on this point, Néraudau-d'Unienville, E., *Ordre public et droit des étrangers en Europe. La notion d'ordre public en droit des étrangers à l'aune de la construction européenne*, Bruylant, 2006, p. 424.

142 — See, inter alia, the judgments in *van Duyn* (41/74, EU:C:1974:133), *Bonsignore* (67/74, EU:C:1975:34), *Rutili* (36/75, EU:C:1975:137), *Bouchereau* (30/77, EU:C:1977:172), *Calfa* (C-348/96, EU:C:1999:6), *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262), *Commission* v *Spain* (C-503/03, EU:C:2006:74), *Commission* v *Germany* (C-441/02, EU:C:2006:253) and *Commission* v *Netherlands* (C-50/06, EU:C:2007:325).

143 — As regards Mr Rendón Marín, I am of course referring to his situation with regard to his son, who is a Spanish national. I would reiterate that, in so far as his daughter, a Polish national, is concerned, I concluded that their situation did fall within the scope of Directive 2004/38. In any event, if the national court were to conclude that Mr Rendón Marín and his daughter did not satisfy the conditions laid down in that directive (see point 106 of this Opinion), the analysis which I set out in point 146 et seq. of this Opinion will apply to the situation of Mr Rendón Marín and both of his children.

144 — In the event that Directive 2004/38 is not applicable; see point 106 of this Opinion.

145 — See Article 3(1) of Directive 2004/38.

146 — C-34/09, EU:C:2011:124.

152. To take the opposite view, that that case-law does not apply to the situations in which Mr Rendón Marín and CS find themselves, would, in my view, lead to inconsistencies in the treatment of the derived right of residence, depending on whether it flows from Directive 2004/38 or from Article 20 TFEU, as interpreted in the judgment in *Ruiz Zambrano*.[147] Would it then be acceptable for limitations of that right, for reasons relating to public policy or public security, to differ according to whether the right flowed from primary law or secondary law?

153. I think that the situation of Mr Rendón Marín perfectly illustrates this potential inconsistency. Indeed, as the Commission has rightly pointed out, the need of consistency is particularly evident in that situation, inasmuch as the two children are of different nationalities and as Directive 2004/38 applies solely to the situation of one of those two children and to the derived right of residence of the children's father.

154. Could such an inconsistency be acceptable?

155. In addition, could an interpretation of the public policy or public security exception allowing different treatment, in terms of the degree of protection afforded against expulsion measures, of minor children who are citizens of the Union and of their parents who are third-country national parents, depending on the Member State of the children's nationality, be permitted?

156. In light of the foregoing considerations, I am convinced that it is appropriate to apply, by analogy, the case-law relating to expulsion measures taken against nationals of a Member State who have been convicted of a criminal offence also to expulsion measures taken against the third-country national parents of citizens of the Union, who have been convicted of a criminal offence, in the context of the derived right of residence which such parents have in accordance with the case-law as stated in the judgment in *Ruiz Zambrano*.[148]

157. In this connection, the Commission rightly observes that the guarantees in Directive 2004/38 ought, at very least, to represent a minimum standard that must be observed when, as in the present case, the third-country national is the parent of a citizen of the Union and enjoys a right of residence in the European Union in accordance with the judgment in *Ruiz Zambrano* (C-34/09, EU:C:2011:124). The Commission also observes that the guarantees and principles affirmed in Articles 27 and 28 of Directive 2004/38 merely give details of the scope of the principle of proportionality underlying those provisions. Those guarantees are envisaged with equal clarity by Article 21 TFEU, pursuant to which every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

158. In particular, it would appear logical to me that the analysis made in points 92 and 105 of this Opinion, as regards the situation of Mr Rendón Marín and his daughter, a Polish national, should be transposed to the situation of Mr Rendón Marín and his son, a Spanish national, or possibly to both children, if, after checking the matter, the national court were to find that the situation of the daughter, who is a Polish national, does not satisfy the conditions laid down in Directive 2004/38.

159. However, it still remains for me to analyse the reasons put forward by the United Kingdom for the expulsion decision.

147 — C-34/09, EU:C:2011:124.

148 — C-34/09, EU:C:2011:124.

b) Assessment of the public policy or public security exception invoked by the United Kingdom Government

160. It must be recalled that, by contrast with the case in *Ruiz Zambrano* (C-34/09, EU:C:2011:124), in which the public policy or public security exception was not invoked by the Belgian Government, the United Kingdom Government does invoke that exception. The Court must therefore examine it.

161. In its observations, the United Kingdom Government argued that the decision to deport CS on account of her serious criminal conduct corresponded to a reason relating to public order, inasmuch as that conduct constituted a clear threat to a legitimate interest of that Member State, namely, the preservation of social cohesion and of society's values. The United Kingdom Government pointed out that, in this case, the Court of Appeal had acknowledged the gravity of the offence committed by CS. [149]

162. As regards, first of all, the legislation at issue, the national court states that, under that legislation, where a person who is not a British citizen is convicted of an offence and is sentenced to a period of imprisonment of at least 12 months, it is mandatory for the Home Secretary to make a deportation order, [150] unless that would 'breach rights of the foreign criminal under the [EU] Treaties'.

163. That legislation would therefore seem to establish an automatic systematic link between the criminal conviction of the person in question and the application of an expulsion measure against that person, or there is, at all events, a presumption that the foreign national must be removed from the United Kingdom. That excludes any weighing in the balance of the legitimate interests and any consideration of the circumstances of the particular case.

164. Secondly, as regards CS's conduct, as is clear from the order for reference, CS was convicted of a serious criminal offence for which she was sentenced to a term of imprisonment of 12 months.

165. Inasmuch as the deportation order at issue relates to a third-country national who is the parent of a minor child who is a citizen of the Union and as it would entail denial of the enjoyment of the rights which the latter derives from his status as a citizen of the Union, a sentence of one year's imprisonment may not give rise to a removal decision under the legislation at issue without any 'assessment of where the fair balance between the legitimate interests in issue lies'. [151]

166. The matters outlined in the preceding points must be taken into account by the national authority when carrying out that assessment and it is for the national court to verify that.

167. First, it is clear from the case-law [152] that, in principle, a national of a Member State or a member of his family may not be expelled solely on the grounds of a past criminal conviction. [153] A removal measure must in fact be based on an individual examination of the particular case. Accordingly, the conduct of the person in question must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. [154] It is therefore on the individual conduct of the person in question that a Member State might found a possible expulsion order. Consequently, it is

149 — It is apparent from the documents before the Court that, according to the Court of Appeal, CS's position as a mother having care and custody of a minor child had been taken into account as a mitigating circumstance, without which 'the sentence would no doubt have been longer'.

150 — See also point 13 of this Opinion.

151 — The Court has pointed out that 'it is for the competent national authority to take into account, in its assessment of where lies the fair balance between the legitimate interests in issue, the particular legal position of persons subject to [EU] law and of the fundamental nature of the principle of the free movement of persons'; see the judgment in *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraph 96).

152 — Judgments in *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262), *Tsakouridis* (C-145/09, EU:C:2010:708), and *P.I.* (C-348/09, EU:C:2012:300).

153 — See also Articles 27 and 28 of Directive 2004/38.

154 — Judgments in *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraph 95), *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 48), and *P.I.* (C-348/09, EU:C:2012:300, paragraph 30).

necessary, in my opinion, to identify what, in CS's conduct or in the offence which she committed, might constitute either a serious ground of public policy or public security [155] or imperative grounds of public security capable of justifying an order for her expulsion from the United Kingdom. [156] Indeed, given that it is apparent from the order for reference that CS has had indefinite leave to remain in the United Kingdom since 2005 and that her child, who is a citizen of the Union, is a minor, my thinking should be guided by one of those two factors.

168. In the present case, given that the minor child who is a citizen of the Union might, as a consequence of the expulsion of his mother, temporarily have to leave the territory of the European Union altogether, it is appropriate, to my mind, that he should be accorded the enhanced protection implied by the term 'imperative grounds of public security'. Accordingly, only imperative grounds of public security are capable of justifying the adoption of an expulsion order against CS if, as a consequence, her child would have to follow her.

169. Given the brevity of the factual background given in the order for reference, it is difficult to assess accurately the severity of the threat to society posed by an offence such as that committed by CS or the possible consequences that such an offence might have for public order or public security in the Member State in question.

170. I would observe that the Court has held that *public security* covers both a Member State's internal and external security. [157] In particular, it has held that 'a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security'. [158] The court has also stated that the fight against crime in connection with dealing in narcotics as part of an organised group, [159] combating terrorism [160] and combating the sexual exploitation of children [161] are included within the concept of 'public security'.

171. In this context, any threat to the public order or public security of a Member State must be genuine and present. Consequently, the risk of reoffending must be examined as part of the assessment of the conduct of the person in question. [162]

172. In that assessment, account must be taken of the fundamental rights whose observance the Court ensures, in particular, the right to respect for private and family life, as set forth in Article 7 of the Charter and Article 8 ECHR, [163] as well as observance of the principle of proportionality.

155 — The concept of a 'serious ground of public policy or public security' employed in Article 28(2) of Directive 2004/38 applies to '*Union citizens [and] their family members*, irrespective of nationality, who have the right of *permanent residence*'; emphasis added.

156 — Under Article 28(3) of Directive 2004/38, this concept is employed in the case of expulsion decisions taken against Union citizens who are minors, unless the expulsion is necessary in the best interests of the child.

157 — Judgment in *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 43 and the case-law cited).

158 — Ibidem (paragraph 44 and the case-law cited).

159 — To that effect, ibidem (paragraphs 45 and 46).

160 — See the judgment in *Oteiza Olazabal* (C-100/01, EU:C:2002:712).

161 — See the judgment in *P.I.* (C-348/09, EU:C:2012:300).

162 — The Court has held in this connection that if a finding that such a threat exists 'implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy'; see the judgment in *Bouchereau* (30/77, EU:C:1977:172, paragraph 29).

163 — See, to that effect, the judgment in *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 52). See also ECtHR, *Jeunesse v. Netherlands* [GC], no. 12738/10, § 114 to 122, 3 October 2014.

173. Accordingly, in assessing whether an expulsion measure is proportionate to the legitimate aim pursued, that being, in this case, the protection of public order or public security, account must be taken of the nature and seriousness of the offence, the duration of residence of the person concerned in the territory in question, his age,[164] state of health, family and economic situation, his social and cultural integration into the Member State of residence and the extent of his links with his country of origin.

174. According to the case-law of the European Court of Human Rights, it must be determined whether there are any exceptional circumstances that warrant a finding that the national authorities have failed to strike a fair balance between the competing interests, in particular the interest of the children in maintaining their family life in the Member State in question, and thus whether the fundamental right of respect for family life guaranteed by Article 8 ECHR has been observed,[165] especially in cases involving an expulsion decision, like the present case. The consequences which such a decision might have for the children must therefore be taken into account. In weighing the interests at stake, the best interests of the children must be taken into account.[166] Particular attention must be paid to their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents.[167]

175. At all events, the Court having held that a Member State may, in the interests of public policy or public security, consider that the offences listed in point 170 of this Opinion constitute a danger for society such as to justify special measures against foreign nationals who contravene the laws in question,[168] it must follow that the criminal offence at issue is covered by the concept of public security, provided that it has consequences which threaten public security, which it is a matter for the national court to assess.

c) Interim conclusion in Case C-165/14

176. It is contrary to Article 20 TFEU, as interpreted in the light of the judgments in *Zhu and Chen*[169] and *Ruiz Zambrano*,[170] for national legislation to require the automatic refusal of a residence permit for a third-country national, the parent of minor children who are citizens of the Union and of whom the parent has sole care and custody, on the grounds of the parent's criminal record, when the consequence of such a refusal is that the children will have to leave the territory of the European Union.

164 — In the case of a Union citizen who has lawfully spent most or even all of his childhood and youth in the host Member State, very good reasons would have to be put forward to justify the expulsion measure. See the judgment in *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 53) and, to that effect, inter alia, the judgment in *Maslov v. Austria* [GC], no. 1638/03, § 61 et seq, ECHR 2008.

165 — See, inter alia, ECtHR, *Jeunesse v. Netherlands* [GC], no. 12738/10, § 118, 3 October 2014.

166 — Ibidem, § 118. See also ECtHR, *Neulinger and Shuruk* v. *Switzerland* [GC], no. 41605/07, § 135, ECHR 2010 and *X v. Latvia* [GC], no. 27853/09, § 96, ECHR 2013.

167 — Ibidem, § 118. See also ECtHR, *Tuquabo-Tekle and Others v. Netherlands*, no. 60665/00, § 44, 1 December 2005.

168 — See, to that effect, the judgment in *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 54).

169 — C-200/02, EU:C:2004:639.

170 — C-34/09, EU:C:2011:124.

d) Interim conclusion in Case C-304/14

177. Having regard to the foregoing considerations, I propose that the Court's answer should be that it is, in principle, contrary to Article 20 TFEU for a Member State to expel from its territory to a non-member State a third-country national who is the parent of a child who is a national of that Member State and of whom the parent has sole care and custody, when to do so would deprive the child who is a citizen of the Union of genuine enjoyment of the substance of his or her rights as a citizen of the Union. Nevertheless, in exceptional circumstances, a Member State may adopt such a measure, provided that it:

— observes the principle of proportionality and is based on the personal conduct of the foreign national, which must constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and

— is based on an imperative reason relating to public security.

178. It is for the referring court to determine whether that is the position in the case before it.

VI – Conclusion

179. In light of all the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Tribunal Supremo (Supreme Court) and the Upper Tribunal (Immigration and Asylum Chamber) London as follows.

In Case C-165/14:

Article 21 TFEU and Directive 2004/38 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 must be interpreted as precluding national legislation which requires the automatic refusal of a residence permit for a third-country national who is the parent of a minor child who is a citizen of the Union and a dependent of that parent and lives with that parent in the host Member State, when that parent has a criminal record.

It is contrary to Article 20 TFEU, as interpreted in the light of the judgments in *Zhu and Chen* (C-200/02, EU:C:2004:639) and *Ruiz Zambrano* (C-34/09, EU:C:2011:124), for that national legislation to require the automatic refusal of a residence permit for a third-country national, the parent of minor children who are citizens of the Union and of whom the parent has sole care and custody, on the grounds of the parent's criminal record, when the consequence of such a refusal is that the children will have to leave the territory of the European Union.

In Case C-304/2014:

It is, in principle, contrary to Article 20 TFEU for a Member State to expel from its territory to a non-member State a third-country national who is the parent of a child who is a national of that Member State and of whom the parent has sole care and custody, when to do so would deprive the

child who is a citizen of the Union of genuine enjoyment of the substance of his or her rights as a citizen of the Union. Nevertheless, in exceptional circumstances, a Member State may adopt such a measure, provided that it:

— observes the principle of proportionality and is based on the personal conduct of the foreign national, which must constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and

— is based on an imperative reason relating to public security

It is for the referring court to determine whether that is the position in the case before it.