OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 30 September 2010[1]

1. The present reference from the Tribunal du travail de Bruxelles concerns the scope of the right of residence for third country nationals who are the parents of an infant Union citizen who has not, as yet, left the Member State of his birth.

2. In answering the questions referred by the national court, the Court has a number of difficult and important choices to make. What precisely does Union citizenship entail? Do the circumstances giving rise to the national proceedings constitute a situation that is 'purely internal' to the Member State concerned, in which European Union ('EU') law has no role to play? Or does full recognition of the rights (including the future rights) that necessarily flow from Union citizenship mean that an infant EU citizen has a right, based on EU law rather than national law, to reside anywhere within the territory of the Union (including in the Member State of his nationality)? If so, ensuring that he can exercise that right effectively may entail granting residence to his third country national parent if there would otherwise be a substantial breach of fundamental rights.

3. At a more conceptual level, is the exercise of rights as a Union citizen dependent – like the exercise of the classic economic 'freedoms' – on some trans-frontier free movement (however accidental, peripheral or remote) having taken place before the claim is advanced? Or does Union citizenship look forward to the future, rather than back to the past, to define the rights and obligations that it confers? To put the same question from a slightly different angle: is Union citizenship merely the non-economic version of the same generic kind of free movement rights as have long existed for the economically active and for persons of independent means? Or does it mean something more radical: true citizenship, carrying with it a uniform set of rights

1 — Original language: English.

and obligations, in a Union under the rule of law [2] in which respect for fundamental rights must necessarily play an integral part?

Legal framework

Relevant EU law

4. Article 6 TEU (former Article 6 EU) provides:

'1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

5. Article 18 TFEU (former Article 12 EC) provides:

'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

…'

2 — I borrow the expression 'Union under the rule of law' from Advocate General Dámaso Ruiz-Jarabo Colomer's Opinion in Case C-228/07 *Petersen* [2008] ECR I-6989, point 32. Following his sudden and untimely death on 12 November 2009, I took over responsibility for the present reference. I should like at the outset to acknowledge both the work and commitment that he had already invested in this case and, more generally, the quality and extent of his contribution to what was still, for him, 'Community' rather than 'EU' law.

6. Article 20 TFEU (former Article 17 EC) states:

‘1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties.

…’

7. Article 21 TFEU (former Article 18 EC) provides:

‘1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

…’

8. Articles 7, 21 and 24 of the Charter of Fundamental Rights of the European Union [3] state:

‘*Article 7*

Respect for private and family life

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

…

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

3 — Proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1). An updated version was approved by the European Parliament on 29 November 2007, after removal of references to the European Constitution (OJ 2007 C 303, p. 1).

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

…

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'

Relevant international provisions

9. Article 17 of the International Covenant on Civil and Political Rights [4] provides:

'1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.'

10. Article 9.1 of the Convention on the Rights of the Child [5] states:

'1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the

4 — Treaty opened for signature on 19 December 1966; *United Nations Treaty Series*, vol. 999, p. 171 and vol. 1057, p. 407. All Member States of the European Union are party to the Covenant and no reservations have been introduced to Article 17.

5 — Treaty adopted by resolution 44/25 of 20 November 1989; *United Nations Treaty Series*, vol. 1577, p. 3. All Member States of the EU are party to the Covenant and no reservations have been entered to Article 9.1.

child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.'

11. Article 8 of, and Article 3 of Protocol 4 to, the European Convention of Human Rights ('the ECHR') state as follows: [6]

'Article 8

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.

...

Article 3 of Protocol 4

No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national

No one shall be deprived of the right to enter the territory of the State of which he is a national.'

Relevant national legislation

The Royal Decree of 25 November 1991

12. Article 30 of the Royal Decree of 25 November 1991 concerning rules on unemployment provides as follows:

'In order to be eligible for unemployment benefit, a full-time worker must have completed a qualifying period comprising the following number of working days:

1. ...

6 — Signed in Rome on 4 November 1950 and ratified by all Member States of the European Union. The position is slightly more complicated in respect of Protocol 4. At present, Greece has neither signed nor ratified that Protocol, whilst the United Kingdom has signed but not ratified it. Austria, Ireland and the Netherlands have entered reservations to Article 3 on specific points that are not relevant to the facts and issues of the present case.

2. 468 during the 27 months preceding the claim, if the worker is more than 36 and less than 50 years of age,

…'

13. Article 43(1) of the Royal Decree states:

'Without prejudice to the previous provisions, a foreign or stateless worker is entitled to unemployment benefit if he or she complies with the legislation relating to aliens and to the employment of foreign workers.

Work undertaken in Belgium is not taken into account unless it complies with the legislation relating to the employment of foreign workers.'

14. According to the relevant provisions of Belgian legislation (Article 40 of the Law of 15 December 1980 and Article 2 of the Royal Decree of 9 June 1999), the spouse of an EC foreign national and his children or those of his spouse who are dependent on them, whatever their nationality, are to be treated in the same way as the EC foreign national provided that they come with the purpose of settling with him.

15. Dependent relatives in the ascending line of a Belgian national or of an EC foreign national, whatever their nationality, do not require work permits (by virtue of, respectively, Article 2(2)2°(b) of the Royal Decree implementing the Law of 30 April 1999 on the employment of foreign workers and Article 40(4)(iii) of the Law of 15 December 1980).

The Belgian Nationality Code

16. Under Article 10(1) of the Belgian Nationality Code, in the version applicable at the relevant time, those having Belgian nationality included:

'[A]ny child born in Belgium who, at any time before reaching the age of 18 or being declared of full age, would be stateless if he or she did not have Belgian nationality.'

17. Subsequently, the Law of 27 December 2006 rendered it impossible for a child born in Belgium to non-Belgian nationals to acquire Belgian nationality 'if, by appropriate administrative action instituted with

the diplomatic or consular authorities of the country of nationality of the child's parent(s), the child's legal representative(s) can obtain a different nationality for it'.

Facts and main proceedings

18. Mr Ruiz Zambrano and his wife, Mrs Moreno López are both Colombian nationals. They arrived in Belgium on 7 April 1999, holding a visa issued by the Belgian embassy in Bogotá, accompanied by their first child.

19. A week later, Mr Ruiz Zambrano requested asylum in Belgium. He based that application on the need to flee from Colombia after being exposed since 1997 to continuous extortion demands (backed by death threats) from private militias, witnessing assaults on his brother and suffering the abduction of his three-year old son for one week during January 1999.

20. On 11 September 2000 the Commissariat général aux réfugiés et aux apatrides (Commissariat-general for Refugees and Stateless Persons) refused Mr Ruiz Zambrano's application for asylum and made an order requiring him to leave Belgium. However, it added a *non-refoulement* clause, stating that Mr Ruiz Zambrano and his family should not be sent back to Colombia in view of the critical situation there.

21. Notwithstanding that order, Mr Ruiz Zambrano requested a residence permit from the Office des Étrangers (Aliens' Office) on 20 October 2000. He subsequently made two further applications. [7] All three applications were refused. Mr Ruiz Zambano sought annulment of those decisions and, in the meantime, requested the suspension of the order requiring him to leave Belgium. At the time when the present reference for a preliminary ruling was made, the action for annulment was still pending before the Conseil d'État.

22. Since 18 April 2001, Mr Ruiz Zambrano and his wife have been registered in the municipality of Schaerbeek.

23. In October 2001 Mr Ruiz Zambrano obtained full-time employment with a Belgian company, Plastoria SA ('Plastoria'), in its Brussels workshop, carrying out workshop duties under an employment contract for an unlimited period. The work was duly declared

7 — The further applications followed the birth of his second and third children: see below, point 26.

to the Office national de la sécurité sociale (National Social Security Office). His pay was subject to statutory social security deductions in the usual way and his employer was accordingly required to pay (and did pay) the corresponding contributions. The order for reference does not explicitly indicate whether (as is often the case) his earnings were also subject to deduction of income tax at source.

24. Mr Ruiz Zambrano did not hold a work permit when he was hired by Plastoria. Nor did he obtain one in the course of the five years during which he worked for the company.

25. In the meantime his wife gave birth to a second child, Diego, on 1 September 2003, and to a third, Jessica, on 26 August 2005. Both children were born in Belgium. Pursuant to Article 10(1) of the Belgian Nationality Code, both acquired Belgian nationality. [8] Mr Ruiz Zambrano's counsel informed the Court during the hearing that both Diego and Jessica are presently enrolled in school in Schaerbeek.

26. The birth of Diego and Jessica gave rise, respectively, to the second and third applications lodged with the Aliens' Office. [9] In each of those applications, Mr Ruiz Zambrano claimed that the birth of a child who is a Belgian national entitled him to a residence permit on the basis of the Law of 15 December 1980 and Article 3 of Protocol 4 to the European Convention of Human Rights.

27. As a result of the third application, the Belgian authorities issued a decision granting Mr Ruiz Zambrano a residence registration certificate covering his stay in Belgium from 13 September 2005 until 13 February 2006. Following his appeal against the various decisions refusing him a residence permit, Mr Ruiz Zambrano's stay in Belgium was covered by a special authorisation pending final determination of those proceedings.

28. On 10 October 2005 Mr Ruiz Zambrano's contract was temporarily suspended. He immediately applied to the Office national de l'emploi (National Employment Office) for temporary unemployment benefits. That application was eventually refused, on the ground that he did not hold a work permit (because his stay in Belgium was irregular). He brought a first action before the Tribunal du travail (Employment Tribunal) challenging that refusal ('the first claim'), but was

8 — According to the relevant Colombian legislation, children born outside the territory of Colombia do not acquire Colombian nationality unless an express declaration is made to that effect with the appropriate consular officials. No such declaration was made in respect of Diego and Jessica Ruiz Moreno.

9 — See point 21 above.

shortly after recruited again by Plastoria to work full-time.

29. However, as a result of that first action, the Belgian labour authorities made enquiries to verify the conditions upon which Mr Ruiz Zambrano was employed. An official investigator visited Plastoria's premises on 11 October 2006. He found Mr Ruiz Zambrano at work and confirmed that he did not have a work permit. The investigator issued an order for the immediate termination of his employment. Plastoria duly ended Mr Ruiz Zambrano's employment contract, without compensation, on grounds of force majeure; and gave him the official document ('form C4') that certified that social security contributions and unemployment insurance had been paid covering his entire period of employment from October 2001 to October 2006.

30. The Belgian labour authorities decided not to bring criminal charges against Plastoria, stating that, apart from the fact that the company had recruited Mr Ruiz Zambrano without a work permit, no other breaches had been found of the requirements relating to social security obligations, deposit of correct employment documents, coverage against accidents at work, or obligations in respect of remuneration.

31. Finding himself unemployed, Mr Ruiz Zambrano again applied to the National Employment Office, this time for full unemployment benefit. Again he was refused payment of the benefit. Mr Ruiz Zambrano brought a further action before the Tribunal du travail de Bruxelles against that decision ('the second claim'). The first claim and the second claim form the subject-matter of the main proceedings before the referring court.

32. In its written submissions, the Belgian Government states that, as a result of a government measure to regularise specific situations of illegal residents in the country, on 30 April 2009 Mr Ruiz Zambrano was granted a provisional and renewable residence permit, as well as a work permit (type C). The latter does not have retroactive effect; and Mr Ruiz Zambrano's employment with Plastoria from 2001 to 2006 is still considered as not being covered by a work permit.

The questions referred

33. In the proceedings brought against the two decisions of the National Employment Office refusing Mr Ruiz Zambrano's claim to temporary and full unemployment benefit,

the Tribunal du travail de Bruxelles (Employment Tribunal, Brussels) referred the following questions for a preliminary ruling:

'(1) Do Articles 12 [EC], 17 [EC] and 18 [EC], or one or more of them when read separately or in conjunction, confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?

(2) Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right which they recognise, without discrimination on the grounds of nationality, in favour of any citizen of the Union to move and reside freely in the territory of the Member States means that, where that citizen is an infant dependent on a relative in the ascending line who is a national of a non-member State, the infant's enjoyment of the right of residence in the Member State in which he resides and of which he is a national must be safeguarded, irrespective of whether the right to move freely has been previously exercised by the child or through his legal representative, by coupling that right of residence with the useful effect whose necessity is recognised by Community case-law (Case C-200/02 *Zhu and Chen*), and granting the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who has sufficient resources and sickness insurance, the secondary right of residence which that same national of a non-member State would have if the child who is dependent upon him were a Union citizen who is not a national of the Member State in which he resides?

(3) Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right of a minor child who is a national of a Member State to reside in the territory of the State in which he resides must entail the grant of an exemption from the requirement to hold a work permit to the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who, were it not for the requirement to hold a work permit under the national law of the Member State in which he resides, fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State, so that the child's right of residence is coupled with the useful effect recognised by Community case-law (Case C-200/02

Zhu and Chen) in favour of a minor child who is a European citizen with a nationality other than that of the Member State in which he resides and is dependent upon a relative in the ascending line who is a national of a non-member State?'

34. Written observations were submitted by Mr Ruiz Zambrano, by the Belgian, Danish, German, Greek, Irish, Netherlands, Austrian and Polish Governments and by the Commission.

35. Counsel for Mr Ruiz Zambrano and agents for the Belgian, Danish, Greek, French, Irish and Netherlands Governments and the Commission attended the hearing on 26 January 2010 and presented oral argument.

Preliminary matters

36. No one involved in the present reference has specifically questioned its admissibility. However, there are two matters that I should briefly address.

37. The first is whether the questions referred have any real bearing upon the case before the national court.

38. It is apparent from the material contained in the order for reference that Mr Ruiz Zambrano has fulfilled the substantive conditions to be able to claim unemployment benefit (such as having worked for at least 468 days during the 27 months preceding the claim, as required by Article 30 of the Royal Decree of 25 November 1991, and having paid the appropriate social security contributions). His claim faces two interlinked obstacles. First, national law states [10] that only work that complies with the legislation relating to aliens and foreign workers may be taken into account. Applying that condition would mean disregarding Mr Ruiz Zambrano's full-time employment with Plastoria from 1 October 2001 to 12 October 2006, because at no stage during that period did he hold a work permit; and he only held a residence registration certificate from 13 September 2005 onward. [11] Second, national law states that in order to receive

10 — Article 43(1), second sentence, of the Royal Decree of 25 November 1991 and Article 7(14), second sentence, of the Decree-Law of 28 December 1944.

11 — See, respectively, points 24 and 22 above.

allowances a foreign worker must comply with the legislation relating to aliens. [12]

39. Mr Ruiz Zambrano's whole claim before the national court turns on whether, as a third country national who is the father of children who hold Belgian nationality, either (a) his position can be assimilated to that of an EU national or (b) he enjoys a derivative right of residence from the fact that, as well as being Belgian nationals, his children are citizens of the Union. Both (a) and (b) would confer the necessary substantive right of residence as a matter of EU law; [13] (a) would of itself also exempt him from the need to hold a work permit; and (b) would arguably permit him to benefit, by necessary analogy, from the dispensation from the work permit requirement that is available, under Article 2(2)2°(b) of the Law of 30 April 1999, to *dependent* relatives in the ascending line of a Belgian national. If such were not the case (the argument runs), there would be reverse discrimination against Belgian nationals who had not exercised rights of free movement under EU law, in as much as they would be unable to benefit from the family reunification provisions [14] that enable both an EU national who has moved to Belgium from another Member State and a Belgian who has previously exercised freedom of movement to be joined by a non-dependent ascendant family member who is a third country national.

40. Even though the immediate subject-matter of the action before the national court concerns a claim under social security/employment law for unemployment benefit, rather than an administrative law application for a residence permit, it is thus clear that the national court cannot decide the case with which it is seised without knowing (a) whether Mr Ruiz Zambrano can claim derivative rights under EU law by virtue of the fact that, as Belgian nationals, his children are also citizens of the Union and (b) what rights would be enjoyed by a Belgian who, as a citizen of the Union, *had* moved to another Member State and then returned to Belgium (in order to evaluate the reverse discrimination argument and apply any relevant rules of national

12 — Article 43(1), first sentence, and Article 69(1) of the Royal Decree of 25 November 1991 and Article 7(14), first sentence, of the Decree-Law of 28 December 1944.

13 — It is settled case-law that a residence permit serves to confirm the right of residence rather than to confer it: see Case 48/75 *Royer* [1976] ECR 497, paragraph 50, and Case C-215/03 *Oulane* [2005] ECR I-1215, paragraph 25.

14 — Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), now replaced by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158, p. 77, with corrigendum OJ 2004 L 229, p. 35).

law). Furthermore, the national court has explained in some detail that national law [15] refers to EU law for the definition of who is considered to be a 'family member' of a citizen of the Union, indicating that this is pertinent for the resolution of the case before it. [16]

41. The second matter arises from the fact that counsel for Mr Ruiz Zambrano informed the Court that the Belgian Conseil d'État and the Cour Constitutionnelle have both recently ruled in similar circumstances that, as a result of the reverse discrimination created by EU law, there had been a breach of the constitutional principle of equality. [17] It could perhaps be thought that, in consequence, the present reference has become superfluous. Put another way: does the referring court still need answers to its questions about EU law now that it has that guidance under national law from its own superior courts?

42. In my view, it does.

43. Before the Tribunal du travail can apply the case-law developed by the Conseil d'État and the Cour Constitutionnelle, it will have to ascertain whether a situation of reverse discrimination does indeed arise as a result of the interaction between EU law and national law. To do that, it needs guidance from the Court as to the proper interpretation of EU law. The Court has in the past determined references that serve precisely that purpose: to facilitate the referring court's task of comparing the position under EU law with the position under national law. [18] It has accepted in a series of cases that it should give a ruling where the 'interpretation of provisions of Community [now EU] law might possibly be of use to the national court, in particular if the law of the Member State concerned were to require every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from Community [now EU] law in a situation considered to be comparable by

15 — Article 40a of the Law of 15 December 1980 and Article 2 of the Royal Decree of 9 June 1999.

16 — See Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 42.

17 — Conseil d'État, arrêt 193.348 of 15 May 2009 and arrêt 196.294 of 22 September of 2009; Cour Constitutionnelle, arrêt 174/2009 of 3 November 2009.

18 — See, for example, Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 23; Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch* [2002] ECR I-2157, paragraph 26; Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 41; and Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 29.

that court'.[19] Indeed, the agent for Belgium accepted in oral argument that the referring court would need a reply from the Court of Justice in order to examine whether there was reverse discrimination caused by EU law.

44. It follows that the Court should answer the questions referred.

Rearrangement of the issues to be resolved

45. The questions posed by the national court envisage three strands of argument. Whilst these are, perhaps, not entirely clear from the actual wording of the questions referred, they may be deduced from the more detailed analysis set out in the order for reference.

46. The referring court's main concern has to do with whether movement is needed to trigger the Treaty's provisions on citizenship of the Union. The referring court is well aware that Articles 20 and 21 TFEU are different, conceptually, from free movement for workers under Article 45 TFEU, freedom of establishment under Article 49 TFEU (or, indeed, from all the 'economic' freedoms enshrined in Articles 34 TFEU and following). But just how different are the citizenship provisions?

47. The national court next enquires into the role that fundamental rights play (in particular the fundamental right to family life, as developed by the Court in *Carpenter*,[20] *MRAX*[21] and *Zhu and Chen*[22]) in determining the scope of application of Articles 20 and 21 TFEU.

48. Finally, the national court asks about the function of Article 18 TFEU in protecting individuals against reverse discrimination created by EU law through the provisions relating to citizenship of the Union.

19 — *Government of the French Community and Walloon Government*, cited in previous footnote, paragraph 40.

20 — Case C-60/00 [2002] ECR I-6279.

21 — Case C-459/99 [2002] ECR I-6591.

22 — Case C-200/02 [2004] ECR I-9925. Having checked the national file in *Zhu and Chen*, I take this opportunity to clarify a long-running confusion in nomenclature. Catherine's mother was born Lavette Man Chen. She married Guoqing Zhu (known as Hopkins Zhu) and became Mrs Zhu. The couple's daughter was therefore Catherine Zhu. Both mother and daughter bore the surname Zhu when the application that gave rise to Case C-200/02 was lodged. The reference to Chen (and the ensuing confusion as to which applicant was Zhu and which Chen) flows from a simple misunderstanding.

49. For the sake of clarity, and so as to give a useful answer to the referring court, I will approach the three questions as follows.

50. I shall deal first with the question of whether Diego and Jessica can invoke rights under Articles 20 and 21 TFEU as citizens of the Union, notwithstanding that they have not (as yet) moved from their Member State of nationality; and whether Mr Ruiz Zambrano can therefore claim a derivative right of residence in order to be present in Belgium to look after and support his young children ('question 1'). Addressing that question requires me to consider whether this is – as has been strongly suggested – a 'purely internal' situation, or whether there is indeed a sufficient link with EU law for citizenship rights to be invoked. It also raises the issue of whether Article 21 TFEU encompasses two independent rights – a right to move *and* a free-standing right to reside – or whether it merely confers a right to move (and *then* reside).

51. Second, I shall address the issue of reverse discrimination, which is repeatedly raised by the national court. I shall therefore enquire into the scope of Article 18 TFEU and ask whether it can be applied so as to resolve instances of reverse discrimination created by the provisions of EU law relating to citizenship of the Union ('question 2'). Although this question has been touched upon in recent years, [23] it still remains unresolved.

52. Finally I shall deal with the fundamental rights issue ('question 3'). The national court has made it very plain in the order for reference that it seeks guidance as to whether the fundamental right to family life plays a role in the present case, where neither the Union citizen nor his Colombian parents have moved outside Belgium. That question raises in turn a more basic question: what is the scope of EU fundamental rights? Can they be relied upon independently? Or must there be some point of attachment to another, classic, EU right?

53. Since it is clear that the issue of fundamental rights appears as a leitmotif running through all three questions, before commencing that analysis I shall – as a prologue – look at whether it is plausible to think that Mr Ruiz Zambrano and his family run a real risk of suffering a breach of the fundamental right to family life under EU law.

23 — See notably my Opinion in *Government of the French Community and Walloon Government*, cited in footnote 18 above.

Prologue: the Ruiz Zambrano family's circumstances and the potential breach of the EU fundamental right to family life

54. In *Carpenter*, [24] the Court recognised the fundamental right to family life as part of the general principles of EU law. In reaching that conclusion, it relied on the case-law of the European Court of Human Rights ('the Strasbourg court'). In *Boultif* [25] that court held that 'the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8(1) of the [ECHR]'. [26] The ECHR definition of 'family' is mostly limited to the nuclear family, [27] which clearly encompasses Mr Ruiz Zambrano and Mrs Moreno López as the parents of Diego and Jessica.

55. The Strasbourg court's settled case-law likewise establishes that removal of a person from his family members is permissible only when it is shown to be 'necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued'. [28] The application of Article 8(2) of the ECHR, derogating from the right guaranteed by Article 8(1) of the ECHR, entails a proportionality test that takes account (inter alia) of elements such as when the family settled, the good faith of the claimant, the cultural and social contrasts of the State to which the family members would be taken and their degree of integration in the contracting State's society. [29]

56. For its part, the Court of Justice, although relying closely on the Strasbourg court's case-law, has developed its own line of reasoning. In summary, the Court will grant protection in the following cases and/or by reference to the following factors. [30]

24 — Cited in footnote 20 above, paragraph 41; see also *MRAX*, cited in footnote 21 above, paragraph 53; Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 109; Case C-157/03 *Commission* v *Spain* [2005] ECR I-2911, paragraph 26; Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraph 41; Case C-109/01 *Akrich* [2003] ECR I-9607, paragraphs 58 and 59; Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 52; and Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 79. On the Community fundamental right to family life and its impact on third country nationals, see S. Carrera, *In Search of the Perfect Citizen?,* Marinus Nijhoff Publishers, Leiden, 2009, pp. 375 to 388.

25 — *Boultif* v *Switzerland*, judgment of 2 August 2001, §§ 39, 41 and 46, ECHR 2001-IX.

26 — See also *Amrollahi* v *Denmark*, judgment of 11 July 2002, §§ 33 to 44, unreported.

27 — *Slivenko* v *Latvia*, judgment of 9 October 2003 § 94, ECHR 2003-X.

28 — See *Mehemi* v *France*, judgment of 26 September 1997 § 34, ECHR 1997-VI and *Dalia* v *France*, 19 February 1998 § 52, ECHR 1998-I.

29 — *Sen* v *Netherlands*, judgment of 21 December 2001, § 40, unreported.

30 — On the differences between the Court's case-law and the Strasbourg court's case-law on Article 8 of the ECHR, see F. Sudre, *Les grands arrêts de la Cour européenne des Droits de l'Homme,* 3rd edition, Paris, PUF, 2003, pp. 510 and 511.

57. First, the Court does not require the citizen of the Union to be the claimant in the main proceedings in order to trigger protection. Thus, the fundamental right to family life under EU law has already served indirectly to protect third country nationals who were close family members of the Union citizen. Because there would have been interference with the Union citizen's right to family life, the third country national who was the family member bringing the claim also enjoyed protection. [31]

58. Second, the fundamental right may be invoked even if the family member who is being ordered to leave the country is not a legal resident. [32]

59. Third, the Court takes into account whether the family member constitutes a danger to public order or public safety (which would justify removal from the territory). [33]

60. Fourth, the Court will accept a justification based on abuse of rights only where the Member State can put forward clear evidence of bad faith on the part of the applicant. [34]

61. These and other features of the fundamental rights at issue here – the right to family life and the rights of the child – are reflected, respectively, in Articles 7 and 24(3) of the Charter. At the material time the Charter was 'soft' law and did not bind the Belgian authorities. However, it was already being relied upon by the Court as an aid to interpretation, including in cases involving the right to family life. [35] Since the entry into force of the Treaty of Lisbon, the Charter has acquired the status of primary law. [36]

62. In my view, the Belgian authorities' decision to order Mr Ruiz Zambrano to leave Belgium, followed by their continued refusal

31 — See *Carpenter*, cited in footnote 20 above. In *Zhu and Chen*, cited in footnote 22 above, both the infant daughter (Catherine Zhu, the Union citizen) and the third country national (her mother, Mrs Zhu) were, formally, applicants. Given Catherine's age, the action was effectively brought by the mother alone, on behalf of her daughter and herself.

32 — See *Carpenter*, cited in footnote 20 above, paragraph 44. Under UK immigration law, Mrs Carpenter was an 'overstayer' (someone who had had permission to enter the United Kingdom but who had then stayed beyond the expiry of that permission), whereas Mr Ruiz Zambrano is an asylum seeker whose claim to asylum has been refused. As I understand it, however, no distinction can be drawn on that basis. It is clear from the judgment in *Carpenter* that the Secretary of State was as entitled under national law to proceed against Mrs Carpenter as the Belgian authorities are to proceed against Mr Ruiz Zambrano in the present case.

33 — See *Carpenter*, cited in footnote 20 above, paragraph 44.

34 — See *Carpenter*, cited in footnote 20 above, paragraph 44; *Zhu and Chen*, cited in footnote 22 above, paragraphs 36 to 41; *Akrich*, cited in footnote 24 above, paragraph 57; and *Metock*, cited in footnote 24 above, paragraph 75.

35 — See *Parliament* v *Council*, cited in footnote 24 above, paragraph 38.

36 — See Article 6(1) TEU.

to grant him a residence permit, constitutes a potential breach of his children's fundamental right to family life and to protection of their rights as children; and thus (applying *Carpenter* and *Zhu and Chen*) of Mr Ruiz Zambrano's equivalent right to family life as their father. I say 'potential' because Mr Ruiz Zambrano is still on Belgian territory. It is however evident that activating the deportation order would trigger the breach of those rights.

63. It is equally evident that the breach would be likely to be serious. If Mr Ruiz Zambrano were to be deported, then so, too, would his wife. The effect of such steps on the children would be radical. Given their age, the children would no longer be able to live an independent life in Belgium. The lesser evil would therefore, presumably, be for them to leave Belgium with their parents. That would, however, involve uprooting them from the society and culture in which they were born and have become integrated. Whilst it is ultimately for the national court to make the detailed assessment in the individual case, it seems appropriate to proceed on the basis that the breach might well be significant.

64. It is true that Mr Ruiz Zambrano's children were born at a time when his situation was already irregular. However, the material set out in the order for reference suggests that Mr Ruiz Zambrano has become fully integrated into Belgian society and does not pose a threat or danger. Whilst it is for the national court, as sole judge of fact, to make any necessary finding in that regard, the following elements seem to me to support that view.

65. First, Mr Ruiz Zambrano worked regularly after entering Belgium, duly contributed to the Belgian social security system and made no claim for financial support.[37] Second, he and his wife Mrs Moreno López appear to have lived a normal family life and their children are now at school in Belgium. Third, the Belgian authorities were willing to accept Mr Ruiz Zambrano's social security contributions to the coffers of the Belgian State for five years while he worked at Plastoria – a willingness that contrasts curiously with a different Belgian ministry's reluctance

37 — It will be recalled that the unemployment benefit Mr Ruiz Zambrano is now claiming is one to which his contribution record would entitle him, were his employment with Plastoria to be treated, as from Diego's birth, as counting towards the qualifying period of employment.

to grant him a residence permit.[38] Fourth, the fact that the Commissariat-general for Refugees and Stateless Persons made a *non-refoulement* order indicates that Mr Ruiz Zambrano and his family cannot be returned to Colombia because that would place them in real danger. Thus, if they were required to leave Belgium they would have to find a third State that was willing to accept them, with which they might or might not have existing ties. Fifth, by granting Mr Ruiz Zambrano a temporary renewable residence permit in 2009, the Belgian authorities have tacitly confirmed that his presence in Belgium does not pose a risk to society and that there are no overriding considerations of public order that would justify requiring him to leave the country immediately.

66. For those reasons, it seems to me that, were the Belgian authorities to follow up on their refusal to grant Mr Ruiz Zambrano a residence permit after the birth of his first Belgian child (Diego) by implementing the outstanding order made against him requiring him to leave the country,[39] it is likely that that would fall to be regarded as a significant breach of Diego's – and hence, indirectly, Mr Ruiz Zambrano's – fundamental right to family life under EU law.

38 — In *Trojani* (Case C-456/02 [2004] ECR I-7573), the fact that, although the Belgian social security authorities were contesting payment of the *minimex*, the municipal authorities of Brussels had granted a residence permit (*permis de séjour*) appears to have been a factor in the Court's decision that Mr Trojani could rely on Article 18 EC (now Article 21 TFEU) read in conjunction with Article 12 EC (now Article 18 TFEU): see paragraph 44 of the judgment. Mr Ruiz Zambrano's current temporary renewable residence permit is limited to the duration of the appeal proceedings before the Conseil d'État. See point 27 above.

39 — As I understand it, whilst the deportation order has been suspended pending the determination of his appeal to the Conseil d'État, it has not been rescinded.

Question 1 — Citizenship of the Union

Introductory remarks

67. In 1992, the Maastricht Treaty introduced European citizenship as a novel and complementary status for all Member State nationals. By granting to every citizen the right to move and reside freely within the territory of the Member States, the new Treaty recognised the essential role of individuals, *irrespective of whether or not they were economically active*, within the newly created Union. Each individual citizen enjoys rights and owes duties that together make up a new status – a status which the Court declared in

2001 was 'destined to become the fundamental status of nationals of the Member States'.[40]

Can one invoke rights derived from Union citizenship merely from residence in one's Member State of nationality?

Movement and the classic (economic) rights to freedom of movement

68. The consequences of that statement are, I suggest, 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* as being potentially of similar significance to its seminal statement in *Van Gend en Loos* 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'.[41]

69. It is trite law that, in order to be able to claim classic economic rights associated with the four freedoms, some kind of movement between Member States is normally required. Even in that context, however, it is noteworthy that the Court has accepted the importance of not hindering or impeding the exercise of such rights and has looked askance at national measures that might have a dissuasive effect on the potential exercise of the right to freedom of movement.

70. In *Dassonville*,[42] the Court stated famously that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade are to be considered as measures having an effect equivalent to quantitative restrictions'. The breadth of that formula has allowed the Court to scrutinise discriminatory and non-discriminatory

40 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, confirmed later in, inter alia, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 28; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 65; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 22; *Zhu and Chen*, cited in footnote 22 above, paragraph 25; Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 16; Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 45; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 31; Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 15; Case C-145/04 *Spain* v *United Kingdom* [2006] ECR I-7917, paragraph 74; Case C-50/06 *Commission* v *Netherlands* [2007] ECR I-9705, paragraph 32; and Case C-524/06 *Huber* [2008] ECR I-9705, paragraph 69.

41 — Case 26/62 *Van Gend en Loos* [1963] ECR 1, p. 12. In *Van Gend en Loos* the Court said that the Member States had limited their sovereign rights 'albeit within limited fields'. When the *Van Gend en Loos* statement was repeated in Opinion 2/94, the second part of the phrase was not retained.

42 — Case 8/74 [1974] ECR 837, paragraph 5.

national measures even when no goods have necessarily moved. [43] The chilling effect of a national measure can be sufficient to trigger the application of what is now Article 34 TFEU (formerly Article 28 EC). Thus in *Carbonati* [44] the Court, following Advocate General Poiares Maduro, found that charges imposed on goods within an individual Member State were in breach of the Treaty. [45] The Court stated clearly that Article 26(2) TFEU (formerly Article 14(2) EC), in defining the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured', does so 'without drawing any distinction between inter-State frontiers and frontiers within a State'. [46]

71. A similar test was extended to free movement of persons and services in *Säger* [47] where the Court explained that Article 59 EEC (now Article 56 TFEU) required 'not only the elimination of all discrimination against a person providing services on the ground of his nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services'. [48] This line of argument came full circle in *Kraus*, [49] where the Court held that measures 'liable to hamper or to render less attractive the exercise by [EU] nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty' also came within the scope of Community law. [50]

72. Therefore, it is now settled case-law that a person whose ability to move within the EU is 'hampered' or 'made less attractive', even by

43 — See, inter alia, Case 178/84 *Commission* v *Germany* [1987] ECR 1227, paragraph 27; Case C-192/01 *Commission* v *Denmark* [2003] ECR I-9693, paragraph 39; Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 66; Case C-420/01 *Commission* v *Italy* [2003] ECR I-6445, paragraph 25; and Case C-24/00 *Commission* v *France* [2004] ECR I-1277, paragraph 22.

44 — Case C-72/03 [2004] ECR I-8027.

45 — The Advocate General openly described the nature of the measures at stake in cases like *Carbonati*, admitting that 'discrimination is not caused by either the national legislation or Community law alone. It is the result of the partial application of EU law to the national legislation at issue. Even though it was not intended or anticipated, that situation is a necessary consequence of the application of EU law. Even though, essentially, it falls within the scope of domestic law, that situation is also a "residual" situation from the point of view of EU law. As a consequence of the effects it has voluntarily or involuntarily created, EU law becomes one of the constituent parts of the situation' (point 62).

46 — *Carbonati*, cited in footnote 44 above, paragraph 23.

47 — Case C-76/90 [1991] ECR I-4221.

48 — *Säger*, paragraph 12.

49 — Case C-19/92 [1993] ECR I-1663, paragraphs 28 and 32.

50 — *Kraus*, paragraph 32. See further, in particular, Case C-370/90 *Singh* [1992] ECR I-4265, paragraphs 23, applying this case-law to the family unit of husband and wife.

his Member State of nationality, can rely on Treaty rights. [51]

73. The Court has, indeed, already accepted some dilution of the notion that the exercise of rights requires actual physical movement across a frontier. Thus, in *Alpine Investments*, [52] it stated that a prohibition against telephoning potential clients in another Member State came within the scope of the Treaty provisions on freedom to provide services, even though no physical movement was involved. In *Carpenter*, [53] the Court accepted that EU law was determinative of the outcome of a challenge to a deportation order made by the United Kingdom authorities against a Philippine national. The basis for reliance on EU law was that Mrs Carpenter's husband, a British national, travelled occasionally to other Member States to sell advertising space in a British journal. The Court accepted the argument that it was easier for Mrs Carpenter's husband to provide and receive services because she was looking after his children from his first marriage. Therefore, the Court concluded that Mrs Carpenter's deportation would restrict her husband's right to provide and receive services, as well as his fundamental right to family life [54]

74. More recently, in *Metock* [55] the Court accepted that the past exercise of rights to freedom of movement by Mrs Metock, a Cameroonian who subsequently acquired British nationality and who was already established and working in Ireland when she married her husband (also Cameroonian, whom she had met 12 years earlier in that country) sufficed to enable him to acquire a derivative right of residence in Ireland, notwithstanding that he did not satisfy the requirement in national law that he should have been lawfully resident in another Member State prior to arrival in Ireland. [56]

Movement and citizenship of the Union

75. In many citizenship cases, there is a clearly identifiable cross-border element that parallels the exercise of classic economic free

51 — See, inter alia, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; Case C-285/01 *Burbaud* [2003] ECR I-8219, paragraph 95; Case C-299/02 *Commission* v *Netherlands* [2004] ECR I-9761, paragraph 15; Case C-249/04 *Allard* [2005] ECR I-4535, paragraph 32; and Case C-389/05 *Commission* v *France* [2008] ECR I-5337, paragraph 56.

52 — Case C-384/93 [1995] ECR I-1141.

53 — Cited in footnote 20 above.

54 — *Carpenter*, cited in footnote 20 above, paragraph 39.

55 — Cited in footnote 24 above.

56 — *Metock*, cited in footnote 24 above, paragraph 58.

movement rights. Thus, in *Bickel and Franz*, [57] the defendants were, respectively, an Austrian and a German national facing criminal proceedings in the Trentino – Alto Adige region of Italy (that is, in the former Süd Tirol) and hoping to stand trial in German rather than in Italian. In *Martínez Sala* [58] the claimant was a Spanish national who had moved to Germany. In *Bidar*, [59] Dany Bidar had moved from France to the United Kingdom where he stayed with his grandmother to complete his schooling after his mother's death before seeking a student loan to finance his university studies.

76. Moreover, when nationals of a Member State are invoking rights arising from citizenship of the Union against their own Member State, there has usually been some previous movement away from that Member State followed by a return. In *D'Hoop*, [60] Marie-Nathalie D'Hoop moved from Belgium to France, where she completed her schooling, and then returned to Belgium where she sought to claim the 'tideover' allowance granted to young people who had just completed their studies and who were seeking their first employment. In *Grunkin and Paul,* [61] Leonhard Matthias Grunkin Paul travelled between Denmark (where he was born and lived and attended school) and Germany (the country of which he was a national) in order to spend time with his divorced father there. He needed his German passport to be issued in the same name as he had lawfully been given in Denmark, rather than in a different name.

77. However, I do not think that exercise of the rights derived from citizenship of the Union is always inextricably and necessarily bound up with physical movement. There are also already citizenship cases in which the element of true movement is either barely discernable or frankly non-existent.

78. In *García Avello*, [62] the parents were Spanish nationals who had moved to Belgium; but their children Esmeralda and Diego (who held dual Spanish and Belgian nationality and whose contested surname formed the subject-matter of the proceedings) were born in Belgium and, so far as can be gleaned from the case report, had never moved from there. In *Zhu and Chen*, [63] Catherine Zhu was born in one part of the United Kingdom (Northern Ireland) and merely moved *within* the United Kingdom (going to England). The laws then granting Irish nationality to anyone born on the island of Ireland (including in

57 — Case C-274/96 [1998] ECR I-7637.
58 — Case C-85/96 [1998] ECR I-2591.
59 — Cited in footnote 40 above.
60 — Cited in footnote 40 above.
61 — Case C-353/06 [2008] ECR I-7639.
62 — Cited in footnote 40 above.
63 — Cited in footnote 22 above.

Northern Ireland), coupled with good legal advice, enabled her to rely on citizenship of the Union to found a right of residence in the United Kingdom for herself and her Chinese mother, since otherwise it would have been impossible for her, as a toddler, to exercise her rights as a citizen of the Union effectively. In *Rottmann*,[64] the crucial citizenship (German citizenship by naturalisation, rather than his earlier Austrian citizenship by birth) was acquired by Dr Rottmann after he had moved to Germany from Austria. However, the judgment disregards that earlier move and looks exclusively to the *future* effects that withdrawal of German citizenship would have by rendering Dr Rottmann stateless. (I shall return later, in more detail, to this recent important judgment.)[65]

79. When one examines the various rights that the Treaty confers on citizens of the Union, it is clear that some – notably, the right to vote and to stand as a candidate in municipal elections and elections to the European Parliament – can only be invoked in a Member State other than the Member State of which the person concerned is a national.[66] Others – the right to petition the European Parliament in accordance with Article 227 TFEU and the right to apply to the Ombudsman in accordance with Article 228 TFEU – appear to be capable of being exercised without geographical limitation.[67] The right to diplomatic or consular protection under Article 23 TFEU (formerly Article 20 EC) is exercisable in any third country in which the Member State of which that person is a national is not represented.

80. What is, perhaps, the 'core' right – the 'right to move and reside freely within the territory of the Member States'[68] – is less easy to pin down. Is it a combined right (the right to 'move-and-reside')? A sequential right ('the right to move and, having moved at some stage in the past, to reside')? Or two

64 — Case C-135/08 [2010] ECR I-1449.

65 — See point 93 et seq. below.

66 — See Article 22 TFEU (formerly Article 19 EC), which refers specifically to 'residing in a Member State of which he is not a national', and Article 20(2)(b) TFEU (formerly Article 17 EC) which refers to citizens of the Union exercising those rights 'in their Member State of residence, under the same conditions as nationals of that State'.

67 — Both rights are established by Article 24 TFEU (formerly Article 21 EC). Under the same article, a citizen of the Union could also (presumably) write to any of the institutions from anywhere on the globe, provided that he respected the language regime, and have the right to have an answer. Thus (for example) Mr Ruiz Zambrano's children could write to one of the institutions in Spanish from any third country, as well as from any Member State, and be entitled to a reply.

68 — As set out in Article 20(2)(a) TFEU (formerly Article 17 EC) and Article 21(1) TFEU (formerly Article 18(1) EC).

independent rights ('the right to move' *and* 'the right to reside')?

The impact of fundamental rights

81. Given a choice between confining the interpretation of 'the right to move and reside freely within the territory of the Member States' enshrined in Articles 20(2)(a) and 21(1) TFEU to situations in which the EU citizen has first moved to another Member State or accepting that the terms 'move' and 'reside' can be read disjunctively so that an EU citizen is not disbarred from invoking such rights when he resides (without prior movement) in his Member State of nationality, what should the Court do?

82. At this point, it is necessary to revert to the question of fundamental rights protection within the EU legal order.

83. The importance of fundamental rights in the classic context of free moment was put most eloquently by Advocate General Jacobs in *Konstantinidis*, [69] a case involving a Greek masseur working in Germany who claimed that the official transliteration of his name breached his rights under EU law. Advocate General Jacobs' approach to the existing *Wachauf* case-law had far-reaching consequences. *Konstantinidis* ceased to be merely a case about discrimination on grounds of nationality and became a case about the fundamental right to personal identity. Accepting the applicant's right (as the Court did in its judgment) implies accepting the premiss that an EU national who goes to another Member State *is* entitled to assume 'that, wherever he goes to earn his living in the EU, he will be treated in accordance with a common code of fundamental values … In other words, he is entitled to say "civis europeus sum" and to invoke that status in order to oppose any violation of his fundamental freedoms.' [70] The Union citizen exercising rights to freedom of movement can invoke the complete range of fundamental rights protected by EU law (whether or not they are connected with the economic work that he is moving between Member States to perform). If that were not the case, he might be dissuaded from exercising those rights to freedom of movement.

84. It would be paradoxical (to say the least) if a citizen of the Union could rely

69 — Case C-168/91 [1993] ECR I-1191.

70 — Opinion in *Konstantinidis*, cited in previous footnote, point 46.

on fundamental rights under EU law when exercising an economic right to free movement as a worker, or when national law comes within the scope of the Treaty (for example, the provisions on equal pay) or when invoking EU secondary legislation (such as the services directive), but could not do so when merely 'residing' in that Member State. Setting aside, for the purposes of the illustration, any protection to be derived within the national legal order itself from invoking Article 8 of the ECHR, let us suppose (rather implausibly) that a national rule in Member State A grants enhanced protection for freedom of religious expression only to persons who have resided there continuously for 20 years. A national of Member State A (like Marie-Nathalie D'Hoop) who had in the past exercised rights to freedom of movement by going to the neighbouring Member State B and who had only recently returned to Member State A would be able to rely on his fundamental rights against his Member State of nationality in the context of his citizenship of the Union (invoking both Article 9 of the ECHR and Article 10 of the Charter). Would an 18 year old citizen of the Union who was a national of Member State B, but who had been born and had always lived in Member State A, be able to do likewise? (There is no discrimination in the contested national rule that is based directly or indirectly on nationality, so Article 18 TFEU [formerly Article 12 EC] cannot be invoked.) On the basis of *Garcia Avello*, the answer is surely 'yes' – but giving that answer implies that the 'right to reside' is a free-standing right, rather than a right that is linked by some legal umbilical cord to the right to move. What, finally (and here I also foreshadow the discussion of reverse discrimination) of the 18 year old citizen of the Union who is a national of Member State A, who resides there and who cannot point to some further link with EU law that has arisen either by accident or design (for example, that he has travelled to Member State B on a school visit)?

85. Against that background, I return to the Court's existing case-law on citizenship.

86. If one insists on the premiss that physical movement to a Member State other than the Member State of nationality is required before residence rights as a citizen of the Union can be invoked, the result risks being both strange and illogical. Suppose a friendly neighbour had taken Diego and Jessica on a visit or two to Parc Astérix in Paris, or to the

seaside in Brittany.[71] They would then have received services in another Member State. Were they to seek to claim rights arising from their 'movement' it could not be suggested that their situation was 'purely internal' to Belgium.[72] Would one visit have sufficed? Two? Several? Would a day trip have been enough; or would they have had to stay over for a night or two in France?

87. If the family, having been obliged to leave Belgium and indeed the European Union, were to seek refuge in, say, Argentina, Diego and Jessica would be able, as EU citizens, to invoke diplomatic and consular protection from other Member States' missions in that third country. They could seek access to documents and write to the Ombudsman. But they would not, on this hypothesis, be able to rely on their rights as citizens of the Union to go on residing in Belgium.

88. It is difficult to avoid a sense of unease at such an outcome. Lottery rather than logic would seem to be governing the exercise of EU citizenship rights.

89. Would it be necessary to construct some radical extension of the citizenship case-law in order to hold, in the present case, that Mr Ruiz Zambrano's children's rights as citizens of the Union were engaged – notwithstanding that they have not yet ventured outside their Member State of nationality – and (if so) to go on to consider whether he can claim a derivative right of residence?

90. I do not think that a particularly large step is required.

Is this a purely internal situation?

91. In the present proceedings, the Member States that have submitted observations have argued, unanimously, that Mr Ruiz Zambrabo's situation is one that is 'purely internal' to Belgium and that EU law provisions, including those relating to citizenship of the Union, are therefore not triggered. The Commission has adopted a similar line of argument. To a greater or lesser extent, all point to potential protection that may be afforded to Mr Ruiz Zambrano and his family under either national law or the ECHR and invite the Court, with varying degrees of vehemence, not to

71 — It is clear that the children's parents could not sensibly contemplate making such an expedition themselves and risk finding that they could not regain admission to Belgium.

72 — See Case 186/87 *Cowan* [1989] ECR 195, paragraph 15.

contemplate the possibility that rights under the citizenship provisions might be engaged.

92. I do not share their view.

93. It is noteworthy that in *Rottmann*, both Germany (Dr Rottmann's Member State of naturalisation) and Austria (his Member State of origin), supported by the Commission, argued that 'when the decision withdrawing [his] naturalisation in the main proceedings was adopted, [Dr Rottmann] was a German national, living in Germany, to whom an administrative act by a German authority was addressed... [T]his is, therefore, a *purely internal situation* not in any way concerning EU law, the latter not being applicable simply because a Member State has adopted a measure in respect of one of its nationals. 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.' [73]

94. In dealing with that argument, the Court accepted the invitation to disregard Dr Rottmann's earlier exercise of his right to free movement (from Austria to Germany) and looked to the future, not the past. It pointed out, robustly, that even though the grant and withdrawal of nationality are matters that fall within the competence of the Member States, in situations covered by EU law the national rules concerned must nevertheless have regard to the latter. The Court concluded that, 'the situation of a citizen of the Union who... is faced with a decision withdrawing his naturalisation... and placing him... in *a position capable of causing him to lose his status* conferred by Article 20 TFEU *and the rights attaching thereto* falls, by reason of *its nature and its consequences*, within the ambit of EU law.' [74]

95. It seems to me that the Court's reasoning in *Rottmann*, read in conjunction with its earlier ruling in *Zhu and Chen*, may readily be transposed to the present case. Here, the grant of Belgian nationality to Mr Ruiz Zambrano's children Diego and Jessica was a matter that fell within the competence of that Member State. Once that nationality was granted, however, the children became citizens of the Union and entitled to exercise the rights conferred on them as such citizens, concurrently with their rights as Belgian nationals. They have not yet moved outside their own Member State. Nor, following his naturalisation, had Dr Rottmann. If the parents do not

73 — *Rottmann*, cited in footnote 64 above, paragraph 38, emphasis added.

74 — *Rottmann*, paragraph 42, emphasis added.

have a derivative right of residence and are required to leave Belgium, the children will, in all probability, have to leave with them. That would, in practical terms, place Diego and Jessica in a 'position capable of causing them to lose the status conferred [by their citizenship of the Union] and the rights attaching thereto'. It follows – as it did for Dr Rottmann – that the *children's situation* 'falls, by reason of its nature and its consequences, within the ambit of EU law'.

Is there interference?

96. Moreover, like Catherine Zhu, Diego and Jessica cannot exercise their rights as Union citizens (specifically, their rights to move and to reside in any Member State) fully and effectively without the presence and support of their parents. Through operation of the same link that the Court accepted in *Zhu and Chen* (enabling a young child to exercise its citizenship rights effectively) it follows that *Mr Ruiz Zambrano's situation* is likewise not one that is 'purely internal' to the Member State. It too falls within the ambit of EU law.

98. As citizens of the Union, Mr Ruiz Zambrano's children unquestionably have a 'right to move and reside freely within the territory of the Member States'. In theory, they can exercise that right. In practice, they cannot do so independently of their parents because of their age.

97. It therefore also follows (as in *Rottmann*) that 'in those circumstances, it is for the Court to rule on the questions referred by the national court' – or, to put essentially the same point in a different way, that the facts of this case do *not* constitute a purely internal situation, devoid of any link to EU law. In so doing, it will – I suggest – need to decide the following issues: (a) is there likely to be an interference with Mr Ruiz Zambrano's children's rights, as citizens of the Union, to move and reside freely within the territory of the Member States? (b) If such interference exists, is it in principle permissible? (c) If it is in principle permissible, is it nevertheless subject to any limitations (for example, on grounds of proportionality)?

99. If Mr Ruiz Zambrano cannot enjoy a derivative right of residence in Belgium (the issue on which his entitlement to unemployment benefit turns) then, sooner or later, he will have to leave the Member State of which his children hold the nationality. Given their age (and provided, of course that any

departure was not so far delayed that the children had reached the age of majority), his children will have to leave with him.[75] They will be unable to exercise their right to move and reside within the territory of the European Union. The parallels with *Rottmann* are obvious. Dr Rottmann's rights as a citizen of the Union were under serious threat because revocation of his naturalisation in Germany would leave him unable to exercise those rights *ratione personae*. Here, Mr Ruiz Zambrano's children face a not dissimilar threat to their rights *ratione loci*. They need to be able to remain physically present within the territory of the European Union in order to move between Member States or reside in any Member State.[76]

100. As we have seen (most notably in *Garcia Avello*, *Zhu and Chen* and *Rottmann*), the existing case-law already allows certain citizenship rights to be invoked independently of prior trans-border movement by the EU citizen in question. It seems to me that if the applicant(s) in the first two of those cases had *needed* to assert a free-standing right of residence against the authorities of the Member States concerned (Spanish nationals in Belgium, Irish national in the United Kingdom) the Court would surely have recognised such a right. In *Rottmann*, the Court has already gone further by protecting the future citizenship rights of a German national resident in Germany. Against that background, it would be artificial not openly to recognise that (although in practice the right to reside is, in the vast majority of cases, probably exercised after exercise of the right to move) Article 21 TFEU contains a separate right to reside that is independent of the right of free movement.

101. Accordingly, I recommend that the Court now recognise the existence of that free-standing right of residence.

102. For the reasons I have already discussed, Diego and Jessica cannot exercise such a right of residence without the support of their parents. I therefore conclude that, in the circumstances of the present case, a refusal to recognise a derivative right of residence for Mr Ruiz Zambrano is capable, potentially, of constituting an interference with Diego's and Jessica's right of residence as Union citizens.

103. I add that, if the Court is not disposed to accept that Article 21 TFEU confers a free-standing right of residence, I would still

75 — See points 86 and 87 above, where the impact on the right to family life is examined.

76 — It is of course theoretically possible that another Member State might be prepared to take the family. If so, Diego and Jessica could still exercise their rights as Union citizens, at least to some extent.

conclude, in the circumstances of this case, that the potential interference with Diego's and Jessica's right to move and reside within the territory of the Union is sufficiently analogous to that affecting Catherine Zhu (who had never resided in the Republic of Ireland and had, indeed, never left the territory of the United Kingdom) that their situation should be assimilated to hers.

Can the interference be justified?

104. I begin by observing that, in choosing not to make an express declaration that his children should become Columbian and in opting instead for them to acquire the nationality of the EU Member State in which they were born, Mr Ruiz Zambrano availed himself of a possibility that was lawfully available to him. In that respect, his conduct may fairly be compared with that of Mr and Mrs Zhu. The Court has made it clear that there is nothing reprehensible about taking advantage of a possibility conferred by law and that this is clearly distinguishable from an abuse of rights.[77] Since the facts of the present case arose, Belgian nationality law has been amended[78] and it would no longer be open to someone in Mr Ruiz Zambrano's position to choose not to register his child with the diplomatic or consular authorities of his own country in order to ensure that they obtained Belgian nationality. But at the time there was nothing wrong in his acting as he did.

105. It is important to bear this fact in mind – in particular, in relation to any 'floodgates' argument. Member States control who can become one of their nationals.[79] The Court is here concerned exclusively with the rights that such persons may invoke, *once they have become nationals of a Member State*, through their simultaneous acquisition of citizenship of the Union.

106. Thus, in *Kaur*[80] Mrs Manjit Kaur could not be 'deprived' of the rights deriving from the status of citizen of the Union because she did not meet the definition of a national of the United Kingdom of Great Britain and Northern Ireland. Since she fell at the first hurdle and did not qualify, under the nationality

77 — See *Akrich*, cited in footnote 24 above, paragraphs 55 to 57 (in respect of rights under EU law) and *Zhu and Chen*, cited in footnote 22 above, paragraph 36 (in respect of rights derived initially from national law).

78 — Irish nationality law has similarly been amended (there, *after* the Court's ruling in *Zhu and Chen*) by the Irish Nationality and Citizenship Act 2004.

79 — See Case C-369/90 *Micheletti* [1992] ECR I-4239, paragraph 10; Case C-179/98 *Mesbah* [1999] ECR I-7955, paragraph 29; Case C-192/99 *Kaur* [2001] ECR I-1237, paragraph 19; and *Zhu and Chen*, cited in footnote 22 above, paragraph 37.

80 — Cited in preceding footnote.

rules applicable to her, as someone 'holding the nationality of a Member State', she was unable subsequently to invoke EU law rights as a citizen of the Union to reside in any Member State (including the United Kingdom). [81] In the present case, however, Mr Ruiz Zambrano's children hold and enjoy the normal rights of Belgian nationals, just as Dr Rottmann held and enjoyed the normal rights of his German nationality by naturalisation.

107. There are, clearly, situations in which the exercise of rights by an EU citizen is *not* contingent upon the grant of residence rights to an ascendant family member. Thus, an EU citizen who has attained his majority is able to exercise his rights to travel and to reside within the territory of the European Union without it being necessary to grant his parent(s) concurrent rights of residence in the chosen Member State.

108. In my view, therefore, the potential interference with EU citizenship rights that arises if an ascendant family member does not enjoy an automatic derivative right of residence in the EU citizen's Member State of nationality is acceptable in principle. However, it may not be a permissible interference in certain circumstances (in particular, because it may not be proportionate).

Proportionality

109. As the Court has stated in *Micheletti,* [82] *Kaur* [83] and more recently in *Rottmann,* although the grant of nationality is a matter that falls within the competence of each Member State, it must, none the less, when exercising that competence, comply with [EU] law. [84] The same result was reached in *Bickel and Franz* when it came to criminal law and procedure, [85] in *García Avello* as regards national rules governing surnames [86] and in *Schempp,* concerning direct taxation [87] – all sensitive areas in which Member States still exercise significant powers.

81 — *Kaur*, cited in footnote 79 above (and cited in *Rottmann*, paragraph 49): see, in particular, paragraphs 20 to 24.

82 — Cited in footnote 79 above, paragraph 10.
83 — Cited in footnote 79 above, paragraph 19.
84 — *Rottmann*, cited in footnote 64 above, paragraphs 41 and 42.
85 — Cited in footnote 40 above, paragraph 17.
86 — Cited in footnote 40 above, paragraph 25.
87 — Cited in footnote 40 above, paragraph 19.

110. Here, as so often, the situation is one that involves exercise of a right and a potential justification for interfering with (or derogating from) that right; and the question comes down to one of proportionality. Is it proportionate, in the circumstances of this case, to refuse to recognise a right of residence for Mr Ruiz Zambrano, derived from his children's rights as EU citizens? Whilst the decision on proportionality is (as usual) ultimately a matter for the national court, some brief remarks may be of assistance.

111. Application of the principle of proportionality in the present case (as in *Rottmann*) requires 'the national court to ascertain... whether the... decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of [EU] law' [88] (in addition to any examination of proportionality that may be required under national law). As the Court went on to explain in that case, '[h]aving regard to the importance which primary law attaches to the status of citizen of the Union... 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. In this respect it is necessary to establish, in particular, whether that loss is justified...' [89]

112. During the hearing, the intervening Member States emphasised that residence requirements for third country nationals fall within Member State competence. Counsel for Belgium and Denmark stated that Mr Ruiz Zambrano is a failed asylum seeker who was ordered to leave Belgian territory shortly after his arrival in 1999. He resided illegally for a considerable period of time thereafter and should not benefit from a right of residence under EU law. Counsel for Ireland painted a dramatic picture of the wave of immigration by third country nationals that would inevitably result if Mr Ruiz Zambrano were held to enjoy a right of residence derived from his children's Belgian nationality.

113. Counsel for Mr Ruiz Zambrano pointed out that his client had worked without interruption for Plastoria for almost five years. Throughout that period, he had duly paid his social security contributions. The Belgian authorities' investigation at Plastoria had found no fault with the tax, social security and employment law arrangements relating to his employment. The only issues had been his lack of work permit and residence permit;

88 — *Rottmann*, cited in footnote 79 above, paragraph 55.

89 — *Rottmann*, cited in footnote 79 above, paragraph 56.

and no action had been taken against his employer. Diego and Jessica were born several years after Mr Ruiz Zambrano and his wife entered Belgium with their first child. There was no evidence that adding first Diego and then Jessica to the family represented a cynical attempt to exploit any available loophole so as to stay in Belgium. This was a genuine family. Mr Ruiz Zambrano was fully integrated in Belgium. His children attended their local school regularly. He had no criminal record. He had, indeed, since been granted both a provisional and renewable residence permit and a type C work permit.

114. I have already dealt in essence with the Irish Government's 'floodgates' argument. As that Member State itself demonstrated after the Court's ruling in *Zhu and Chen*, if particular rules on the acquisition of its nationality are – or appear to be – liable to lead to 'unmanageable' results, it is open to the Member State concerned to amend them so as to address the problem.

115. In so saying, I am not encouraging the Member States to be xenophobic or to batten down the hatches and turn the European Union into 'Fortress Europe'. That would indeed be a retrograde and reprehensible step – and one, moreover, that would be in clear contradiction to stated policy objectives. [90] I am merely recalling that the rules on acquisition of nationality are the Member States' exclusive province. However, the Member States – having themselves created the concept of 'citizenship of the Union' – cannot exercise the same unfettered power in respect of the *consequences*, under EU law, of the Union citizenship that comes with the grant of the nationality of a Member State.

116. So far as Mr Ruiz Zambrano's failure to leave Belgium after his asylum application was rejected is concerned, I recall that he challenged the administrative decisions

90 — The Presidency Conclusions of the Tampere European Council, of 15 and 16 October 1999, stated that 'the challenge … is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all … This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others worldwide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory' (points 2 and 3). In a similar vein, in the European Pact on Immigration and Asylum of 15-16 October 2008, the European Council invites Member States 'to promote the harmonious integration in their host countries of immigrants who are likely to settle permanently; those policies, the implementation of which will call for a genuine effort on the part of the host countries, should be based on a balance between migrants' rights (in particular to education, work, security, and public and social services) and duties'.

in question; and that those judicial proceedings have been long-running. I also recall that, in *Carpenter,* the third country national (Mrs Carpenter) had infringed national immigration law by not leaving the United Kingdom before her leave to remain as a visitor expired. The Court did not treat that as an insuperable obstacle to her subsequent claim to rights under EU law, pointing out that, 'her conduct, since her arrival in the United Kingdom in September 1994, had not been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety'. [91]

117. In contrast, in the present case the longer term consequences for Diego and Jessica of *not* recognising a derivative right of residence for Mr Ruiz Zambrano are stark. They cannot exercise their right to reside as Union citizens effectively without the help and support of their parents. Their residence right will therefore – until they are old enough to exercise it on their own – be almost completely devoid of content (as Catherine Zhu's would have been without the continued presence in the United Kingdom of her mother, Mrs Zhu).

91 — *Carpenter*, cited in footnote 20 above, paragraph 44.

118. For the sake of completeness, I should deal briefly with an additional argument that arises from the subject-matter of the proceedings before the national court, namely the possible risk that Mr Ruiz Zambrano may become an 'unreasonable burden' on public finances.

119. In *Baumbast,* [92] the Court stressed that the limitations and conditions which are referred to in Article 21 TFEU are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. In that regard, 'beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State'. [93] However, the Court also held that 'those limitations and conditions must 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'. [94] In other words, the national measures adopted on that subject must be necessary and appropriate to attain the objective pursued. [95]

92 — Cited in footnote 40 above.

93 — *Baumbast*, cited in footnote 40 above, paragraph 90.

94 — *Baumbast*, cited in footnote 40 above, paragraph 91.

95 — See, inter alia, Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* [1993] ECR I-4309, paragraph 15; *Zhu and Chen*, cited in footnote 22 above, paragraph 32; and *Rottmann*, cited in footnote 64 above, paragraph 56.

120. In assessing proportionality in the present case, the national court will need to take into account the fact that Mr Ruiz Zambrano worked full time for nearly five years for Plastoria. His employment was declared to the Office national de la sécurité sociale. He paid the statutory social security deductions, and his employer paid the corresponding employer's contributions. He has thus in the past contributed steadily and regularly to the public finances of the host Member State.

121. In my view, these are factors that point to the conclusion that it would be disproportionate not to recognise a derivative right of residence in the present case. Ultimately, however, the decision is one for the national court, and the national court alone.

122. I therefore conclude that Articles 20 and 21 TFEU are to be interpreted as conferring a right of residence in the territory of the Member States, based on citizenship of the Union, that is independent of the right to move between Member States. Those provisions do not preclude a Member State from refusing to grant a derivative right of residence to an ascendant relative of a citizen of the Union who is a national of the Member State concerned and who has not yet exercised rights of free movement, provided that that decision complies with the principle of proportionality.

Question 2 — Reverse discrimination

123. This question asks whether Article 18 TFEU may be invoked to resolve reverse discrimination created by the interaction of EU law (here, the provisions governing citizenship of the Union) with national law. The problem may be stated thus. If young children (such as Catherine Zhu) have acquired the nationality of a different Member State from their Member State of residence, their parent(s) will enjoy a derivative right of residence in the host Member State by virtue of Article 21 TFEU and the Court's ruling in *Zhu and Chen*. Diego and Jessica have Belgian nationality and reside in Belgium. Can Mr Ruiz Zambrano rely on Article 18 TFEU, which prohibits, within the scope of application of the Treaties, 'any discrimination on grounds of nationality', so as to claim the same derivative right of residence?

124. If the Court accepts the reasoning that I have put forward in respect of question 1, this question becomes redundant. If the Court does not follow me, however, it becomes necessary to consider whether Article 18 TFEU may be invoked to address reverse discrimination of this kind.

The current case-law: a critique

125. In *Baumbast*, [96] the Court stated that Article 18 EC (now Article 21 TFEU) has direct effect, conferring on non-economically active individuals a free-standing right of free movement. In so holding, it extended rights of free movement to persons having no direct connection with the economics of the single market, who were therefore unable to invoke 'classic' free movement rights. The evolution was, I suggest, both coherent and inevitable, following logically from the creation of citizenship of the Union. If the European Union was to evolve into something more than a convenient and effective framework for the development of trade, it had to ensure a proper role for those it had decided to start calling its citizens. [97]

126. However, that development necessarily entailed a number of further consequences.

127. First, from the moment that the Member States decided to add, to existing concepts of nationality, a new and complementary status of 'citizen of the Union', it became impossible to regard such individuals as mere economic factors of production. Citizens are not 'resources' employed to produce goods and services, but individuals bound to a political community and protected by fundamental rights. [98]

128. Second, when citizens move, they do so as human beings, not as robots. They fall in love, marry and have families. The family unit, depending on circumstances, may be composed solely of EU citizens, or of EU citizens and third country nationals, closely linked to one another. If family members are not treated in the same way as the EU citizen exercising rights of free movement, the concept of freedom of movement becomes devoid of any real meaning. [99]

96 — Cited in footnote 40 above, paragraphs 82 to 84.

97 — For two early, thoughtful examinations of the scope and meaning of European citizenship after Maastricht, see, S. O'Leary, *The Evolving Concept of Community Citizenship*, The Hague/London/Boston, Kluwer Law International, 1996, and C. Closa, 'The Concept of Citizenship in the Treaty on European Union', *Common Market Law Review* 1992, pp. 1137 to 1169.

98 — On the importance of EU citizenship and the ties of the individual to a political community, see *Spain* v *United Kingdom*, cited in footnote 40 above, paragraphs 78 and 79.

99 — See *Carpenter*, cited in footnote 20 above, paragraph 39. Directive 2004/38, although not applicable in the present case, states in recital 5 that 'the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality'.

129. Third, by granting fundamental rights under EU law to its citizens, and stating that such rights are the very foundation of the Union (Article 6(1) TEU), the European Union committed itself to the principle that citizens exercising rights to freedom of movement will do so under the protection of those fundamental rights. [100]

130. Fourth, by ratifying the Maastricht Treaty and the subsequent amending Treaties, the Member States accepted that – because their nationals are also EU citizens – the task of dealing with tensions or difficulties arising from those citizens' exercise of free movement rights is a shared one. It pertains to the individual Member States, but also to the European Union. [101]

131. Those consequences sit uncomfortably with the idea that one should simply follow, in respect of citizenship of the Union, the orthodox approach to free movement of goods and freedom of movement for employed and self-employed workers and capital.

132. The underlying rationale of economic fundamental freedoms is to create a single market by eliminating barriers to trade and enhancing competition. The tools that the Treaty confers to pursue the single market goals (set out, inter alia, in what is now Article 3 TEU) have been developed by the Court accordingly. Thus, the Court has, inter alia, established criteria to determine what constitutes the necessary link with each fundamental freedom. To take one example: ever since *Dassonville* [102] potential as well as actual physical movement has been relevant to free movement of goods. Although that specific case-law does not require actual previous movement to have taken place, it is nevertheless still the idea of *movement* (even if that movement is hypothetical) that serves as the key to the rights granted by the fundamental freedoms.

133. A consequence of that approach to the internal market is the risk that 'static' factors of production will be left in a worse position than their 'mobile' counterparts, even though in all other respects their circumstances may be similar or identical. The outcome is reverse discrimination created by the interaction of EU law with national law – a discrimination that the Court has hitherto left each Member State to solve, notwithstanding that such a result is, prima facie, a breach of the principle

100 — See *Metock*, cited in footnote 24 above, paragraph 56.

101 — See *Rottmann*, cited in footnote 64 above, paragraphs 41 and 42.

102 — Cited in footnote 42 above.

of non-discrimination on the grounds of nationality. [103]

134. Is such a result acceptable, from the perspective of EU law, in the present specific context of citizenship of the Union?

135. An examination of three recent cases serves to demonstrate that continuing to apply that traditional, hands-off approach is capable of generating results that are curiously random. [104]

136. As a result of *Carpenter*, [105] a self-employed person who has clients in other Member States can confer a derivative right of residence on his third-country national spouse, in the interests of protecting the right to family life. If the same self-employed person has clients only in his own Member State, EU law is irrelevant. But nowadays, and precisely because of the success of the internal market, drawing such a clear-cut distinction between self-employed persons with interests in another Member State and self-employed persons with interests solely in their own Member State is problematic. Mr Carpenter travelled occasionally to other Member States to sell journal advertisements. Suppose he had not physically moved but had still provided occasional services to clients in other Member States, via the telephone or the internet? Suppose his clients had occasionally included subsidiaries, within the United Kingdom, of German or French parent companies? Suppose that he had, on one occasion, sold advertising space in one journal to one client who was not exclusively based in the United Kingdom?

137. In *Zhu and Chen*, [106] Catherine Zhu's Chinese mother became entitled to a derivative right of residence as a result of her daughter's Irish nationality, acquired through application of the extraterritorial rule that then formed part of that Member State's nationality law. All the 'movement' in the case took place across the St George's Channel,

103 — See, inter alia, Case 86/78 *Peureux* [1979] ECR 897, paragraph 38; Case 355/85 *Cognet* [1986] ECR 3231, paragraphs 10 and 11; Case 98/86 *Mathot* [1987] ECR 809, paragraph 7; *Government of the French Community and Walloon Government*, cited in footnote 18 above, paragraph 33 and *Metock*, cited in footnote 24 above, paragraph 77. Advocates General have taken different stances on this point. See the Opinion of Advocate General Léger in Case C-294/01 *Granarolo* [2003] ECR I-13429, point 78 et seq.; Opinion of Advocate General Poiares Maduro in *Carbonati*, cited in footnote 44 above, paragraph 51 et seq.; and my Opinion in *Government of the French Community and Walloon Government*, cited in footnote 18 above, paragraph 112 et seq.

104 — For a critical analysis, see, inter alia, A. Tryfonidou, *Reverse Discrimination in EC Law*, Kluwer Law International, The Hague, 2009; E. Spaventa, *Free Movement of Persons in the EU: Barriers to Movement in their Constitutional Context*, Kluwer Law International, The Hague, 2007; C. Barnard, *EC Employment Law*, Third Edition, Oxford, OUP, 2006, pp. 213 and 214; N. Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?', *Common Market Law Review*, 2002, p. 748; and C. Ritter, 'Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234', *31 European Law Review*, 2006.

105 — Cited in footnote 20 above.

106 — Cited in footnote 22 above.

between England and Northern Ireland, within one and the same Member State (the United Kingdom). A sufficient link with EU law nevertheless existed to enable mother and daughter both to claim residence rights in the United Kingdom. This was only brought about by arranging for Catherine Zhu to be born in Northern Ireland. But should it be a matter of chance conditioned by history (the extraterritorial rule in one Member State's nationality law) that governs whether EU law can be relied upon in such circumstances? Is that a reasonable outcome in terms of legal certainty and equal treatment of Union citizens?

A proposal

138. The recent decision in *Metock* illustrates the uncertainty – and the consequent discrimination – neatly. In 2003, the Grand Chamber held in *Akrich* that 'in order to benefit from rights under Article 10 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475), the national of a non-member country who is the spouse of a Union citizen must have been lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated'.[107] Five years later, the Court held that, in the light of *MRAX*[108] and *Commission* v *Spain*,[109] *Akrich* had to be reconsidered. And so it was: the benefit of the same rights that were at issue in *Akrich* cannot now depend on the prior lawful residence of a third-country national spouse in another Member State. Nevertheless, the Court continued to draw a distinction between Union citizens who had already exercised rights to freedom of movement and those who had not, recalling laconically that all Member States are signatories to the ECHR and that Article 8 of the ECHR protects the right to family life.[110] 'Static' Union citizens were thereby still left to suffer the potential consequences of reverse discrimination even though the rights of 'mobile' Union citizens were significantly extended.

139. In my view, there are significant drawbacks to the Court's current line of thought. I therefore believe that it is time to invite the Court to deal openly with the issue of reverse

107 — *Akrich*, cited in footnote 24 above, paragraph 50, summarised in *Metock*, paragraph 58.

108 — Cited in footnote 21 above.

109 — Cited in footnote 24 above.

110 — See *Akrich*, cited in footnote 24 above, paragraphs 77 to 79.

discrimination. The arguments I shall put forward follow the line that I advanced in *Government of the French Community and Walloon Government*; but I shall venture to suggest – in the specific context of cases involving citizenship rights under Article 21 TFEU – criteria that might be used to determine whether Article 18 TFEU may itself be relied upon to counter such discrimination.

140. A radical change in the entire case-law on reverse discrimination is not going to happen overnight. That is, indeed, not what I am proposing. My suggestions are confined to cases involving citizenship of the Union. It is in this area that the results of the present case-law are the most clearly damaging; and where a change is perhaps most called for.

141. The cases I have just discussed – *Carpenter, Zhu and Chen* and *Metock* – all share two traits. They create legal uncertainty in a delicate area of both EU law and domestic law; and they are cases in which the Court has opted for a generous interpretation of Article 21 TFEU in order to protect fundamental rights. In striking the balance between legal certainty and protection of fundamental rights, the Court has thus consistently given precedence to the latter. Its reasoning accords well with its earlier seminal statement that citizenship of the Union is 'destined to become the fundamental status of the nationals of Member States'.[111]

142. However, the uncertainty created by the case-law is undesirable. In which direction should the Court therefore now go?

143. On the one hand, it is necessary to avoid the temptation of 'stretching' Article 21 TFEU so as to extend protection to those who 'just' fail to qualify. There must be a boundary to every rule granting an entitlement. If there is no such limit, the rule becomes undecipherable and no one can tell with certainty who will, and who will not, enjoy the benefit it confers. That is not in the interests of the Member States or the citizen; and it undermines the authority of the Court. On the other hand, if Article 21 TFEU is interpreted too restrictively, a greater number of situations of reverse discrimination will be created and left to Member States to deal with. That, too, does not seem a very satisfactory outcome.

111 — See the case-law cited in footnote 40 above.

144. I therefore suggest to the Court that Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU and national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law.

145. If such an approach were pursued, Article 18 TFEU would be triggered when (but only when) three cumulative conditions were met.

146. First, the claimant would have to be a citizen of the Union resident in his Member State of nationality who had not exercised free movement rights under the TFEU (whether a classic economic free movement right or free movement under Article 21 TFEU), but whose situation was comparable, in other material respects, to that of other citizens of the Union in the same Member State who were able to invoke rights under Article 21 TFEU. Thus, the reverse discrimination complained of would have to be *caused by* the fact that the appropriate comparators (other Union citizens) were able to assert rights under Article 21 TFEU whereas a 'static' Union citizen residing in his Member State of nationality was *prima facie* unable to rely on national law for such protection.

147. Second, the reverse discrimination complained of would have to entail a violation of a fundamental right protected under EU law. Not every minor instance of reverse discrimination would be caught by Article 18 TFEU. What constituted a 'violation of a fundamental right' would be defined where possible by reference to the case-law of the Strasbourg court. [112] Where reverse discrimination led to a result that would be considered to be a violation of a protected right by the Strasbourg court, it would likewise be regarded as a violation of a protected right by our Court. Thus, EU law would assume responsibility for remedying the consequences of reverse discrimination caused by the interaction of EU law with national law when (but only when) those consequences were inconsistent with the minimum standards of protection set by the ECHR. By thus guaranteeing, in such circumstances, effective protection of fundamental rights to minimum 'Strasbourg' standards, the Court would in part anticipate the requirements that might flow from the planned accession of the European Union to the ECHR. Such a development could only

112 — To the extent that fundamental rights under the Charter that did not replicate ECHR rights were invoked, a separate jurisprudence would necessarily need to be developed; but that would be likely to happen in any event in the ordinary context of EU law.

enhance the existing spirit of cooperation and mutual trust between the two jurisdictions. [113]

148. Third, Article 18 TFEU would be available only as a subsidiary remedy, confined to situations in which national law did not afford adequate fundamental rights protection. EU law has an extensive history of conferring protection that is subsidiary in nature. Thus, the principles of effectiveness [114] and equivalence, [115] the right to effective legal protection [116] and the principle of State liability for breach of EU law [117] are all tools that come into play only when domestic rules prove inadequate. This final condition serves to maintain an appropriate balance between Member State autonomy and the 'effet utile' of EU law. [118] It ensures that subsidiary protection under EU law complements national law rather than riding roughshod over it. It would be for the national court to determine (a) whether any protection was available under national law and (b) if protection was in principle available, whether that protection was (or was not) at least equivalent to the protection available under EU law.

149. At the hearing, counsel for Mr Ruiz Zambrano indicated that the Belgian Conseil d'État and Cour Constitutionnelle have recently ruled on the reverse discrimination

113 — That collaborative task is implicitly attributed to the Court by Article 52(3) of the Charter of Fundamental Rights, when it states that: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent EU law providing more extensive protection.' The practical need for the Court to take a proactive stance in promoting minimum 'Strasbourg' standards has been portrayed, inter alia, by R. Alonso, 'The General Provisions of the Charter of Fundamental Rights of the European Union', *European Law Journal*, 8 2002, p. 450 et seq., and A. Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication*, Oxford University Press, Oxford, 2009, p. 31 et seq.

114 — See, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14, and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 123.

115 — See, inter alia, Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 36, and Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 41.

116 — See, inter alia, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45.

117 — See, inter alia, Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; and Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 19.

118 — It is unfortunately not the case that national courts invariably address and remedy reverse discrimination caused by EU law. In its judgment in *Government of the French Community*, cited previously in footnote 18 above, the Court openly invited the national court to remedy the difference of treatment suffered by those who did not come within the scope of EU law (paragraph 40). The case then returned before the Belgian Constitutional Court, which omitted to deal with the issue (see judgment 11/2009 of 21 January 2009 and the critical analysis by P. van Elsuwege and S. Adam, 'The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination', *European Constitutional Law Review*, 5 2009, p. 327 et seq.). For a more encouraging example of a national supreme jurisdiction being willing to remedy reverse discrimination (albeit without necessarily drawing on a related judgment in a preliminary ruling), see the ruling of the Spanish Constitutional Court (judgment 96/2002 of 25 April 2002).

suffered by a non-Member State national in a comparable situation to that of his client. [119] It is, of course, entirely for the national court to ascertain whether, in the present case, Mr Ruiz Zambrano can derive the necessary protection from national law, without recourse to Article 18 TFEU. Under my proposal, it would remain the task of the national court to apply the three cumulative criteria that I suggest; and to permit EU law to be invoked to prevent reverse discrimination only where those criteria were satisfied.

150. I therefore suggest that the answer to the second question should be that Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction of Article 21 TFEU with national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law.

Question 3 — Fundamental rights

151. If the Court considers that both the first and the second question (as set out above) should be answered in a way that does not assist Mr Ruiz Zambrano, it becomes necessary to turn to the third question. Can he rely on the EU fundamental right to family life independently of any other provisions of EU law?

152. This raises a very major issue of principle: what is the scope of application of fundamental rights under EU law? Can they be invoked as free-standing rights against a Member State? Or must there be some other link with EU law? It is unnecessary to dwell on the potential significance of the answer to that question.

153. The Court itself was, of course, responsible for the early recognition of fundamental principles of law and fundamental rights within the EU legal order. [120] In 1992, the Treaty on European Union incorporated the fruits of that case-law into the Treaty on European Union, setting out (in Article 6 TEU) the obligation on the Union to respect fundamental rights.

154. Over succeeding years, the EU has reinforced its policy on fundamental rights through (for example) setting up a

119 — See judgments cited in footnote 17 above.

120 — See, for example, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold* v *Commission* [1974] ECR 491; Case 44/79 *Hauer* [1979] ECR 3727; and Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859.

Fundamental Rights Agency,[121] creating an independent portfolio within the Commission responsible for fundamental rights,[122] supporting humanitarian projects throughout the world[123] and transforming the Charter of Fundamental Rights of the EU, first proclaimed in 2000, from a non-binding text ('soft law') into primary law.[124] Fundamental rights have thus become a core element in the development of the Union as a process of economic, legal and social integration aimed at providing peace and prosperity to all its citizens.

The scope of application of EU fundamental rights

155. Of course, it is true that this Court is not, as such, a 'human rights court'. As the supreme interpreter of EU law, the Court nevertheless has a permanent responsibility to ensure respect for such rights within the sphere of the Union's competence. Indeed, in *Bosphorus*[125] the Strasbourg court indicated that the European Court of Justice has an essential role to play in safeguarding rights deriving from the ECHR and its associated protocols as they apply to matters governed by EU law – a function that can only assume greater significance as and when the European Union accedes to the ECHR.[126] For that reason, it is essential for the Court to ensure that it interprets the Treaties in a way that reflects, coherently, the current role and significance of EU fundamental rights.

156. According to the Court's settled case-law, EU fundamental rights may be invoked when (but only when) the contested measure comes within the scope of application of EU law.[127] All measures enacted by the institutions are therefore subject to scrutiny

121 — See Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (OJ 2007 L 53, p. 1) and Council Decision 2008/203/EC of 28 February 2008 implementing Council Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework (MAF) for the Fundamental Rights Agency for 2007-2012 (OJ 2008 L 63 p. 14).

122 — For the first time, one of the current Commission's Vice-Presidents is Commissioner for Justice, Fundamental Rights and Citizenship.

123 — See, inter alia, Council Regulation (EC) No 1257/96 of 20 June 1996 concerning humanitarian aid (OJ 1996 L 163, p. 1) and Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide (OJ 2006 L 386, p. 1).

124 — Article 6(1) TEU now confers on the rights, freedoms and principles set out in the Charter 'the same legal value as the Treaties'.

125 — *Bosphorus Hava Yolları Turizm v. Ireland ve Ticaret Anonim Şirketi*, ECHR 2005-VI.

126 — See Article 6(2) TEU and Protocol No 8 relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

127 — Case 36/75 *Rutili* [1975] ECR 1219, paragraph 26; Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 17 to 19; and Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraphs 14 and 15.

as to their compliance with EU fundamental rights. The same applies to acts of the Member States taken in the implementation of obligations under EU law or, more generally, that fall within the field of application of EU law. [128] This aspect is obviously delicate, [129] as it takes EU fundamental rights protection into the sphere of each Member State, where it coexists with the standards of fundamental rights protection enshrined in domestic law or in the ECHR. The consequential issues that arise as to overlapping levels of protection under the various systems (EU law, national constitutional law and the ECHR) and the level of fundamental rights protection guaranteed by EU law are well known; [130] and I shall not explore them further here.

157. The Court has developed ample case-law confirming its initial statement in *Wachauf* [131] that '[fundamental rights] requirements are also binding on the Member States when they implement [EU] rules'. Significantly, that rule has also been held to apply when a Member State derogates from a fundamental economic freedom guaranteed under EU law. [132] In *Carpenter*, [133] the Court went further, building on the 'cold-calling' case-law in *Alpine Investments* [134] so as to protect the fundamental rights of an EU citizen (Mr Carpenter) residing in his own Member State but providing occasional services to recipients located in other Member States. Recognition of the fact that Mrs Carpenter's deportation would be a disproportionate interference with Mr Carpenter's right to family life had the effect of granting Mrs Carpenter – a third country national who could not possibly have exercised EU rights of free movement – a right of residence.

158. The Court has, however, applied limits to the scope of EU fundamental

128 — See, inter alia, Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraphs 10 and 11; Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 22; Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16; and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 68.

129 — See, for example, Case C-285/98 *Kreil* [2000] ECR I-69, paragraphs 15 and 16.

130 — See, inter alia, the judgments of the German *Bundesverfassungsgericht* of 29 May 1974, known as Solange I (2 BvL 52/71) and of 22 October 1986, known as Solange II (2 BvR 197/83); the judgment of the Italian *Corte Costituzionale* of 21 April 1989 (No 232, Fragd, in Foro it., 1990, I, 1855); the declaration of the Spanish *Tribunal Constitucional* of 13 December 2004 (DTC 1/2004) and the European Court of Human Rights' judgment in *Bosphorus*, cited in footnote 125 above.

131 — Cited in footnote 128 above, paragraph 19.

132 — See, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 42 et seq.; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 75; and Case C-36/02 *Omega* [2004] ECR I-9609, paragraphs 30 and 31.

133 — Cited in footnote 20 above, paragraphs 43 and 44.

134 — Cited in footnote 52 above.

rights – specifically, in relation to situations that it has held fell outside the scope of EU law.

159. Thus, in *Maurin* [135] the defendant was charged with selling food products after their 'use by' date had expired. He claimed that his rights of defence had been breached during the course of the national procedure. The Court pointed out that, although there was a directive requiring food products to indicate a 'sell by' date, the directive did *not* regulate the sale of properly-labelled food products whose 'use by' date had expired. Consequently, the offence with which Mr Maurin was charged 'involve[d] national legislation falling outside the scope of … [EU] law … [T]he Court therefore [did] not have jurisdiction to determine whether the procedural rules applicable to such an offence amount[ed] to a breach of the principles concerning observance of the rights of the defence and of the adversarial nature of proceedings.' [136]

160. In *Kremzow,* [137] the Court likewise rejected the claims of an Austrian national who had been convicted in Austria, but whose appeal was later held by the Strasbourg court to have breached the right to a fair trial under Article 6 of the ECHR. Mr Kremzow sought compensation and also claimed that his right to freedom of movement under EU law had been infringed as a result of his unlawful imprisonment. The Court disagreed with that approach, stating that 'whilst any deprivation of liberty may impede the person concerned from exercising his right to free movement, … a purely hypothetical prospect of exercising that right does not establish a sufficient connection with [EU] law to justify the application of [EU] provisions.' [138]

161. However, the *Kremzow* judgment adds an important gloss to the earlier case-law. Having confirmed the hypothetical nature of the claim, the Court stated that since 'Mr Kremzow was sentenced for murder and for illegal possession of a firearm under provisions of national law which were not designed to secure compliance with rules of [EU] law, [it thus follows] that the national legislation applicable in the main proceedings relates to a situation which does not fall within the field of application of [EU] law'. [139] *A contrario*, it seems to follow that a relevant link with EU law *could* have been found if the offences had had a connection with an area

135 — Case C-144/95 *Maurin* [1996] ECR I-2909.

136 — *Maurin*, paragraphs 12 and 13.

137 — Case C-299/95 [1997] ECR I-2629, paragraph 15.

138 — *Kremzow*, paragraph 16.

139 — *Kremzow*, cited in footnote 137 above, paragraphs 17 and 18.

of EU policy (for example, if they had been created in order to secure compliance with an EU law objective laid down in EU secondary legislation). [140]

162. Is the specific area of law involved and the extent of EU competence in that area of law of relevance to the question of fundamental rights? The question seems an important one to ask. The desire to promote appropriate protection of fundamental rights must not lead to usurpation of competence. As long as the European Union's powers remain based on the principle of conferral, EU fundamental rights must respect the limits of that conferral. [141]

163. Transparency and clarity require that one be able to identify with certainty what 'the scope of Union law' means for the purposes of EU fundamental rights protection. It seems to me that, in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on *the existence and scope of a material EU competence.* To put the point another way: the rule would be that, provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU *even if such competence has not yet been exercised.*

164. Why do I advance that suggestion?

165. The Member States have conferred competences upon the European Union that empower it to adopt measures that will take precedence over national law and that may be directly effective. As a corollary, once those powers have been granted the European Union should have both the competence and the responsibility to guarantee fundamental rights, independently of whether those powers have in fact been exercised. The EU 'is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.' [142]

140 — See Case C-176/03 *Commission* v *Council* [2005] ECR I-7879.

141 — See, inter alia, Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, paragraph 83; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 203; Joined Cases C-393/07 and C-9/08 *Italy* v *Parliament* [2009] ECR I-3679, paragraph 67; and Case C-370/07 *Commission* v *Council* [2009] ECR I-8917, paragraph 46.

142 — Article 2 TEU. Its predecessor, Article 6(1) EU, stated that '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.

That Treaty guarantee ought not to be made conditional upon the actual exercise of legislative competence. In a European Union founded on fundamental rights and the rule of law, protection should not depend on the legislative initiative of the institutions and the political process. Such contingent protection of rights is the antithesis of the way in which contemporary democracies legitimise the authority of the State. [143]

166. Such an approach would have a number of advantages.

167. First, it avoids the need to create or promote fictitious or hypothetical 'links with Union law' of the kind that have, in the past, sometimes confused and possibly stretched the scope of application of Treaty provisions. A person who had exercised rights to freedom of movement would not need to prove some link between the fundamental right subsequently invoked and facilitating that freedom of movement. [144] A person who had not yet exercised such rights would not need to set about doing so in order to create the circumstances in which he could benefit from fundamental rights protection [145] (freedom to move to receive services is, perhaps, the easiest of the four freedoms to exploit in this regard). Reverse discrimination against nationals of a Member State caused by the protection of EU fundamental rights afforded to their fellow EU citizens and fellow nationals who *had* exercised rights of free movement would cease to exist. [146] There would, in future, be no discrepancy (as far as EU fundamental rights protection was concerned), between fully harmonised and partially harmonised policies. In terms of legal certainty, the improvement would be significant.

168. Second, such an approach keeps the EU within the four corners of its powers. Fundamental rights protection under EU law would only be relevant when the circumstances leading to its being invoked fell within an area

143 — J. Locke, *Two Treatises of Government*, Cambridge University Press, Cambridge, 1988, Book II, section II.

144 — *Singh*, cited in footnote 50 above, *Cowan*, cited in footnote 72 above, and *Carpenter*, cited in footnote 20 above, all provide examples of circumstances where the link between the free movement and the fundamental right/additional protection afforded by EU law was not particularly direct. I am in no sense querying the correctness, from a rights protection perspective, of the decision reached by the Court in those three cases. My purpose is simply to highlight the sometimes tenuous nature of the link on which that protection was based.

145 — In *Akrich*, cited in footnote 24 above, Mr and Mrs Akrich were very open, during their interview by the competent national authorities, about the fact that she had moved to take up a temporary job in Ireland so as to be able to return to the United Kingdom with her husband and claim a right of entry for him based upon Community law.

146 — See *Government of the French Community and Walloon Government*, cited in footnote 18 above.

of exclusive or shared EU competence. [147] The type of competence involved would be of relevance for the purpose of defining the proper scope of protection. In the case of shared competence, the very logic behind the sharing of competence would tend to imply that fundamental rights protection under EU law would be complementary to that provided by national law. [148] (This mirrors the approach that I have suggested above in respect of reverse discrimination.)

169. Third, if fundamental rights under EU law were known to be guaranteed in all areas of shared or exclusive Union competence, Member States might be encouraged to move forward with detailed EU secondary legislation in certain areas of particular sensitivity (such as immigration or criminal law), which would *include* appropriate definition of the exact extent of EU fundamental rights, rather than leaving fundamental rights problems to be solved by the Court on an *ad hoc* basis, as and when they are litigated.

170. Fourth, such a definition of the scope of application of EU fundamental rights would be coherent with the full implications of citizenship of the Union, which is 'destined to become the fundamental status of the nationals of Member States.' [149] Such a status sits ill with the notion that fundamental rights protection is partial and fragmented; that it is dependent upon whether some relevant substantive provision has direct effect or whether the Council and the European Parliament have exercised legislative powers. In the long run, only seamless protection of fundamental rights under EU law in all areas of exclusive or

147 — See, concerning exclusive and shared competence, Case 41/76 *Donckerwolcke and Schou* [1976] ECR 1921, paragraph 32; Case 174/84 *Bulk Oil* [1986] ECR 559, paragraph 31; and Case 68/76 *Commission* v *France* [1977] ECR 515, paragraph 23. On the application of these rules in relation to the EU's external competence, see, inter alia, Case 22/70 *ERTA* [1971] ECR 263.

148 — The explanatory notes attached to the Charter (OJ 2007 C 303, p. 17) are clear on this point: 'The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation … for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers.' However, the explanatory notes go on to state that 'it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be "implementation of Union law"'. As I understand them, those remarks unequivocally link fundamental rights protection under EU law to what lies within the EU's sphere of competence. Taken together, fundamental rights protection under EU law and fundamental rights protection under national law should nevertheless result in adequate protection (at least for all fundamental rights that can be found both within the Charter and within the ECHR).

149 — See case-law cited in footnote 40 above.

shared EU competence matches the concept of EU citizenship.

171. Despite those significant advantages, I do not think that such a step can be taken unilaterally by the Court in the present case.

172. Making the application of EU fundamental rights dependent solely on the existence of exclusive or shared EU competence would involve introducing an overtly federal element into the structure of the EU's legal and political system. Simply put, a change of the kind would be analogous to that experienced in US constitutional law after the decision in *Gitlow* v *New York*, [150] when the US Supreme Court extended the reach of several rights enshrined in the Constitution's First Amendment to individual states. The 'incorporation' case-law, based since then on the 'due process' clause of the Fourteenth Amendment, does not require an inter-state movement nor legislative acts from Congress.

150 — 268 U.S. 652 (1925).

According to the Supreme Court, certain fundamental rights are so significant that they are 'among the fundamental personal rights and liberties protected by the due process clause […] from impairment by the states.' [151]

173. The federalising effect of the American incorporation doctrine is well known. A change of that kind would alter, in legal and political terms, the very nature of fundamental rights under EU law. It therefore requires both an evolution in the case-law *and* an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU.

174. For present purposes, the material point in time is the birth of Mr Ruiz Zambrano's second child, Diego, on 1 September 2003. It

151 — On *Gitlow* v *New York* and the incorporation doctrine, see R. Cortner, *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties*, Madison, University of Wisconsin Press, 1981; L. Henkin, '"Selective Incorporation" in the Fourteenth Amendment', *Yale Law Journal*, 1963, pp. 74 to 88, and H.L., Pohlman, *Justice Oliver Wendell Holmes: Free Speech & the Living Constitution*, NYU Press, New York, 1991, pp. 82 to 87.

is that event (the entry into the equation of a citizen of the Union) which – if Mr Ruiz Zambrano is right – ought to have led the Belgian authorities to accept that he had derivative rights of residence and to treat his claim for unemployment benefit accordingly.

175. At that stage, the Treaty on European Union had remained essentially unchanged since Maastricht. The Court had clearly stated in Opinion 2/94 that the European Community had, at that point, no powers to ratify the European Convention of Human Rights. [152] The Charter was still soft law, with no direct effect or Treaty recognition. The Lisbon Treaty was not even on the horizon. Against that background, I simply do not think that the necessary constitutional evolution in the foundations of the EU, such as would justify saying that fundamental rights under EU law were capable of being relied upon independently as free-standing rights, had yet taken place.

176. I therefore conclude, in answer to the last of the questions that I have reformulated, that, at the time of the relevant facts, the fundamental right to family life under EU law could not be invoked as a free-standing right, independently of any other link with EU law, either by a non-Member State national or by a citizen of the Union, whether in the territory of the Member State of which that citizen was a national or elsewhere in the territory of the Member States.

177. In proposing that answer, I am accepting that the Court should not, in the present case, overtly anticipate change. I do suggest, however, that (sooner rather than later) the Court will have to choose between keeping pace with an evolving situation or lagging behind legislative and political developments that have already taken place. At some point, the Court is likely to have to deal with a case – one suspects, a reference from a national court – that requires it to confront the question of whether the Union is not now on the cusp of constitutional change (as the Court itself partially foresaw when it delivered Opinion 2/94). Answering that question can be put off for the moment, but probably not for all that much longer.

152 — Opinion 2/94 [1996] ECR I-1759, paragraph 6.

Conclusion

178. In the light of all the above considerations, I am of the opinion that the Court should answer the matters raised by the Tribunal du travail de Bruxelles as follows:

Articles 20 and 21 TFEU (formerly Articles 17 and 18 EC) are to be interpreted as conferring a right of residence in the territory of the Member States, based on citizenship of the Union, that is independent of the right to move between Member States. Those provisions do not preclude a Member State from refusing to grant a derived right of residence to an ascendant relative of a citizen of the Union who is a national of the Member State concerned and who has not yet exercised rights of free movement, provided that that decision complies with the principle of proportionality.

Article 18 TFEU (formerly Article 12 EC) should be interpreted as prohibiting reverse discrimination caused by the interaction of Article 21 TFEU with national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law.

At the material time in the main proceedings, the fundamental right to family life under EU law could not be invoked as a free-standing right, independently of any other link with EU law, either by a non-Member State national or by a citizen of the Union, whether in the territory of the Member State of which that citizen was a national or elsewhere in the territory of the Member States.