VIEW OF ADVOCATE GENERAL MENGOZZI
delivered on 29 September 2011 [1]

I — Introduction

1. The present reference for a preliminary ruling, made by the Verwaltungsgerichtshof (Administrative Court, Austria), essentially concerns the interpretation of Article 20 TFEU and the scope of that provision following the judgments delivered in *Ruiz Zambrano* [2] and *McCarthy*. [3]

2. This reference has been made in five cases brought before the referring court, each of which seeks the annulment of appellate decisions confirming the refusal by the Bundesministerium für Inneres (Ministry for the Interior) to grant a residence permit to the claimants in the main proceedings, accompanied in some cases by a decision ordering their expulsion or removal from Austrian territory.

3. A common feature of the five cases is the fact that the claimants in the main proceedings are nationals of non-member countries and family members of Union citizens residing in Austria, who wish to live there with them.

4. The cases also have in common the fact that the Union citizens concerned have never exercised their right of free movement and that they are not dependent on the claimants in the main proceedings, who are members of their family, for their subsistence.

5. There are nevertheless a number of differences between the five cases in the main proceedings, which essentially relate to (a) the legal (Heiml and Kokollari cases) or illegal (Dereci and Maduike cases) character of the entry to Austria; (b) the legal or illegal character of residence (with the exception of the claimant in the main proceedings in the fifth case, Mrs Dragica Stevic, the other claimants in the main proceedings all resided unlawfully in Austria); (c) the family bond linking them with the Union citizen(s) concerned (husband and father of young children in the Dereci case; husband in the Heiml and Maduike cases; adult child in the Kokollari and Stevic cases) and (d) their possible economic dependence on those Union citizens (varying degrees of dependence of the national of

1 — Original language: French.
2 — Judgment of 8 March 2011 (C-34/09 [2011] ECR I-1177).
3 — Judgment of 5 May 2011 (C-434/09 [2011] ECR I-3375).

a non-member country in all cases, with the exception of the Maduike case).

6. More specifically, in the first case in the main proceedings, Mr Murat Dereci, a Turkish national, entered Austria illegally in November 2001, married an Austrian citizen in July 2003, by whom he has had three minor children in 2006, 2007 and 2008, who are all also Austrian nationals. His application for a residence permit, submitted in June 2004, was assessed and refused following the entry into force, on 1 January 2006, of the Austrian Law on establishment and residence (Niederlassungs- und Aufenthaltsgesetz, NAG), under which, inter alia, applicants from non-member countries who wish to obtain a residence permit in Austria must remain outside the territory of that Member State pending the decision on their applications. The Austrian authorities therefore took the view that, from 1 January 2006, and even pending the decision on his application for a residence permit, Mr Dereci remained illegally in Austria. They also issued an expulsion order against him, against which a suspensory appeal was brought, which was not settled when the present reference for a preliminary ruling was made. According to the referring court, although Mr Dereci stated that he would be able to pursue an activity as an employed or self-employed person as a hairdresser if he were granted the residence permit, the Austrian authorities doubt that he would have sufficient resources to qualify for family reunification, since the family income was less than the statutory amount required by the provisions of the NAG. The Austrian authorities also considered that neither Union law nor Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed at Rome on 4 November 1950, requires a residence permit to be granted to Mr Dereci.

7. The claimant in the main proceedings in the second case, Mrs Vishaka Heiml, is a Sri Lankan national and married an Austrian citizen in May 2006. Having been issued a visa in January 2007, she entered Austria legally in February of the same year. In April 2007, she applied for a residence permit as a family member of an Austrian national. Whilst her husband has stable employment in Vienna, Mrs Heiml stated that she wished to continue her higher education studies at a university in that city, at which she had already been accepted. However, her application for a residence permit was rejected on the ground that upon the expiry of her visa, Mrs Heiml should have remained abroad pending the decision on her application. In addition, the Austrian authorities considered, as in the Dereci case, that Mrs Heiml could not rely on Union law or on Article 8 of the ECHR.

8. In the third case, Mr Alban Kokollari, who comes from Kosovo, entered Austria legally in 1984 with his parents, who were Yugoslavian nationals at the time, when he was just two years old. He held a residence permit

until 2006, in respect of which he applied for an initial extension in that same year. Since he failed to produce certain documents, that application was rejected. In July 2007, Mr Kokollari made a fresh application for a residence permit on the ground, inter alia, that his mother, who was now an Austrian national and employed at a cleaning service, guaranteed his subsistence, whilst his father was in receipt of unemployment benefits. The application made by Mr Kokollari was rejected on the ground that since the rejection of his initial application for an extension in 2006, he should have left Austria and remained abroad pending the response to the application he submitted in July 2007. Furthermore, the Austrian authorities took the view that Mr Kokollari could not rely on Union law and had not invoked any other particular ground on which he should be issued a residence permit. A removal order had already been made.

9. In the fourth case, Mr Izunna Emmanuel Maduike, a Nigerian national, entered Austria illegally, like Mr Dereci, in 2003. He submitted an asylum application based on false statements, the rejection of which became irrevocable in December 2005. In the meantime, Mr Maduike married an Austrian citizen and, in December 2005, applied for a residence permit. His application was rejected inter alia on the ground that he had resided illegally in Austria whilst awaiting the response to his application and that, having infringed the asylum rules, he constituted a threat to public order, which precluded the issue of such a permit.

10. Mrs Stevic, a Serbian national living in Serbia with her husband and her adult children, is the claimant in the main proceedings in the fifth case. On 5 September 2007, she applied for a permit to reside in Austria in order to be reunited with her father, who had lived in that Member State since 1972 and who was granted Austrian citizenship on 4 September 2007. According to Mrs Stevic and her father, he had paid monthly support of EUR 200 throughout these years and would guarantee his daughter's subsistence once she was in Austria. The Austrian authorities rejected Mrs Stevic's application on the ground that the monthly support received by her could not be regarded as subsistence support and that, having regard to the amounts laid down by the NAG, her father's means would be insufficient to allow Mrs Stevic to cover her subsistence. Furthermore, neither Union law nor Article 8 of the ECHR required the application for family reunification submitted by Mrs Stevic to be granted.

11. Hearing these cases, the referring court is uncertain, in view of the abovementioned

judgment in *Ruiz Zambrano*, about the conditions in which Union citizens would, within the meaning of that judgment, have to leave the territory of the Union in order to accompany the members of their family, who are nationals of non-member countries, and would therefore be deprived of the genuine enjoyment of the rights conferred on them by virtue of their status as citizens of the Union. Furthermore, whilst recognising that Directive 2004/38/EC [4] is not applicable in the five cases in the main proceedings because the Union citizens concerned have not exercised their right of free movement, the referring court asks whether, since that directive favours the maintenance of the family unit, it should be taken into account so that it might be held that the impossibility of leading a family life in a Member State could in itself deprive Union citizens of the enjoyment of the substance of the rights which they derive from their status. In addition, in the Dereci case only, the referring court asks, in the light of the nationality of the claimant in the main proceedings in that case, whether, in the alternative, one of the provisions of the Agreement establishing an Association between the European Community and Turkey, signed at Ankara on 12 September 1963 and concluded on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963, [5] precludes the application, from 1 January 2006, of the conditions for obtaining a residence permit in Austria which the NAG imposes on Turkish nationals and which are stricter than previously.

12. In these circumstances, the referring court has decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – whose spouse and minor children are Union citizens – residence in the Member State of residence of the spouse and children, who are nationals of that Member State, even in the case where those Union citizens are not dependent on the national of a non-member country for their subsistence? (Dereci case)

(b) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – whose spouse is a Union citizen – residence in the Member State of residence of that spouse, who is a national of that Member State, even in the case where that Union citizen is not dependent on the national of a non-member country for his or her subsistence? (Heiml and Maduike cases)

(c) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – who has reached the age of majority and whose mother is a Union citizen – residence in the Member State of residence of the mother, who is a national of that Member State, even in the case where it is not the Union citizen who is dependent on

4 — Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and – corrigenda – OJ 2004, L 229, p. 35, and OJ 2005 L 197, p. 34).

5 — OJ 1973 C 113.

the national of a non-member country for her subsistence but rather that national of a non-member country who is dependent on the Union citizen for his subsistence? (Kokollari case)

(d) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – who has reached the age of majority and whose father is a Union citizen – residence in the Member State of residence of the father, who is a national of that Member State, even in the case where it is not the Union citizen who is dependent on the national of a non-member country for his subsistence but rather the national of a non-member country who receives subsistence support from the Union citizen? (Stevic case)

(2) If any of the questions under 1 is to be answered in the affirmative:

Does the obligation on the Member States under Article 20 TFEU to grant residence to nationals of non-member countries relate to a right of residence which follows directly from European Union law, or is it sufficient that the Member State grants the right of residence to the national of a non-member country on the basis of its law establishing such a right?

(3) (a) If, according to the answer to Question 2, a right of residence exists by virtue of European Union law:

Under what conditions, exceptionally, does the right of residence which follows from European Union law not exist, or under what conditions may the national of a non-member country be deprived of the right of residence?

(b) If, according to the answer to Question 2, it should be sufficient for the national of a non-member country to be granted the right of residence on the basis of the law of the Member State concerned which establishes such a right:

Under what conditions may the national of a non-member country be denied the right of residence, notwithstanding an obligation in principle on the Member State to enable that person to acquire residence?

(4) In the event that Article 20 TFEU does not prevent a national of a non-member country, as in the situation of Mr Dereci, from being denied residence in the Member State:

Does Article 13 of Decision No 1/80 of 19 September 1980 on the development of the Association, drawn up by the Association Council set up by the Agreement establishing an Association between the European Economic Community and

Turkey, or Article 41 [6] of the Additional Protocol, signed in Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972, [7] which, according to Article 62 thereof, forms an integral part of the Agreement establishing an Association between the European Economic Community and Turkey, preclude, in a case such as that of Mr Dereci, the subjection of the initial entry of a Turkish national to stricter national rules than those which previously applied to the initial entry of Turkish nationals, even though those national provisions which had facilitated the initial entry did not enter into force until after the date on which the aforementioned provisions concerning the association with Turkey entered into force in the Member State in question?'

13. By order of 9 September 2011, the President of the Court granted the application made by the referring court for the accelerated procedure to be applied to the present case.

14. Written observations were submitted by the German, Austrian, Danish, Greek, Netherlands, Polish and United Kingdom Governments, by Ireland, and by the European Commission. Those interested parties and Mr Dereci put forward oral argument at the hearing on 27 September 2011, with the exception of the Polish and Netherlands Governments, which were not represented.

II — Analysis

15. As I have already stated, the four questions referred to the Court have differing purports. The first three relate to the interpretation of Article 20 TFEU and concern the situations of the five cases in the main proceedings, whilst the answers to the second and third questions are subject to a positive answer – even partially positive – to the first question. The fourth question, which relates solely to the situation of Mr Dereci, is asked in the event that the Court answers the first question in the negative and concerns the interpretation of the 'standstill' clauses which apply in the context of the Agreement establishing an Association between the Union and the Republic of Turkey.

A — *The first three questions (interpretation of Article 20 TFEU)*

16. By its first three questions, the referring court is essentially seeking to ascertain

6 — Additional Protocol and Financial Protocol, signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force – Final Act – Declarations (OJ 1977 L 361, p. 60).

7 — OJ 1972 L 293, p. 1.

whether, and if so under what conditions, the provisions of the TFEU on citizenship of the Union require the grant of a derived right of residence to a national of a non-member country who is the spouse, one of the parents, or the child of a Union citizen, where that citizen has always resided in the Member State of which he is a national without ever having exercised his right of free movement.

17. The reasons for which the referring court expresses doubts as to the interpretation of Article 20 TFEU are clear: it is necessary to gain a better understanding of the implications of the abovementioned judgment in *Ruiz Zambrano*, delivered by the Grand Chamber on 8 March 2011.

18. For the record, I would point out that, in that case, it was essentially necessary to ascertain whether the provisions of the TFEU on citizenship of the Union could confer on a national of a non-member country (in that instance a Columbian national, accompanied by his wife, who had the same nationality), upon whom two of his minor children, who were European Union citizens, were dependent, a right of residence or an exemption from the requirement to hold a work permit in the Member State of which the two children were nationals (in that instance the Kingdom of Belgium) and in which they were born and had resided, without ever having exercised their right of free movement.

19. In the light of the absence of movement on the part of Mr Ruiz Zambrano's children in a Member State other than the Kingdom of Belgium, it was clear, as the Court noted in paragraph 39 of the abovementioned judgment in *Ruiz Zambrano*, that Directive 2004/38 was not applicable to the situation in that case.

20. This fact had also led the governments which submitted observations to the Court and the Commission to conclude that the facts giving rise to the *Ruiz Zambrano* case constituted a purely internal situation which was incapable of activating the provisions of the TFEU on citizenship of the Union cited by the national court. [8]

21. The Court did not follow this reasoning and ruled that the refusal to grant Mr Ruiz Zambrano a right of residence and a work permit was precluded by Article 20 TFEU 'in so far as such decisions deprive those children of the genuine enjoyment *of the substance of*

8 — According to case-law, the rules of the TFEU governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State (see, inter alia, Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 33; Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 77; and Case C-434/09 *McCarthy*, cited above, paragraph 45).

the rights attaching to the status of European Union citizen.' [9]

22. According to the Court, such a refusal would have led to a situation where those children, citizens of the Union, would have *had to leave the territory of the Union* in order to accompany *their parents*. Similarly, if a work permit had not been granted to Mr Ruiz Zambrano, he would have risked not having sufficient resources to provide for himself and his family, which would also have resulted in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, the Court considered that those citizens of the Union would, as a result, have been unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union. [10]

23. In doing so, the Court appears to reject classification as a 'purely internal situation' of a Member State where a national measure has the effect of depriving a Union citizen of the genuine enjoyment of the substance of the rights attaching to his status, despite the fact that he has not already exercised his right of free movement.

24. Moreover, this interpretation was adopted by the Court in *McCarthy*, [11] which is also briefly mentioned in the present reference for a preliminary ruling.

25. That case concerned a United Kingdom national who was in receipt of benefits in that Member State, also held Irish nationality, but had never resided in a Member State other than the United Kingdom. Having married a Jamaican national, Mrs McCarthy and her husband applied to the United Kingdom authorities for a residence permit under European Union law as, respectively, a Union citizen and the spouse of a Union citizen. Those applications were rejected. Hearing an appeal on the decision concerning Mrs McCarthy, the Supreme Court of the United Kingdom asked the Court about the interpretation of the provisions of Directive 2004/38.

26. Having reformulated the questions asked so as to include Article 21 TFEU, [12] the Court first logically rejected the application of Directive 2004/38 to a Union citizen, like Mrs

9 — Operative part of the judgment in Case C-34/09 *Ruiz Zambrano*, cited above (my italics). See also paragraph 42 of that judgment, which itself refers to paragraph 42 of the judgment in Case C-135/08 *Rottman* [2010] ECR I-1449, in which the Court ruled that it was clear that the situation of a citizen of the Union who, like Mr Rottman, was faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC (now Article 20 TFEU) and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.

10 — Case C-34/09 *Ruiz Zambrano*, cited above, paragraph 44.

11 — Judgment cited above (paragraphs 46, 47 and 55).

12 — Idem (paragraph 26).

McCarthy, who had never exercised his right of free movement and who had always resided in a Member State of which he is a national. [13]

27. Moving on to consider the applicability of Article 21 TFEU, and having observed that the situation of a Union citizen who has not made use of his right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, the Court investigated whether, on the one hand, applying the criterion outlined in paragraph 42 of the abovementioned judgment in *Ruiz Zambrano*, the national measure at issue had the effect of depriving Mrs McCarthy of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen or whether, on the other, applying the criterion developed in *Garcia Avello* [14] and *Grunkin and Paul*, [15] that measure had the effect of impeding the exercise of her right of free movement and residence within the territory of the Member States, in accordance with Article 21 TFEU. [16]

28. The Court rejected the possibility that the refusal to take into account the Irish nationality of Mrs McCarthy in the United Kingdom in order, ultimately, to obtain a derived right of residence for her spouse, who was a national of a non-member country, [17] could affect Mrs McCarthy 'in her right to move and reside freely within the territory of the Member States, or any other right conferred on her by virtue of her status as a Union citizen.' [18]

29. In particular, as the Court points out, by contrast with the case of *Ruiz Zambrano*, the application of the national measure at issue did not lead Mrs McCarthy to leave the territory of the European Union, because she enjoys, under a principle of international law, an unconditional right of residence in the United Kingdom since she is a national of that Member State. [19]

30. In those circumstances, the Court ruled that the personal situation of Mrs McCarthy had no factor linking it with any of the situations governed by European Union law, with the result that Article 21 TFEU was not applicable to her. [20]

31. At this stage, and irrespective of certain questions which may be raised by the scheme of the abovementioned judgments in *Ruiz*

13 — Idem (paragraphs 39 and 43).

14 — Case C-148/02 *Garcia Avello* [2003] ECR I-11613.

15 — Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639.

16 — Case C-434/09 *McCarthy*, cited above, paragraphs 49 to 53.

17 — See, in this regard, the reclassification of Mrs McCarthy's application in paragraphs 22 and 23 of the judgment in Case C-434/09 *McCarthy*, cited above.

18 — Idem (paragraph 49).

19 — Idem (paragraph 50). As is stated in paragraph 29 of the judgment in *McCarthy*, the principle of international law in question, reaffirmed in Article 3 of Protocol No 4 to the ECHR, means that a Member State may not expel its own nationals or refuse their right to enter or reside in its territory.

20 — Idem (paragraphs 55 and 56).

Zambrano and *McCarthy*, [21] it is already possible to draw helpful lessons from them for the purposes of the answers to the first three questions.

32. First, Directive 2004/38 is no more applicable in the five factual situations giving rise to the reference for a preliminary ruling than in the abovementioned *Ruiz Zambrano* and *McCarthy* cases, since none of the Union citizens concerned has exercised his right of free movement. Moreover, the referring court also agrees. [22]

33. Secondly, as the Governments which submitted observations to the Court and the Commission have argued, none of these five cases seems to be characterised by a risk of deprivation of the genuine enjoyment of the substance of the rights attaching to citizenship of the Union or an impediment to the exercise of the right of the Union citizens concerned to move and reside freely within the territory of the Member States.

34. With regard to the situation of the Dereci family, first of all, there is no likelihood that the refusal by the Austrian authorities to grant Mr Dereci a residence permit could lead Mr Dereci's wife and three young children, who are all four Union citizens, to be deprived of the enjoyment of one of the rights set out in Article 20(2) TFEU. In particular, as regards the right to move and reside freely within the territory of the Member States, mentioned in Article 20(2)(a) TFEU, Mrs

21 — Two points should be mentioned. First of all, the reason why the Court chooses to examine the situations underlying those two cases either having regard to Article 20 TFEU or having regard to Article 21 TFEU is not very clear. In this regard, Article 20(2) TFEU takes the form of a list of the rights conferred on Union citizens, the modalities for which are set out in Articles 21 to 24 TFEU, and therefore has a broader scope than the right to reside and move under Article 21(1) TFEU. Nevertheless, it is not apparent, among the rights listed in Article 20(2)(a) to (d) TFEU, which of these rights, except the right relating to movement and residence of Union citizens within the territory of the Member States, could be relevant in *Ruiz Zambrano* and *McCarthy*. Secondly, the addition in the grounds of the judgment in *McCarthy* of the criterion of 'impeding the exercise of the right of free movement and residence within the territory of the Member States', making it possible to link an internal situation to Union law, alongside the criterion, outlined in *Ruiz Zambrano*, of deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen, ultimately appears to make this criterion more flexible in regard to the only real right of which the Ruiz Zambrano children could potentially be deprived. Thus, if the *McCarthy* judgment were to be applied to a given situation, a Union citizen who has not yet exercised his right of free movement could fall within the scope of Union law not by proving *deprivation* of the genuine enjoyment of the right to move and reside freely within the territory of the Member States, but simply by proving the existence of an *impediment* to the exercise of such a freedom. From this perspective, *McCarthy* therefore seems to relax the burden of proof required in *Ruiz Zambrano* for an internal situation to fall within the scope of Union law.

22 — So far as is relevant, the situations underlying the cases in main proceedings are also not covered by Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12), which, although it concerns family reunification enjoyed by nationals of non-member countries, is applicable only on the condition that they are legally resident within the territory of the Member States and, as the Commission stated in its written observations, benefits only family members of those nationals who are not Union citizens and who are joining them in the territory of the European Union.

Dereci, as an Austrian national, may continue to enjoy the right of residence in Austria and may legitimately exercise her right of free movement between the Member States. The same holds for her children who, on account of their age, however, will not be able to exercise that right independently of their mother. Furthermore, and contrary to the situation underlying the abovementioned *Ruiz Zambrano* case, it is clear from the reference for a preliminary ruling that none of the four Union citizens is dependent on Mr Dereci, who is a national of a non-member country. [23] Consequently, if Mr Dereci were not to obtain a residence permit and/or were to be expelled to Turkey, neither his wife nor his children, unlike the children of Mr Ruiz Zambrano, risk having to leave the territory of the Union.

35. Secondly, the situations of Mrs Heiml, a Sri Lankan national, and Mr Maduike, a Nigerian national, both married to Union citizens, are in some way analogous with the situation of Mrs McCarthy's husband. Just as in the abovementioned *McCarthy* case, neither Mrs Heiml's husband nor Mr Maduike's wife, who, according to the referring court, both benefit from stable employment in Vienna, would have to leave the territory of the Union if the Austrian authorities refused their respective spouses a right of residence in Austria. In addition, these Union citizens would certainly not be deprived of the enjoyment of the rights derived from citizenship of the Union, in particular the right of free movement and residence within the territory of the Member States.

36. Thirdly, an identical approach must be taken with regard to Mr Kokollari and Mrs Stevic, who are both adult children of Union citizens. In particular, neither Mr Kokollari's mother nor Mrs Stevic's father would have to leave the territory of the Union if their adult children were not able to remain in or enter Austria, since those Union citizens are certainly not dependent, from an economic and/or legal point of view, on their adult children, who are nationals of non-member countries.

37. The foregoing considerations ultimately prove to be a simple application of the criteria adopted in the abovementioned judgments in *Ruiz Zambrano* and *McCarthy*. They are based on the premiss that 'the substance of the rights attaching to the status of European Union citizen' within the meaning of the abovementioned judgment in *Ruiz Zambrano* does not include the right to respect for family life enshrined in Article 7 of the Charter of Fundamental Rights of the European Union and in Article 8(1) of the ECHR.

38. It follows from the position taken by the Court in these two abovementioned judgments, and particularly from the reasoning put forward in *McCarthy*, that the right to respect for family life appears to be insufficient,

23 — At the hearing before the Court, Mr Dereci's representative claimed that Mr Dereci had a maintenance obligation vis-à-vis his children. However, this is not evident from the factual findings made by the referring court.

in itself, to bring within the scope of Union law the situation of a Union citizen who has not exercised his right of free movement and/or, as the case may be, has not been deprived of the genuine enjoyment of one of the other rights set out in Article 20(2)(b) to (d) TFEU. [24]

39. This position can be explained less by respect for the wording of Article 20(2) TFEU, in which the list of rights enjoyed by Union citizens is clearly not exhaustive, [25] than by the concern that the Union's powers and those of its institutions should not encroach on those of the Member States in the field of immigration or on those of the European Court of Human Rights in the field of protection of fundamental rights, in accordance with Article 6(1) TEU and Article 51(2) of the Charter of Fundamental Rights. [26]

40. With particular regard to family life, the protection afforded to it by these three legal orders – national, Union and treaty law – proves to be complementary. Thus, in the case of a Union citizen who has exercised one of the freedoms laid down in the TFEU, the right to respect for family life is, at present, protected at national level and in Union law. [27] In the case of a Union citizen who has not exercised one of those freedoms, that protection is provided at national level and in treaty law. [28]

41. It cannot therefore be ruled out that, in the cases in the main proceedings, the refusal to issue a residence permit and/or the expulsion orders made against any of the claimants in the main proceedings – parent, child or spouse of a national of a Member State – may constitute a breach of respect for family life guaranteed by Article 8(1) of the ECHR.

24 — Namely, respectively, the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in the Member State of residence of the Union citizen under the same conditions as nationals of that Member State, the right to enjoy, in the territory of a third country in which the Member State of which the Union citizen is a national is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State, and the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

25 — The second sentence of Article 20(2) TFEU mentions that citizens of the Union enjoy 'inter alia' the rights listed in points (a) to (d) of that provision. It should be noted, however, that under the second paragraph of Article 25 TFEU, only the Council, acting unanimously, after obtaining the consent of the European Parliament, seems to be vested with the power to adopt provisions 'to strengthen or to add to the rights listed' in Article 20(2) TFEU.

26 — Under those provisions, the Charter does not extend the field of application of Union law beyond the powers of the Union. It also does not establish any new power or task for the Union, or modify powers and tasks defined by the Treaties.

27 — See, inter alia, Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 41, Case C-127/08 *Metock and Others*, cited above, paragraph 56, and the provisions of Directive 2004/38.

28 — See Case C-127/08 *Metock and Others*, cited above, paragraphs 77 to 79.

42. However, such an infringement would stem from the Republic of Austria's obligations under the ECHR and not as a Member State of the European Union. Jurisdiction for examining the infringement would lie with national courts and tribunals and, as the case may be, the European Court of Human Rights. [29]

43. Notwithstanding the above statements, I cannot disregard the fact that the consequences of the simple application of the *Ruiz Zambrano* and *McCarthy* case-law in the cases in the main proceedings raise certain questions which could be seen as stumbling blocks, or at least as paradoxes.

44. One of these resides in the fact that, in order to be able actually to enjoy a family life within the territory of the Union, the Union citizens concerned *have to* exercise one of the freedoms of movement laid down in the TFEU. Thus, if Mrs Dereci and her children, Mrs Heiml's husband or Mr Maduike's wife settle in Germany, for example, or provide services to a Member State, their situation will fall within the scope of Union law and, consequently, as the Commission acknowledges, they will be able, in all likelihood, to qualify for family reunification with their respective spouses. [30] These Union citizens could also subsequently return to their Member State of origin, accompanied by their close relatives, irrespective of whether they are going to engage in economic activity in that Member State, since a situation of this kind cannot be regarded as a purely internal matter. [31]

45. If we just look at the case of the Dereci family, which, like the situation in *Ruiz Zambrano*, involves young children who are Union citizens, the citizenship of the Union held by Mrs Dereci could, paradoxically, be seen as a factor which checks and/or defers family reunification. Whereas, following the judgment in *Ruiz Zambrano*, the children, who are Union citizens, of the Zambrano couple, who are both nationals of non-member countries, may immediately continue to maintain relations with their two parents in the Member State of which they are nationals and within whose territory they reside, in contrast the family life of the three young children of the

29 — See also the Opinion of Advocate General Kokott in Case C-434/09 *McCarthy*, cited above, point 60. In this regard, I would point out that whilst Austrian law requires the national authorities to weigh the grounds for the refusal to issue a residence permit to a national of a non-member country against the need to respect private and family life within the meaning of Article 8 of the ECHR, it is not clear from the information given by the referring court that these interests were weighed in the cases of Mr Kokollari and Mr Maduike. In the case of the Dereci family, it is also not certain that the national authorities ascertained that the refusal to grant the residence permit, partly on grounds of failure to comply with the strict scale, under Austrian legislation, relating to the level of income required for such a family, was proportionate to the requirement of protection of family life. Whatever the case, as I have already stated, it is for the national court to conduct this examination, if necessary subject to review by the European Court of Human Rights.

30 — See the implications of the abovementioned judgments in Case C-60/00 *Carpenter* and Case C-127/08 *Metock and Others*, and of Directive 2004/38.

31 — See Case C-291/05 *Eind* [2007] ECR I-10719, paragraphs 35 to 37.

Dereci couple is, in practice, subject to their mother exercising one of the freedoms of movement laid down in the TFEU and therefore, in all likelihood, to her movement to a Member State other than Austria.

46. Of course, this does not mean, in my view, that the scope of *Ruiz Zambrano* is limited to the case of minor Union citizens who are dependent on one of their parents, who are both nationals of non-member countries, as the Austrian Government suggested at the hearing.

47. Thus, in the case of the Dereci family, it is not apparent, as far as I can see, that the answer to the first question referred for a preliminary ruling would be the same if certain factual circumstances were different. For example, if Mrs Dereci were, for whatever reason, unable to work and thus to provide for the needs of her children, I believe that there would be a serious risk that the refusal to issue a residence permit to her husband and, *a fortiori*, his expulsion to Turkey would deprive the couple's children of the genuine enjoyment of the substantive rights attaching to citizenship of the Union by forcing them, *de facto*, to leave the territory of the Union. How could a mother of three young children without her own resources, despite the right of residence in Austria which she enjoys by virtue of her nationality, take care of her children if she is unable to work and, therefore, also unable to settle permanently in another Member State with her family members?

48. Similarly, in my view, the refusal to grant a residence permit to a national of a non-member country on whom one of his or her parents, who is a Union citizen, is economically and/or legally, administratively and emotionally dependent, could expose that citizen to the same risk of no longer being able to rely on his or her status and of having to leave the territory of the Union.

49. These are the different specific situations which will be referred to the Court in references for preliminary rulings which will determine the precise scope of *Ruiz Zambrano*. This situation is, I confess, not very satisfactory from the point of view of legal certainty. The present cases, brought less than three months after that judgment was delivered, have the benefit of quickly leading the Court to clarify the limits of its nascent case-law. [32] The answer to the first question, as proposed, in essence, in points 33 to 36 of the present View, will also reduce the legal uncertainty created by *Ruiz Zambrano*. However, it will not resolve all the grey areas surrounding the consequences of that judgment for the application of the criterion of deprivation of the

32 — Other cases concerning the interpretation of Article 20 TFEU, following the judgment in *Ruiz Zambrano*, cited above, are currently pending before the Court: see Case C-356/11 *O and S* and Case C-357/11 *L*, lodged on 7 July 2011.

genuine enjoyment by a Union citizen of the substantive rights pertaining to his status in a number of situations, like those envisaged in the two preceding points of the present View.

50. In the light of these observations, and at this stage in the development of Union law, I suggest that the Court answer the first question as follows: Article 20 TFEU must be interpreted to the effect that it does not apply to a Union citizen who is the spouse, parent or minor child of a national of a non-member country, where that Union citizen has never exercised his right to move freely between the Member States and has always resided in the Member State of which he is a national, in so far as the situation of that Union citizen is not accompanied by the application of national measures which have the effect of depriving him of the genuine enjoyment of the substance of the rights attaching to his status as a Union citizen or of impeding the exercise of his right to move and reside freely within the territory of the Member States.

51. In these circumstances, there is no need to propose an answer to the second and third questions asked by the referring court.

B — *The fourth question (interpretation of 'standstill' clauses in the context of the Agreement establishing an Association between the Union and the Republic of Turkey)*

52. By its fourth question, the referring court wishes to know whether, in the event that its first question is answered in the negative, the 'standstill' clauses provided for respectively in Article 13 of Decision No 1/80 of the Association Council, regarding the movement of Turkish workers, and in Article 41 of the Additional Protocol, regarding freedom of establishment, prevent a Member State subjecting the initial entry of a Turkish national to stricter national rules than those which previously applied to such entry, even though those national provisions which had facilitated the initial entry did not enter into force until after the date on which the aforementioned articles entered into force in the Member State in question.

53. As I have already stated, this question is relevant only in respect of the situation of Mr Dereci, who is a Turkish national and who, according to the information provided by the referring court, claims to be able to pursue a professional activity as an employed or self-employed person if he were granted a work permit by the Austrian authorities.

54. It is common ground that Mr Dereci's application for a permit to reside in Austrian

territory was made under the 1997 Austrian Law which accorded nationals of non-member countries the right to remain in Austrian territory whilst a decision was being taken on their initial application for a residence permit. That Law represented a relaxation of the Law of 1 July 1993, which was in force when the Association Agreement with the Republic of Turkey took effect in Austria.

55. It is also common ground that the provisions of the NAG, which entered into force on 1 January 2006, withdrew the right accorded to nationals of non-member countries, like Mr Dereci, established under the aegis of the 1997 Austrian Law, to remain in Austrian territory whilst their initial application for a residence permit was being processed.

56. It is also apparent from the material in the file that Mr Dereci's residence became unlawful from 1 January 2006 precisely because his application for a residence permit, submitted on 24 June 2004 under the 1997 Austrian Law, had not yet been the subject of a decision on 31 December 2005.

57. The question being examined is therefore whether, in so far as they are applicable to the initial entry of a Turkish national to the territory of a Member State, the 'standstill' clauses provided for in Article 13 of Decision No 1/80 and in Article 41(1) of the Additional Protocol permit the referring court to disregard the obligation, which is now imposed by the NAG, on such a national to remain abroad and to leave Austrian territory whilst his application for a permit to reside in Austria is being processed. [33]

58. I would point out in this regard that, under Article 13 of Decision No 1/80, the Member States and the Republic of Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.

59. Under Article 41(1) of the Additional Protocol, the Contracting Parties must refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.

60. There is no doubt that the contested provisions of the NAG constitute new restrictions within the meaning of Article 13 of Decision No 1/80, in so far as they affect the situation of Turkish workers, and within

33 — Although this is not contested, it should be noted that Article 13 of Decision No 1/80 and Article 41(1) of the Additional Protocol may be relied on directly by Turkish nationals before the national courts to prevent the application of rules of national law which are inconsistent with the unequivocal 'standstill' clauses laid down by those provisions of Union law: see, inter alia, Joined Cases C-317/01 and C-369/01 *Abatay and Others* [2003] ECR I-12301, paragraphs 58 and 117.

the meaning of Article 41(1) of the Additional Protocol, in so far as they relate to Turkish nationals wishing to exercise freedom of establishment and the freedom to provide services under the Association Agreement, because they were adopted after the entry into force of those articles.

61. This assessment is not called into question by the fact, highlighted by the referring court, that the provisions of the NAG have made the conditions applicable to Turkish nationals more stringent not in relation to the provisions applicable in Austria upon the entry into force of Article 13 of Decision No 1/80 and Article 41(1) of the Additional Protocol (namely, those of the Law of 1 July 1993), but in relation to the more beneficial provisions adopted since the entry into force of those instruments in Austria (i.e. those of the 1997 Law).

62. Such an approach has already been adopted by the Court in *Toprak and Oguz* [34] and is fully justified, in my view, by the requirement that the Member States, after the entry into force of those instruments in their territory, must not depart from the objective of not making more difficult the gradual achievement of the economic freedoms accorded to Turkish nationals in the Union, including by reversing measures which they have adopted in favour of those nationals. [35]

63. Furthermore, the Court has already repeatedly ruled, with regard to Article 41(1) of the Additional Protocol, that the prohibition laid down in that article includes new restrictions relating to the substantive and/or procedural conditions governing the first admission to the territory of the Member State in question of Turkish nationals intending to exercise freedom of establishment there. [36]

64. That provision does not therefore encroach on the Member States' power to regulate the right of establishment. [37] According to the Court, it simply operates in the same way as a quasi-procedural rule which stipulates, *ratione temporis*, which are the provisions of a Member State's legislation that must be referred to for the purposes of assessing the position of a Turkish national who wishes to exercise freedom of establishment in a

34 — Joined Cases C-300/09 and C-301/09 *Toprak and Oguz* [2010] ECR I-12845, paragraphs 54 and 60.

35 — Idem (paragraphs 52 and 55).

36 — See, inter alia, Case C-16/05 *Tum and Dari* [2007] ECR I-7415, paragraph 69; Case C-242/06 *Sahin* [2009] ECR I-8465, paragraph 64; and Case C-92/07 *Commission* v *Netherlands* [2010] ECR I-3683, paragraph 47.

37 — See Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031, paragraph 47, and Case C-186/10 *Oguz* [2011] ECR I-6957, paragraph 26.

Member State,[38] irrespective of whether or not he is legally resident in that Member State.[39]

65. With regard to this latter point, it should be noted that in *Savas*[40] the person concerned had relied on the 'standstill' clause laid down in Article 41(1) of the Additional Protocol after having infringed the national immigration rules by residing unlawfully within the territory of a Member State for more than 10 years. However, this fact did not lead the Court to prevent him from invoking the procedural rule contained in that provision.

66. Similarly, in *Tum and Dari*, cited above, the 'standstill' clause laid down in Article 41(1) of the Additional Protocol was relied on by two Turkish nationals who had resided in a Member State in breach of a deportation order issued after their application for asylum had been refused. In its judgment, the Court expressly rejected the argument that a Turkish national could rely on the 'standstill' clause only if he has entered a Member State lawfully.[41]

67. It therefore seems that Mr Dereci, whose situation is not dissimilar to that in *Tum and Dari*, might benefit from the application of Article 41(1) of the Additional Protocol.

68. In these circumstances, it would not be strictly necessary to answer the part of the fourth question relating to the interpretation of Article 13 of Decision No 1/80, since the concurrent application of that provision and Article 41(1) of the Additional Protocol is precluded.[42]

69. It should nevertheless be noted in this regard that, in their observations to the Court, several governments stressed that the 'standstill' clause laid down in Article 13 of Decision No 1/80 does not benefit Turkish nationals who are in an unlawful situation in respect of residence. This interpretation follows from the very wording of that provision and from paragraph 84 of the abovementioned judgment in *Abatay and Others*.

70. If this reasoning were adopted, it would follow that this clause would have a different scope from that provided for in Article 41(1) of the Additional Protocol.

38 — Case C-16/05 *Tum and Dari* (paragraph 55) and Case C-186/10 *Oguz* (paragraph 28), cited above.

39 — Case C-16/05 *Tum and Dari* (paragraph 59) and Case C-186/10 *Oguz* (paragraph 33), cited above.

40 — Case C-37/98 *Savas* [2000] ECR I-2927.

41 — Judgment cited above (paragraphs 59 and 64 to 67).

42 — See Joined Cases C-317/01 and C-369/01 *Abatay and Others*, cited above, paragraph 86.

71. Such an interpretation would run counter to a line of case-law which assimilates the scope of these two 'standstill' clauses [43] and under which the Court has also ruled that Article 13 of Decision No 1/80 prohibits any new restrictions on the exercise of the free movement of workers, including those relating to the substantive and/or procedural conditions governing the first admission to the territory of a Member State, [44] as was held in relation to Article 41(1) of the Additional Protocol.

72. However, even though it is not necessary to resolve this question, it is sufficient to observe, as is clear from the order for reference and as Mr Dereci and the Commission argued at the hearing, that Mr Dereci resided legally in Austrian territory until 31 December 2005 and his residence became illegal only from 1 January 2006 because, in contravention of the contested provisions of the NAG, he remained in Austria whilst his application for family reunification was being processed. However, it is not possible, in my opinion, to hold against a Turkish national who wishes to rely on Article 13 of Decision No 1/80 the purported illegality of his residence within the territory of a Member State on the ground that such illegality stems from the application of precisely the legislation of that Member State whose compatibility with the prohibition on the Member State adopting new restrictions within the meaning of Article 13 of Decision No 1/80 is raised by a national court. To conclude otherwise would, quite simply, deprive that provision of its effectiveness.

73. For these reasons, I propose giving the following answer to the fourth question asked by the referring court: Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80 must be interpreted to the effect that they preclude, in a case of a Turkish national such as Mr Dereci, the subjection of the initial entry of such a national to stricter national rules than those which previously applied to such entry, even though those national provisions which had relaxed the preceding initial entry regime did not enter into force until after the date on which the aforementioned articles concerning the association with the Republic of Turkey entered into force in the Member State in question.

43 — See, inter alia, Joined Cases C-300/09 and C-301/09 *Toprak and Oguz*, cited above, paragraph 54.

44 — See Case C-92/07 *Commission* v *Netherlands*, cited above, paragraph 49. See also Joined Cases C-300/09 and C-301/09 *Toprak and Oguz*, cited above, paragraph 45.

III — Conclusion

74. In light of all these considerations, I propose that the Court answer the questions asked by the Verwaltungsgerichtshof as follows:

'(1) Article 20 TFEU must be interpreted to the effect that it does not apply to a Union citizen who is the spouse, parent or minor child of a national of a non-member country, where that Union citizen has never exercised his right to move freely between the Member States and has always resided in the Member State of which he is a national, in so far as the situation of that Union citizen is not accompanied by the application of national measures which have the effect of depriving him of the genuine enjoyment of the substance of the rights attaching to his status as a Union citizen or of impeding the exercise of his right to move and reside freely within the territory of the Member States.

(2) Article 41(1) of the Additional Protocol, signed on 23 November 1970 and annexed to the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963, and Article 13 of Decision No 1/80 of 19 September 1980 on the development of the Association, drawn up by the Association Council set up by the Agreement establishing an Association between the European Economic Community and Turkey, must be interpreted to the effect that they preclude, in a case of a Turkish national such as Mr Dereci, the subjection of the initial entry of such a national to stricter national rules than those which previously applied to such entry, even though those national provisions which had relaxed the preceding initial entry regime did not enter into force until after the date on which the aforementioned articles concerning the association with the Republic of Turkey entered into force in the Member State in question.'