CASE LAW

A. Court of Justice of the European Union

Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, not yet reported.

1. Introduction

The potential of European Union citizenship as the “fundamental status” of nationals of the Member States has been demonstrated in earlier Court judgments, when Luxembourg relied upon citizenship as a multipurpose instrument to break open the Member States’ social assistance systems (Grzelczyk), correct national rules governing surnames (Garcia Avello) and extend the residence rights of third country national family members (Metock). Building upon this line of dynamic rulings Ruiz Zambrano presents us with another landmark judgment. Luxembourg grants third country nationals the right to legalize their irregular stay, where they are the parents of Union citizens who are minors and have always lived within the Member State of their nationality. This projection of Union citizenship to purely internal situations crosses a crucial conceptual threshold – even by the generous standards of the flexible ECJ case law.

The Court’s critical innovation concentrates on the renunciation of the requirement of intra-EU movement for the invocation of citizenship rights, whenever the effective exercise of the newly postulated “substance” of these rights is at stake (section 3). On the part of the Grand Chamber this reinforcement of the Court’s armoury was a deliberate choice; commentators had questioned the cogency of this expansion of Union law before the judgment was even delivered.1 Despite the relevance of the case the Court does not make an effort to establish a sound methodological or dogmatic basis for the new category of substantive citizenship rights (section 4). This silence complicates the identification of consequences arising from the decision: an expansive reading would call into question the politically sensitive immigration rules on family reunification in many Member States. Such a dramatic outcome need not mate-

rialize, however, if the Court clarifies the implications of the Ruiz Zambrano ruling in line with the established principles of EU immigration and free-movement law (section 5).

2. Course of the proceedings: Background, Opinion and Decision

As often with landmark cases, the facts are rather atypical. The preliminary reference essentially concerns the claim of the Colombian national Ruiz Zambrano for indefinite leave to remain and unemployment benefits. Ruiz Zambrano has been residing in Belgium without a residence permit after the rejection of his asylum application and worked there without authorization for some time. Attempts to regularize the residence status were rejected in protracted administrative and judicial proceedings, but the Belgian authorities did not actively pursue coercive measures to deport the family of the failed asylum seeker. Union citizenship entered the picture when two children were born to the Ruiz Zambrano family during their illegal stay in Belgium. When the parents (deliberately) failed to register the births with the Colombian embassy, the children were granted Belgian nationality under domestic rules which aim to reduce statelessness. Based on their children’s Union citizenship the Colombian parents hope to obtain a right to reside and work within Belgium – which the Court willingly concedes.

During legal proceedings on the legalization of the residence and employment status, the Employment Tribunal in Brussels referred the case to Luxembourg. Its questions focused on Union citizenship, free movement and non-discrimination (Arts. 18, 20 & 21 TFEU) in combination with the Charter on Fundamental Rights in situations without noticeable cross-border element. On this basis, Advocate General Sharpston invited the Court to take the reference as an opportunity to establish new standards for two classic problem areas of EU law: the meaning and scope of cross-border effects, which trigger the applicability of Articles 18 and 21 TFEU, and the issue of reverse discrimina-

3. Under Colombian law, children born abroad acquire nationality only when their parents actively register with the embassy (cf. judgment, para 19); if the parents had opted in favour of registration (and Colombian nationality), the unconditional Belgian rules on the prevention of statelessness (cf. ibid. para 4) would not have applied.
4. Belgium was not obliged to grant nationality under such generous conditions under Art. 1 of the 1961 Convention on the Reduction of Statelessness (UNTS Vol. 989, p. 175).
5. See judgment, para 35.
More specifically, she proposed to re-orientate existing case law in the light of the Charter; the term “fundamental right” featured no less than 101 times in her Opinion. By contrast, the Court’s judgment mentions the same term only on 4 occasions when it repeats or summarizes the preliminary reference of the Belgium court. The Grand Chamber opts for a new approach which focuses on Union citizenship as such. Ten short paragraphs are meant to explain the new perspective. Articles 18 and 21 TFEU, the Charter and the issue of reverse discrimination are not even mentioned.

3. Embracing (purely) internal situations

As the point of departure from previous case law, the Grand Chamber abandons the criterion of cross-border effects, which has characterized the ECJ’s rulings on Union citizenship and the fundamental freedoms for decades. It is true that the Court has handled the cross-border yardstick generously in recent years, thereby extending the free movement rules to situations with only a marginal transnational dimension. Union citizens may rely on the benefits of the free movement regime in cases of return, marriage or birth in another Member State and even for transnational service provision. But the Court has until now always upheld the cross-border element – notwithstanding the repeated criticism of “reverse discrimination” which the criterion of transnationality may entail. As a matter of principle all generous ECJ judgments maintained: “Citizenship of the Union ... is not, however, intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law.”

*Ruiz Zambrano* abandons this position – and the Court does not hide the change of paradigm. The few paragraphs which are meant to explain the Court’s reasoning state unequivocally that all governments which had submitted their observations and the Commission had rejected the link with Union law, since the children “reside in the Member State of which they are nationals and have never left the territory of that Member State.” The facts of the case

7. Ibid., paras. 123–50.
10. For more details see *infra section* 3.1.
11. See the compact reasoning in *ibid*, paras. 36–45.
12. See the summary by A.G. Sharpston, paras. 69–78; see also nic Shuibhne, “Free movement of persons and the wholly internal rule: Time to move on?”, 39 CML Rev. (2002), 731 at 741–60.
quite simply did not come within the reach of the earlier case law; also the family’s return to Colombia would not have constituted an exercise of intra-Union free movement rights.15 This uniform point of view of the Member States did not however impress the ECJ. Similarly, the Court was quick to set aside the legislature’s intention, although the Parliament and the Council had deliberately decided to limit the scope of the Citizenship Directive 2004/38/EC to “Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members … who accompany or join them.”16 The ECJ is no longer willing to draw the conclusion that Union law does not apply to citizenship cases without an element of intra-Union movement.

3.1. “Substance of Rights” Doctrine

Instead, the Union citizenship of the two minors serves as the justification to embrace purely internal situations, by establishing a new dogmatic category which transcends the requirement of cross-border effects. Replicating the generic formula of Union citizenship as the “fundamental status” of the nationals of the Member States, the Grand Chamber postulates that Article 20 TFEU “precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.”17 Where the “substance of rights” is affected no cross-border element is required. But this projection of Union law to purely internal situations is not the only innovation. The new category of “substantive core rights” (German: “Kernbestand der Rechte”; French: “l’essentiel des droits”) is moreover based on the concept of Union citizenship as such, independent of the specific rules in the Treaties.18 The idea of a “substantive core” of Union citizenship allows the Court to set aside the terms and conditions provided for in written primary and secondary law and apply its own, autonomous standards instead.

Given the autonomy of the “substance of rights” benchmark its material scope is crucial for the immediate impact of the judgment. Ruiz Zambrano does not establish precise standards in this respect, since the Court only lays down the consequences for the case before it (residence status and labour mar-

15. Taking its generous interpretation of the cross-border element to the extreme, the Court could possibly have argued that the family’s return to Colombia would hamper the potential, future exercise of free-movement rules by the children, but the Grand Chamber decided not to do so – establishing a new category instead.
17. Judgment, para 42 (emphasis added).
18. See infra section 4.
ket access for parents of Union citizens who are minors). As a result, the regulatory autonomy of the Member States in immigration matters is being curtailed.\(^\text{19}\) With the wisdom of hindsight we may similarly identify the Court’s proportionality requirement under Union law in cases of loss of nationality in the *Rottmann* judgment as an expression of the newly formulated “substance of rights” doctrine.\(^\text{20}\) A domino effect in other policy fields may occur, but is by no means guaranteed. Probable is that the open formulations of the *Ruiz Zambrano* judgment deliberately leave room for later refinement, which will also allow the Court to take on board political and academic criticism.\(^\text{21}\) The inherent flexibility of the “substance of rights” standard does not however unmake the conceptual and practical relevance of the judicial innovation. The Court endows itself with a novel instrument, which may potentially be directed against a variety of national measures.

### 3.2. The end of reverse discrimination?

With regard to reverse discrimination, the dogmatic autonomy of the “substance of rights” standard, which flows directly from the concept of Union citizenship, entails that the ECJ does not embrace all purely domestic situations. For the time being only the loss of Union citizenship (*Rottmann*), the residence rights of minor children, who cannot decide their own fate (*Ruiz Zambrano*), and, possibly, divergent surnames (*Garcia Avello; Grunkin & Paul*)\(^\text{22}\) have been associated with the new core guarantee; another example could be the denial of the right to vote, including in European and municipal elections.\(^\text{23}\) In contrast to Advocate General Sharpston,\(^\text{24}\) the Grand Chamber, in its final judgment, deliberately seems to evade a principled statement on

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19. For details see *infra* section 5.

20. In para 42 of the *Ruiz Zambrano* case, the Court itself refers to its earlier judgment in *Case C-135/08, Rottmann*, 2 March 2010, nyr, para 42, which had not however laid down the new doctrine expressly, but assumed without further explanation that “it is clear” that the loss of national citizenship affected Union citizenship; for further reflection see Kochenov, case note, 47 CML Rev. (2010), 1831 at 1838–40.


22. A few weeks after *Ruiz Zambrano* the third chamber seems to ascribe these two rulings to the “substance of rights” doctrine; see *Case C-434/09, McCarthy*, judgment of 5 May 2011, nyr, para 53; a few days later, the fifth chamber resolves similar questions on the basis of Art. 21 TFEU in *Case C-391/09, Runevič-Vardyn & Wardyn*, judgment of 12 May 2011, nyr.

23. Both rights are expressly mentioned in Art. 20(2)(d) TFEU and may, for example, be affected by the denial of voting rights to prisoners, mirroring ECHR, judgment of 23 Nov. 2010, Nos. 60041/08 & 60054/08, *Greens v. MT v. the United Kingdom* (not final).

reverse discrimination. Only within the novel core guarantee are purely internal situations exposed to judicial ECJ scrutiny, thereby indirectly prohibiting reverse discrimination. In other cases, the regular guarantees of Articles 18, 21 TFEU and the fundamental freedoms continue to apply. Insofar Ruiz Zambrano does not change the established case law; the Member States maintain their regulatory autonomy.

This subsidiarity of the novel “substance of rights” doctrine vis-à-vis specific Treaty rules in regular cases means that the Ruiz Zambrano judgment – again at variance with Advocate General Sharpston – does not considerably extend the scope of EU human rights. Thus Ruiz Zambrano does not neutralize the measured approach deliberately opted for in Article 51 of the Charter. Nonetheless, the judgment has tangible repercussions for the human rights debate; a generous reading of the material scope of the “substance of rights” doctrine would bring an increasing number of purely domestic situations within the reach of EU human rights and the corresponding ECJ scrutiny. Such development might provoke the immediate opposition of constitutional courts, notably the German one, if the ECJ’s case law on citizenship “would prove to constitute ... a shift of competence to the detriment of Member States.” As long as the “substance of rights” standard only applies to extraordinary situations the potential conflict need not materialize. The ECJ’s recent innovation may still be covered by the German judicial concept of “tolerance of error” which precludes the pronunciation of an ultra vires act – despite the methodological deficits.

25. See infra section 4; it should be noted that Art. 20(2) TFEU expressly refers to the rights “provided for in the Treaties”, including the “conditions and limits defined therein.”
26. Protecting the Member States’ regulatory autonomy has been identified as the constitutional telos of the cross-border criterion, by, among others, Poiares Maduro, “The scope of European remedies”, in Kilpatrick et al. (Eds.), The Future of Remedies in Europe (Hart Publishing, 2000), p. 117 at 134–5 and, indirectly, the German Constitutional Court, Decision of 18 July 2005, BVerfGE 113, 273 at 298, “European Arrest Warrant”.
27. As has been explicitly recognized by the ECJ, in Case C-400/10 PPU, McB, judgment of 5 Oct. 2010, nyr, paras. 51–2 & 59 with an annotation by Thym, (2011) JZ, 48–52.
4. Methodological comments

Given the novelty of the “substance of rights” doctrine, one could have expected the Court to provide the legal community with some basic explanations. Instead the Court restricts itself to apodictic declarations of result. Such scarcity of judicial argument does not appear in a rosier light, even if you consider judicial minimalism as a virtue.31 The Court should give reasons for major innovations of its dynamic jurisprudence, if it wants to be taken seriously as a legal actor.32 Moreover, open-ended judgments on the part of the Court of Justice impede legal certainty, if, for example, they do not provide sufficient guidance for national courts on how to apply the novel “substance of rights” standard in other circumstances. Across Europe, considerable intellectual resources will be spent in order to decipher the oracle in Luxembourg. A Supreme Court should behave more responsibly.

4.1. Disregard for written rules

The Court’s silence on the dogmatic underpinning of the Ruiz Zambrano case is all the more remarkable since EU law does, in principle, establish a differentiated legal regime. The wording of the EU Treaty guarantees free movement “subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.”33 On this basis, the Union legislator adopted Directive 2004/38/EC which confers extensive privileges on Union citizens and their third country national family members, but also maintains material conditions in terms of income requirements, public policy caveats and the status of family members.34 Certainly, the Court has recognized residence rights beyond the reach of EU legislation before35 and embarked upon a – methodologically dubious36 – interpretation of secondary law in the

32. The factual reasons for the lack of reasons are well-known: Disagreement about the justification of the decision among the 27 judges from various legal and national backgrounds; the rotating composition of the Grand Chamber; continued deliberation in French which many judges speak imperfectly; the broader thematic reach of EU law (see Editorial Comment, “The Court of Justice in the Limelight – Again”, 45 CML Rev. (2008), 1571 at 1577–8) – also, in Ruiz Zambrano the judges may quite simply not have found any convincing dogmatic arguments supporting their conclusion.
33. Art. 21 TFEU and, similarly, Art. 20(2)(a) TFEU.
light of the fundamental freedoms. However, the Grand Chamber dodges such interpretative efforts in Ruiz Zambrano. Its findings emerge directly from the concept of Union citizenship. The arguments which support the conclusion of a seemingly unconditional residence status with labour market access for family members remain something of an enigma.

In the Court’s official reasoning, consideration of the wording and systematic structure of Union law are limited to the brief observation that the Union legislature decided not to confer a residence status to family members without intra-Union movement. Indeed, secondary law clearly does not sanction the legalization of illegal residence status, which in casu even involved illegal employment in the shadow economy. But also primary law would have mandated the Court to adopt a more nuanced standpoint: Article 79 TFEU as amended by the Lisbon Treaty explicitly calls upon the EU to develop a common immigration policy towards third country nationals aimed, inter alia, at “the prevention of, and enhanced measures to combat, illegal immigration.” The Family Reunification Directive adopted on this basis similarly renders residence rights for family members conditional upon income requirements, prior legal residence and, possibly, integration measures. Such explicit objectives and differentiated regimes do not seem to bother the Court. It is difficult to conceive of more drastic disrespect for written legal rules.

4.2. Distinguishing earlier ECJ case law

Besides the Court’s neglect of the wording and structure of both primary and secondary law, the remarkable silence on the lines of arguments of its earlier case law stands out. The judges seem to have opted quite deliberately not to activate human rights, the principle of non-discrimination under Article 18 TFEU or the general free movement provision of Article 21 TFEU, which have characterized earlier rulings on EU citizenship. It is indeed revealing to juxta-

38. See, again, judgment, para 39 and the Court’s later, extensive analysis in McCarthy, cited supra note 22, paras. 30–41.
40. Art. 79(1) TFEU.
41. Cf. Art. 3(1), Art. 7 “Family Reunification” Directive 2003/86/EC (O.J. 2003, L 251/12), which – like the Citizenship Directive – would not apply in this case, since not all children of the Ruiz Zambrano family are third country nationals; nonetheless the parallelism with the Citizenship Directive illustrates that some degree of conditionality is a common thread of the EU free movement and immigration rules.
42. The potential implications of the migration rules were noticed by the Court (although without substantial comments) in Case C-127/08, Metock, [2008] ECR I-6241, paras. 60–6.
pose the novel “substance of rights” doctrine with the established principles of ECJ case law. Doing so helps us to academically reconstruct the Court’s reasoning and to identify the implications of the \textit{Ruiz Zambrano} judgment for the evolution of EU law.

In earlier cases, Luxembourg answered the human rights dimension of EU free movement rules by means of reference to Strasbourg. In its \textit{Metock} judgment, the ECJ explicitly upheld that purely domestic situations are not covered by EU citizenship, while reminding the Member States of their obligations under Article 8 ECHR.\(^{43}\) By contrast, \textit{Ruiz Zambrano} opts against the orientation at Strasbourg’s human rights perspective. One reason may be that this would not have supported the ECJ’s generous conclusion: the ECtHR consistently emphasizes that the contracting parties are not obliged to guarantee family unity on their territory unconditionally.\(^{44}\) In 2008, the ECtHR held in a comparable case against Norway that the denial of residence permits to third country nationals after the rejection of their asylum claims and the birth of their children in that country does not violate Article 8 ECHR.\(^{45}\) The European Convention does not embody a right to regularize illegal stay.\(^{46}\) These findings do not, however, disturb the ECJ. It establishes Union citizenship as an autonomous concept, which may differ from the human rights standards under the ECHR.\(^{47}\) Under recourse to Union citizenship it concedes privileges which human rights law (in the same way as EU secondary law) does not extend to the \textit{Ruiz Zambrano} family.

The Court similarly eschews an activation of the free movement guarantee under Article 21 TFEU, although it has in recent years established the provision as an autonomous prohibition of restrictions alongside the fundamental (market) freedoms.\(^{48}\) This dismissal of Article 21 TFEU is convincing insofar as the provision, according to established case law, requires a cross-border element,\(^{49}\) which was absent in the \textit{Ruiz Zambrano} case – even if the article’s

\(^{43}\) See \textit{Metock}, ibid., paras. 77–9 and, similarly, Case C-60/00, \textit{Carpenter}, [2002] \textit{ECR} I-6279, paras. 41–3, where the ECJ remained ambiguous whether it incorporated the ECtHR case law into the free movement rules or referred to the ECHR obligations under international law as a declaratory reminder.

\(^{44}\) This has been explicitly recognized in Case C-540/03, \textit{Parliament v. Council}, [2006] \textit{ECR} I-5769, paras. 53–9.

\(^{45}\) See ECtHR, judgment of 37 July 2008, No. 265/07, \textit{Omoregie v. Norway}, paras. 58–68; in contrast to \textit{Ruiz Zambrano} the children were also third-country nationals.

\(^{46}\) For further comments see Thym, “Respect for private and family life under Article 8 ECHR in immigration cases”, 57 \textit{ICLQ} (2008), 87 at 95–102.

\(^{47}\) Art. 53 ECHR confirms that the law of any contracting party (and thus also the EU) may offer more generous standards of protection.


open formulation, which mirrors domestic free movement guarantees in international human rights treaties, could have provided an argument against cross-border conditionality. But this thought does not guide the Court in *Ruiz Zambrano*. Instead of expanding Article 21 TFEU to purely domestic situations, the Court adopts the narrower “substantive core” criterion which does not require a cross-border element. Moreover, Article 21 TFEU would also not have justified the Court’s apodictic conclusion. Restrictions of free movement rights can be justified by objective considerations; Article 21 TFEU does not guarantee absolute rights.

One step further, the prohibition of discrimination on grounds of nationality under Article 18 TFEU is implicitly set aside by the Court in *Ruiz Zambrano*, although it played a prominent role in the earlier expansion of citizenship status. One reason may be the inherent relativity of the non-discrimination yardstick. A comparison with other status groups would not have justified the regularization of the illegal residence status of the *Ruiz Zambrano* family. First, equal treatment with nationals would not support the Court’s conclusion, since Belgium (like most other Member States) does not confer upon its own nationals an unconditional right to family reunification on its territory. Second, a comparison with Union citizens would not necessarily help the *Ruiz Zambrano* family with a view to the conditionality of the Citizenship Directive. *Ruiz Zambrano* guarantees more than equal treatment. The ECJ creates an autonomous category, which flows directly from Union citizenship.

### 4.3. Rationale of Union Citizenship

Finally, the general wording of Article 20(1) TFEU also does not support the self-sufficient “substance of rights” test. Article 20 establishes Union citizenship in the first place and concentrates on its reliance upon national citi-

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50. Compare the wording of Art. 21(1) TFEU and Art. 45(1) of the Charter with Art. 12(1) ICCPR and Art. 2(1) Add. Prot. No. IV the ECHR, which both concern domestic (not transnational) free movement guarantees.


52. See *supra* section 3 and the distinction between Art. 21 TFEU and the “substantive core” in McCarthy, cited *supra* note 22, paras. 44–50.

This reaffirms our general conclusion: *Ruiz Zambrano* is not concerned with the wording or systematic structure of EU law, but rather builds upon the concept of Union citizenship as such. To paraphrase earlier landmark cases: the ECJ’s conclusion resonates with the “spirit” of the Treaty. This is what the Court may be trying to tell us by invoking its (linguistically rather dull) formula of the “fundamental status” which Union citizenship is “intended” to be. This *telos* may not have been in the mind of the drafters of the Maastricht or the Lisbon Treaties, but it remains the only viable explanation for the “substance of rights” doctrine.

The dynamic evolution of Union citizenship will not come as a surprise to those who had long pointed at the normative and unifying effects of the citizenship concept, which also in earlier cases paved the way for the gradual formation of federal structures. Luxembourg elegantly avoids direct conflict with national constitutional courts by reaffirming the Member States’ prerogatives for nationality law. After having naturalized a third country national the Member States do however lose control over the scope of the substantive rights conferred by Union citizenship. Commentators had long called upon the Court to go one step further and abandon the restrictive criterion of cross-border mobility, which – like the earlier focus on economic activity – stands in the way of “true” citizenship at European level. This important conceptual threshold is now being crossed by the Grand Chamber when it grants two unemployed third country national parents of Union citizens who had always lived in Belgium a right to regularize their illegal stay. In *Ruiz Zambrano* the

54. The subtle modification in comparison to Art. 17(1) EC (“be additional” in place of “complement”) is also not taken up by the Court and in any case would not have rationalized the Court’s far-reaching conclusions; see Schrauwen, “European citizenship in the Treaty of Lisbon” (2008) MJ, 55 at 59–60.


56. Arguably, the French formulation “a vocation à être” does at least hint at the inspirational, forward-looking intention, which in other language versions, such as German, is lost; it is not immediately clear why the Court changes its English translation to “is intended to be” (para 40) instead of the more stimulating “is destined to be” in earlier judgments.


58. The confirmation of the *Rottmann* argument in para 40 of the judgment may be an indirect reaction to the German Constitutional Court, Judgment of 30 June 2009, Case 2 BvE 2/08, “Lisbon”, BVerfGE 123, 267, para 249, which associates “Staatsbürgerschaft” (state citizenship) with the core guarantee of national identity; for an explanation of the context see Thym, “In the Name of Sovereign Statehood”; 46 CML Rev. (2009), 1795 at 1800–2.

Court once and for all leaves transnational “market citizenship” behind. Even without convincing arguments this conclusion is seminal.

5. Repercussions for immigration law

The imprecision and brevity of the judicial argument raises a number of questions about the scope and character of the newly defined immigration rights of third country nationals whose family members are Union citizens. Ruiz Zambrano will be invoked as a precedent before national courts in many Member States to dismantle the distinction between Union citizens and third country nationals. In particular, the judgment will be relied upon to contest reverse discrimination and call into question the conditionality of different categories of residence requirements for third country nationals. Given the Court’s silence on the foundation, consequences and limits of the novel “substance of rights” doctrine, the repercussions may indeed be monumental at first sight. As often, the situation does however look more nuanced at second reading. While the results are impressive, they may not entail the categorical departure from the established principles of national and EU immigration law which some commentators will extract from Ruiz Zambrano.

Given the Court’s silence about dogmatic arguments supporting its conclusion, the ECJ holds primary responsibility for legal uncertainty which the judgment brings about. At the end of the day, Luxembourg will have to clarify its position in later judgments, such as the recent McCarthy ruling delivered eight weeks after Ruiz Zambrano. These judgments seem likely to confirm our conclusion that the consequences are less dramatic than the initial reading suggests. A principal reason for this assumption concerns the autonomy of the “substance of rights” standard, which does not overrule the established ECJ case law on human rights, the fundamental freedoms and Articles 18 and 21 TFEU. Reverse discrimination, in particular, is not being outlawed as a matter of principle, but challenged only within the “core” of citizenship rights. Similarly, the new line of argument does not affect all third country nationals. Ruiz Zambrano is in essence about the reinforcement of Union citizenship as a “federal” status. Third country nationals benefit from the judgment on the

61. See McCarthy cited supra note 22 and the corresponding comments in different sections of this annotation.
62. As argued supra in section 4.
63. See supra section 3.
basis of a legal reflex as family members of Union citizens. Other foreigners may “only” invoke human rights, which guarantee less generous standards than the citizenship regime.64

We may directly apply the Ruiz Zambrano argument only to cases in which the children – but not the parents – are Union citizens. The circumstances giving rise to this outcome are irrelevant. The “substance of rights” doctrine applies to all Union citizens, irrespective of whether they obtain their status on the basis of the rules on the reduction of statelessness (as in the case under review) or under general nationality law, which extends citizenship to certain third country nationals born on the territory of the host State (ius soli). It is Union citizenship that matters, not the reasons why it was obtained.65 Thus, the ruling may even motivate the Member States to tighten their nationality laws, mirroring the Irish referendum modifying the ius soli rule after the Court’s Chen case.66 The practical effects of the judgment ultimately depend on the domestic immigration rules. If the naturalization of minors regularly requires a secure residence status on the side of the parents,67 the disputes underlying the Ruiz Zambrano case will rarely surface. In these cases, only the loss of residence status, e.g. after a criminal offence, will have to be resolved on the basis of the “substance of rights” doctrine.

5.1. Countervailing public policy considerations

The implementation of the judgment exposes one central deficit of the Ruiz Zambrano case. The Court does not specify the legal effects which national immigration authorities and courts are meant to draw from its reasoning. Does the Citizenship Directive (or possibly even the Family Reunification Directive) apply by analogy? Or does Article 20 TFEU mandate an autonomous status, whose contents would have to be defined? Does the EU legislature hold the capacity to specify the legal effects within the “core” of Union citizenship? All these questions remain unanswered by the ECJ, but will take centre stage at the national level. One example: in cases of illicit drug trafficking even an EU citizen who was born in another Member State may lose their permanent residence status under the Citizenship Directive, in line with the Tsakouridis case.

64. On the basic distinction between Union citizenship (including the fundamental freedoms) and human rights which underpins the differences between the intra- and extra-Community migration law rules see Hailbronner, Immigration and Asylum Law and Policy of the European Union (Springer, 2000), pp. 87–8 and Thym, Migrationsverwaltungsrecht (Mohr Siebeck, 2010), pp. 103–4.
65. So, unambiguously, judgment, para 40.
67. In casu, Art. 1 of the Convention on the Reduction of Statelessness, supra note 4, permits State parties to establish conditions which prevent the immediate naturalization of children of illegal immigrants (as in Ruiz Zambrano).
decided by the Grand Chamber five months earlier. In contrast, the Court’s apodictic statements in Ruiz Zambrano may leave the impression of unconditional residence rights. Does the judgment intend such drastic consequences?

In this respect, the incorporation of the Rottmann case may be crucial for our understanding of the Court’s reasoning. In Rottmann, the ECJ had limited the Member States’ autonomy in nationality law with recourse to the principle of proportionality as a general principle of Union law. Notwithstanding this caveat, the Court does explicitly recognize that a “reason relating to the public interest” may justify loss of nationality (and Union citizenship). By invoking Rottmann, the Grand Chamber illustrates that the “substance of rights” doctrine does not establish an absolute standard; Union citizenship may be lost. The lack of reference to the “public policy” formula in Ruiz Zambrano probably results from the course of the judicial proceedings. Both the referring and third party interveners focused on the existence of a residence right, not upon its limits. Ruiz Zambrano should therefore not be read as a rejection of policy considerations, whose continued relevance also aligns the “substance of rights” doctrine with the general free movement regime. A proportionality assessment in line with the Rottmann judgment guarantees the ultimate authority of the ECJ without ignoring legitimate public policy objectives at Union and/or national level.

The continued relevance of public policy considerations illustrates that Ruiz Zambrano does not generally unmake the conditionality of national and European immigration law without specifying the character of the residence status which national authorities shall extend to the claimants. Most probably, the Court will bridge the gap with recourse to an established line of reasoning: wherever the Union legislature has not harmonized national rules, Union citizenship will – like the fundamental freedoms – serve as a secondary control standard. The relevant national rules continue to apply, but their output is scrutinized by the Court in the light of the “substance of rights” standard, before referring the final proportionality assessment back to national courts. As a result, national immigration law for family reunification of third country nationals continues to apply in Ruiz Zambrano-style situations,

69. See, in particular, judgment, para 45.
70. See Rottmann, cited supra note 20, para 51 and the threefold reference to Rottmann by the ECJ in the judgment, paras. 40–2.
72. Similarly, again, Rottmann, cited supra note 20, para 45 and, as a prominent example, Garcia Avello, cited supra note 13, para 16.
73. Cf., among many, Joined Cases C-22 & 23/08, Vatsouras, judgment of 4 June 2009, nyr, para 41 and Rottmann, cited supra note 20, para 58.
unless Article 20 TFEU mandates a different outcome (or the EU legislature extends the family reunification Directive to such situations). Such division of labour between EU and national law also corresponds to the delimitation of competences within the EU.

5.2. Unconditional residence status for all family members?

The duration of the residence status is also not specified by the Court. With a view to its derivative character based on the situation of the children, it should come to an end (or not arise in the first place) when the children cease to depend on their parents. Parents will therefore regularly lose the indirect protection of Union citizenship when the children turn eighteen, if the latter do not depend upon their parents’ continued presence for certain special needs (such as mental or physical handicaps on the side of the child). This conclusion would mirror the Court’s line of argument in the recent Ibrahim and Teixeira judgments. Also, Union citizenship will, in regular circumstances, only support the residence of third country nationals who are parents of Union citizens; more extensive privileges for other family members are difficult to deduce from Article 20 TFEU. The protection offered by Ruiz Zambrano to third country nationals is not an end in itself (human rights assume this function), but a means to render the children’s citizenship status effective.

74. The material scope of Art. 79(2)(a) TFEU arguably extends to family members of Union citizens (Directive 2003/86/EC (supra note 41) does insofar not exhaust the Union competence), as long as future directives respect free movement and citizenship rules; see Thym, “Article 79 TFEU”, in Grabitz, Hilf, Nettelsheim (Eds.), EU Commentary, looseleaf, 42nd ed. (Beck, CH 2010), para 19; by contrast, it might prove difficult to extend the “Citizenship” Directive 2004/38/EC (cited supra note 16) to domestic family reunification, if we maintain that Art. 21 TFEU, including the legislative competence in para 2, does not cover purely domestic situations.

75. Union citizenship (Art. 18–25 TFEU), in the same vein as migration law under Art. 79 TFEU, does not constitute an exclusive EU competence in accordance Art. 3–4 TFEU.

76. Given the autonomy of the “substance of rights” standard, real dependence upon the parents’ presence must probably be considered as the decisive factor; thus even parents of minors who are Union citizens do not obtain a residence status if the latter do not depend on their parents. There is – contrary to secondary legislation – no formal 18-year rule.

77. Most parents should by then have obtained an autonomous residence status under national or EU immigration law, possibly on the basis of the “Long Term Residents” Directive 2003/109/EC (O.J. 2004, L 16/44).

78. Special needs on the side of third country national parents are protected by human rights, not their children’s Union citizenship.


80. The generous definition of family members in Art. 2(1)(c)+(d) Directive 2004/38/EC (cited supra note 16) presupposes the applicability of the directive.
It should be noted that the ECJ has so far only applied the “substance of rights” test to Union citizens who are minors. This corresponds to obligations of all Union institutions to act in “the child’s best interests” (Art. 24(2) of the Charter). *Ruiz Zambrano* integrates this obligation into the citizenship argument: during the identity-shaping early years of their lives, EU citizens should not be obliged to leave the Member States and so be socialized outside Europe for the sole reason of their parents’ residence status. These considerations cannot however be extended to adults without adjustment. The ECtHR also applies more restrictive criteria whenever the expulsion of minors is at stake and, as a matter of principle, does not “impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence.” Also *Ruiz Zambrano* does not contain an authoritative statement on national rules concerning family reunification of third country national spouses with adult EU citizens. The Court should be less restrictive in this area, also taking into account the primary responsibility of the Member States for integration policies. It should therefore be welcomed that in its *McCarthy* judgment the Court’s third chamber explicitly recognizes the non-application of the “substance of rights” doctrine to family reunification among adults without intra-EU movement.

Eventually, it remains to be tested in how far the conditionality requirements in immigration law, such as income levels or restrictions for criminals, are affected by the “substance of rights” doctrine. National courts will have to develop precise standards in cooperation with the ECJ in this respect as well. The long-term impact of *Ruiz Zambrano* will crucially depend on the Court’s decision whether to align the residence status of third country national family members of Union citizens with the generous rules of the Citizenship Directive 2004/38/EC or with the regime which the Union legislature has developed for third country nationals in the Family Reunification Directive 2003/86/EC. The choice lies with the Court. When explicating the *Ruiz Zambrano*

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83. See Art. 79(4) TFEU which may, as a value judgment, guide the interpretation of other Treaty provisions by the EU institutions, incl. the ECJ; see also Hailbronner, in ibid (Ed.), *EU Immigration and Asylum Law. Commentary* (C.H. Beck, 2010), Ch. 1 paras. 14–22.
84. See *McCarthy* cited supra note 22, esp. paras. 49–50.
87. When it comes to income requirements, *Ibrahim and Teixeira*, cited supra note 79, may signal a more generous approach, although the case is based on Regulation 1612/68, cited supra.
judgment in later cases, it will not be able to escape some hard choices, which will also give it the opportunity to pay due respect to the written rules of primary and secondary Union law.

6. Conclusion

Over the past 15 years the Court has turned Union citizenship into a crucial point of reference for the evolution of EU law. Citizenship serves as an instrument to bring ever more policy questions into the Court’s remit and to push its case law beyond the single market paradigm. Ruiz Zambrano presents us with another milestone. Granting the unemployed parents of Union citizens who are minors without a meaningful link with another Member State a right to regularize their illegal stay indicates a permanent move beyond the confines of “market citizenship”. In its place, “federal” European Union citizenship cultivates the human dimension of EU integration. In Ruiz Zambrano, the Court endows itself with an instrument which may potentially be directed against a variety of national measures. The “substance of rights” doctrine permits the Court to scrutinize purely domestic situations, whenever the Court considers the “core” of Union citizenship to be at stake.

One motivation on the side of the Grand Chamber may have been to counter uncertainty about the meaning of cross-border effects. Its generous interpretation of Article 18 and 21 TFEU has created a grey area for the (non-)application of the free movement regime. Legal certainty would indeed be welcome in this respect. This putative objective is however not met by the Ruiz Zambrano judgment. On the contrary: by establishing a novel and autonomous category the Court creates multifaceted problems of implementation and delimitation. The Grand Chamber could have avoided these difficulties if it had given reasons explaining the foundations, implications and limits of the “substance of rights” doctrine. Instead it simply invokes the generic “fundamental status” formula. It is left to national judges and academic observers to reconstruct the Court’s reasoning by themselves.

Notwithstanding methodological deficits of the decision, the Court does not have to shoulder sole responsibility for the difficulties underlying its case law on Union citizenship. For structural reasons, EU citizenship cannot bridge the inherent limits of EU action. Even on the basis of the Lisbon Treaty, EU citizenship remains subject to limitations; otherwise the vertical balance of power between the Union and the Member States would be substantially altered. Extending the reach of Union law to all purely domestic situations (i.e. also those outside the scope of “core” rights) or the expansive understanding of the
scope of EU Fundamental Rights on the basis of the Ruiz Zambrano ruling would provoke resistance on the side of the Member States, including national constitutional courts. Such conflict the ECJ certainly does not strive for. It therefore does not come as a great surprise that the Court positions itself for a great leap forward – and stops half-way. The “substance of rights” doctrine may establish a new, autonomous category, but does not unmake all national regulatory autonomy.

Ruiz Zambrano also hints at another area of tension: the ECJ’s relations with the Union legislature. The Grand Chamber’s apodictic conclusions by and large ignore the rather sophisticated legal regimes governing EU free movement and migration policy towards third country nationals. With recourse to the concept of Union citizenship the ECJ concedes immigration privileges which neither the Citizenship nor the Family Reunification Directive nor the human rights case law of the ECtHR would support. In future, Luxembourg will have to pay more respect to the wording and systematic structure of both primary and secondary Union law. For this reason, the judgment’s repercussions are less drastic than a first reading suggests. When it comes to immigration law, in particular, the new “substance of rights” standard does not absolve the ECJ and national court from balancing the individual perspective of Union citizens with countervailing public policy objectives. In its first follow-up judgment,88 the Court’s third chamber recognizes the inherent limits of the “substance of rights” doctrine in welcome clarity.

Kay Hailbronner & Daniel Thym*

88. McCarthy, cited supra note 22.

* Prof. Dr. Dr. h.c. Kay Hailbronner, LL.M. and his successor Prof. Dr. Daniel Thym, LL.M. are the managing director and co-director respectively of the Research Centre Immigration & Asylum Law at the University of Konstanz, Germany.