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THE FAMILY RIGHTS OF EUROPEAN CHILDREN:
EXPULSION OF NON-EUROPEAN PARENTS

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Abstract

In Ruiz Zambrano and Dereci the Court found that the Treaty prohibits expulsion of a family member of a Union citizen if that expulsion would force the Union citizen to leave the Union too. This is of particular importance where the Union citizen is a child, since children are particularly dependent upon their parents and perhaps cannot be expected to remain behind without them. The cases therefore provide a – qualified and complicated – right of residence for the parents of Union citizen children.

This parental right of residence is at odds with many national immigration practices, which have become increasingly restrictive in recent years. The precise limits of the Court's new doctrine therefore become important. What must the relationship between child and parent be for this right to be active? Does the right only apply to children already possessing an EU passport, or also to those with a plausible, but not yet officially accepted, claim to an EU nationality? This paper argues that both measures expelling parents, and measures hindering a child's establishment of its Union citizenship count as interference with the right to reside in the Union, and must satisfy a proportionality test, and that expulsion, in the light of contemporary ideas about the importance of parent-child contact, will often be disproportionate.

Keywords

Union citizenship, family life, expulsion, Ruiz Zambrano, Dereci, residence rights, children and EU

1. Introduction

EU law grants Union citizens the right to reside in Member States other than their own, and to bring various categories of family members to live with them. However, the relevant legislation – directive 2004/38 – implicitly conceives of these family members in terms of their dependency upon the migrant citizen, who is the active party in the decision to migrate.¹ The logic is that the citizen – who is an employed or self-employed person, a student, or a person of independent means – has responsibilities to these people and ties to them, and cannot leave them behind. As a result, the categories of family members who may join or accompany a migrant citizen include spouses, dependent parents, and dependent children, irrespective of their nationality.

The situation where it is the Union citizen who is, in some way, dependent upon their family members is different and precisely the reverse of the scenario imagined by the directive. This situation could arise where the Union citizen is an adult, for example in the case of a handicapped adult citizen who requires care from a parent. However, the most common and obvious example is where the Union citizen is a child.

Provided such a child citizen has access to sufficient resources, in order to meet the criteria for residence in directive 2004/38, there is no controversy about their right to reside; nothing in the Treaty or the directive makes that right dependent upon age. However, neither Treaty nor directive have much to say about the situation of the parents of that child, and whether they are to enjoy a derivative right of residence analogous to that enjoyed by family members of adult migrants. It has been left to the Court to fill this gap.

It has done this in a series of cases, notably *Carpenter*, *Chen*, *Baumbast*, and now two recent cases, *Ruiz Zambrano* and *Dereci*, the subject of this paper.² These represent the coming together of two streams of thinking and law. On the one hand, the cases took place over a period of time in which human rights were increasingly the object of EU attention, whether as a result of the adoption of the Charter of Fundamental Rights, or the ongoing discussion about accession to (and compliance with) the European Convention of Human Rights. Provisions of these two central human rights documents may be therefore seen as framing the case law. In particular, the Charter provides in Article 24 that

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

The Charter only applies to Member States when they are implementing EU law, and the meaning of this limitation is unclear. Nevertheless, in *Dereci* the Court took the view that if the situation of a parent and Union citizen child falls within the Treaty, then it is the Charter which is the relevant legal basis for human rights arguments.³ The Court there was referring to Article 7 of the Charter, which will also be of particular importance, as it contains the right to respect for private and family life. This is the same in meaning and scope as Article 8 of the ECHR, upon which it is modeled. Article 8 ECHR has been regularly relied upon by the Court to emphasise that the separation of family members, including parents and children, must be sufficiently justified.⁴

¹ Article 2, Directive 2004/38 on Citizens' Rights, [2004] OJ L 158/77.

² Case C-60/00 *Carpenter* [2002] ECR I-6279; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925; Case C-413/99 *Baumbast*, [2002] ECR I-7091; Case C-34/09 *Ruiz Zambrano*, judgment of 8 March 2011; Case C-256/11 *Dereci, Heimpl, Kokollari, Maduïke and Stevic*, judgment of 29th September 2011.

³ Paragraph 71 of the judgment.

⁴ *Carpenter*, note 2 above; Case C-109/01 *Akrich* [2003] ECR I-9607; Case C-127/08 *Metock* [2008] ECR I-6241; Case C-459/99 *MRAX* [2002] ECR I-6591.

Within this context of a textual awareness that children and parents should not be separated it is perhaps not surprising that the Court has consistently found in favour of parental rights of residence in the cases above. However, while Article 8 and the Charter have been referred to, the major part of the reasoning in these cases derives from the second stream of thinking and law, which is that associated with Union citizenship and its rights. Despite its origins in economic migration, and early critiques that any social and human aspects attached to it were purely instrumental (Everson), over the years the Court has shown a readiness to interpret the equality and family rights of Union citizens in relatively far-reaching ways, setting aside the protests of Member States (Costello; Spaventa). It has maintained a quasi-utopian rhetoric in which Union citizenship is becoming the fundamental status of citizens of the Member States, and serving as a meaningful guarantee of their equality and solidarity, and while these statements are certainly aspirational more than purely descriptive (Nic Shuibhne), they nevertheless have provided conceptual support for a number of cases which can be more plausibly understood in terms of the protection of citizenship-like norms such as dignity, equality, and opportunity than in economic or narrowly instrumental terms.⁵ The cases above fit this pattern.

The essence of *Carpenter* was that the presence of a third-country mother who could look after the family children while the father was away could be seen as aiding him in his provision of cross-border services.⁶ The law on services therefore protected her right of residence. If the free movement of services is about economic freedom, then this judgment stretches it quite a long way, but the Court was clearly also influenced by Article 8 ECHR, and the combination of the two enabled it to move toward a rights-friendly reading of economic law, a powerful possibility in which the integrity of the family could be seen as a necessary part of a meaningful freedom to engage in economic activity. As with many of the cases discussed in this paper, the factual proposition at the core of the judgment – in the case of *Carpenter* the proposition that a businessman finds it easier to engage in foreign business trips if he has a wife at home to look after the children – is both a both self-evident banality and, simultaneously, a radical legal development. The fact that recognition of the obviously true should be such a legal shock may be a reflection of limited, perhaps conservative, assumptions embedded within the legal system, and in that sense a confirmation that judgments like this are needed to push the law into engagement with contemporary reality and avoid it losing legitimacy through a blindness to fact. Although *Carpenter* was not about parental rights as such, because it was the husband who was relying on EU law, and not the children, it did protect the residence right of a parent on the basis of the consequences of their expulsion for the lives of other family members, and in that sense is the foundational case on parental rights beyond the directive.

Chen addressed a more explicitly parent-child situation, in which a Union citizen who was a child lived in a host Member State with a parent who was not a Union citizen.⁷ In this case the Court found that the child, as a Union citizen, enjoyed a right of residence, but that this right could only be exercised if their parent was also permitted to reside, since it was unrealistic, perhaps impossible, for a child – in this case a baby – to remain while the parent was expelled. A parental right of residence was therefore a corollary of the child's right – provided that the substantive conditions concerning resources were met, which apply to children as to adults. *Baumbast* is a factually slightly more complex variation on this same theme.⁸

Now we have *Ruiz Zambrano*, in which the Court found that Union citizens have a right not just to reside in other Member States, but also in the EU as a whole, and that this latter right can be exerted against their home state. Expulsion of non-European parents from the Union is therefore prohibited by the Treaty if it would cause the child citizen to have to leave the Union too. This latter finding, that a

⁵ Case C-274/96 *Bickel and Franz* [1998] ECR I-7637; Case 184/99 *Grzelczyk* [2001] ECR I-6193; Case C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

⁶ *Carpenter*, note 2 above.

⁷ *Chen*, note 2 above.

⁸ *Baumbast*, note 2 above.

parental residence right is necessary for, and therefore entailed by, a child's residence right is merely a following of *Chen*. However, the extension of the citizen's right of residence to the entire EU, including the home state, is novel, and important, since it means that there is no need for migration for the right to be engaged. This expands the personal scope of citizenship rights and parental residence rights many-fold, since there are far more citizens living in their own state than as migrants. This may be even more true where the citizen is a child.

Ruiz Zambrano was confirmed in *Dereci*, decided shortly afterwards in response to an Austrian reference which was essentially a request for clarification of the *Ruiz Zambrano* judgment. The facts in *Dereci* were more diverse, a number of cases being joined, with the common factor being that a family member of an Austrian faced expulsion. Rather than providing concrete answers on the legality of the expulsions, as it had in *Ruiz Zambrano*, the Court in *Dereci* simply restated the fundamental principle of *Ruiz Zambrano*, which was that the Treaty prohibits expulsion from the Union of a family member of a Union citizen if this expulsion has the consequence that the Union citizen is forced to leave the Union too. It then found that whether this will be the consequence of a threatened expulsion is a question of fact for the national court, implicitly suggesting that the principle can apply to various situations, not only the precise circumstances of *Ruiz Zambrano*.

This paper is an examination of the meaning and consequences of these judgments. The paper focuses, as do the cases, on the legality of the expulsion of non-European parents from the EU. This is just one part of the broader picture of parental rights, including parental residence rights, but it is an important one: the situation of non-European parents is often fragile, and far more fragile than that of Union citizens, for whom any expulsion – and actual expulsion of Union citizens is rare – would only be back to another EU Member State. The threat to the welfare of European parents and their children is usually less than the threat involved in expulsion to some other parts of the world.

Because of this particular focus the phrase 'non-European' is used in place of the commonly used 'third country national' or TCN. This latter phrase originates from the time when EU law residence rights were only for those who migrated from one Member State to another. There were thus always two Member States involved in a migration story, and a non-European was then from a 'third state'. Now, after *Ruiz Zambrano*, there is no longer a need for intra-EU migration to engage Union citizenship or residence rights. The non-European parent is not from a third state, but from a second one that is not part of the EU. Clarity and accuracy then make it inappropriate to use the TCN label. Non-EU or non-Union would be the most precise, but for linguistic comfort the more approximate, but also more readable, 'non-European' is used. In practice it will rarely be Swiss, Norwegian or Lichtensteinian parents who are threatened as Mr and Mrs Ruiz Zambrano were, so perhaps 'non-European' contains more truth than its legal imprecision might suggest.

The paper is structured around a number of questions and issues which *Ruiz Zambrano* and *Dereci* raise: what is meant by a child 'having to leave' the EU? What is now the test for the legality of an expulsion of a parent – the narrow question whether the child in fact leaves too, or Article 8 ECHR, or proportionality? How does this test apply to situations slightly different from that in *Ruiz Zambrano*, notably where one parent is a Union citizen and the other is not? And finally, in the last section, does the right to reside in the EU only apply to children already possessing an EU passport, or also to those with a plausible, but not yet officially accepted, claim to an EU nationality? This matters, more than may seem, for reasons explained below.

The paper's central argument is that what is presented as a primarily empirical question – whether a citizen has to leave – is actually a normative question about when we can expect a child to remain in the EU without their parents. A Union citizen is never forced to leave the EU directly – they are merely pressured to do so by the consequences of the alternative. When do these consequences amount to 'forcing' the child to leave? What aspects of the parent-child relationship are important? How much interference in their family life will the law accept? The answers to these questions, it is argued, will depend on how courts balance the various interests involved; family rights, immigration control, and

citizenship rights. The decision whether a child has to leave the EU will therefore come down to something essentially identical to the proportionality of the parental expulsion. That, however, is a remarkably open-ended principle, which may end up having consequences quite a long way beyond the *Ruiz Zambrano* situation itself.

2. The citizen's right of residence in the Union

Mr Ruiz Zambrano is Colombian, as is his wife. They live in Belgium with their three small children. Two of these children are Belgians. They were born in Belgium, and Mr and Mrs Ruiz Zambrano did not register them with the Colombian consulate. Colombian law however provides that a child born outside Colombia only acquires Colombian nationality if registered with the consulate in the land of birth.⁹ These two children would therefore have been stateless were it not for Belgian law, which provided that children born in Belgium who had no other nationality would automatically be Belgians. Belgium has since amended its law to prevent a repetition of *Ruiz Zambrano*, but a number of Member States still have similar laws, aiming to prevent the unhappy situation of stateless children.¹⁰ As will be seen below, there are in any case other situations where a child Union citizen may have a non-European parent and the case may be relevant.

Mr and Mrs Ruiz Zambrano had no residence or work permits, and had received a letter from the Belgian authorities in which they were informed that they must leave Belgium. However, no steps were taken to enforce this, and they had continued for some time to live there, and Mr Ruiz Zambrano had also worked. During a period of unemployment he applied for an unemployment benefit, but this was refused because of his lack of legal status. His contestation of that refusal led the Belgian labour court to refer a number of questions to the Court of Justice, of which the essence amounted to this: 'is Mr Ruiz Zambrano entitled to a residence and/or work permit because his children are Belgians?' The Court said yes, and the following paragraphs are the core of the judgment:¹¹

42 In those circumstances, 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.

43 A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

44 It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

Mr Ruiz Zambrano therefore had the right, as a matter of EU law, to work and reside in Belgium. The alternative would be that he would have to leave Belgium, and thus the EU, either as a matter of law, or as a matter of fact because he could not support himself there. This, the Court assumed, would have as a consequence that his children would also be forced to leave the EU since they would inevitably and perhaps necessarily go where their parents went. However, national measures which have the consequence that EU citizens are forced to leave the EU deprive them of the substance of their rights as EU citizens, it said, and are therefore contrary to the Treaty.

⁹ *Ruiz Zambrano*, note 2 above, judgment, paragraph 19.

¹⁰ Including France, Italy and Ireland: See the EUDO citizenship modes of acquisition database 'statelessness at birth' at <http://eudo-citizenship.eu/modes-of-acquisition/190/?search=1&idmode=A03b>

¹¹ Case C-34/09 *Ruiz Zambrano*, judgment of 8 March 2011.

Ruiz Zambrano caused some consternation and confusion, and led to a number of references requesting clarification. One of these, *Dereci*, was decided just a few months later, and is a restatement, and to a limited extent a clarification, of the position. This reference concerned a number of cases involving varying factual situations, all taking place in Austria, and all involving an Austrian citizen and a non-European family member facing expulsion. Mr Dereci is the father of Austrian children, but unlike the case in *Ruiz Zambrano* the mother of these children is Austrian too. Mrs Heiml and Mr Maduiké are married to Austrians. Mr Kokollari and Mrs Stevic are both adults with one Austrian parent, and both claim that this parent supports them. The referring court asked whether, in the light of *Ruiz Zambrano*, the Treaty prohibited the expulsion of the non-Europeans in these cases from Austria and the EU.

The Court declined to answer directly. It restated the principle from *Ruiz Zambrano* that ‘Article 20 TFEU prohibits national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status’. It then went on to confirm that such a deprivation is to be found where a measure has the effect that a Union citizen ‘has, in fact, to leave not only the territory of the Member State of which he is a national, but also the territory of the Union as a whole’.¹² It is the meaning of this phrase which is the central question raised by these cases. However, rather than provide further explanation of it, the Court explicitly decided, in its conclusion, that it was a question of fact for the national judge whether such a forced departure would occur in any given case.

A number of other points follow explicitly or implicitly from *Dereci*. Firstly, that the Court gave such a general answer to the reference suggests strongly that there is no a priori rule that the *Ruiz Zambrano* principle is confined to the child-parent relationship. It may be unlikely that the expulsion of a spouse forces the Union spouse to leave the Union too, but it is not excluded as a matter of principle.¹³ It may depend upon the specific circumstances of their relationship and mutual dependency, and is a factual question in each case. Secondly, a number of the persons in the situations referred had been unlawfully present in Austria. The Court did not nuance or modify its principle by reference to this. It appears that – as with the partners of migrant citizens – the unlawfulness of prior entry and residence in the Member State does not prevent a *Ruiz Zambrano*-type residence right being claimed.¹⁴

Thirdly, in *Dereci* the Court addressed the role of human rights in situations such as these. It noted first of all that the mere desirability of keeping a family together is not as such enough to invoke EU law. In egregious enough circumstances Article 8 ECHR may protect the integrity of the family, but EU law only becomes involved precisely where the family is not going to be split: where it is considered that the Union citizen will be forced to accompany their family member out of the Union. However, that is not to say that human rights are irrelevant to such cases. If the case is covered by the Treaty, the Court found, then the Charter of Fundamental Rights will be relevant. It mentioned here Article 7, the Charter transposition of Article 8 ECHR, on the right to respect for family life. However, Article 24, and the rights of the child, may be equally important, and it follows from the applicability of the Charter that this must also be taken into account.

This invocation of the Charter raises many questions, and rests on an unclear basis. Implicitly, it would seem that the Court is saying that where a national measure deprives a Union citizen of the enjoyment of the substance of their rights, the Charter will apply. Yet this statement follows the finding that measures which have such an effect are prohibited anyway. So what is the role of the Charter then? It is suggested that the Court is envisaging that where a national judge has to decide whether such enjoyment is taken away – whether a Union citizen will in fact be forced to leave the

¹² Paragraph 66 of the judgment.

¹³ See also Case C-434/09 *McCarthy*, judgment of 5 May 2011.

¹⁴ See Case C-127/08 *Metock* [2008] ECR I-6241.

Union – they should at that point look at the situation partly in the light of the Charter. It will be argued below that whether a departure is forced depends primarily upon whether not departing is a legally or humanly acceptable option, and it is here that the Charter may play its role.¹⁵ It is a factor in deciding whether a citizen will ‘have to’ leave the EU.

The final doctrinal issue which *Ruiz Zambrano* and *Dereci* raise concerns the internal situation. In finding that the residence right of a child may entail a residence right for their parent they merely follow *Chen* and *Baumbast*.¹⁶ The novelty of the two new cases is that the Union citizens were not migrants in a Member State other than their own, but in their home state. As a result the Union citizens fell outside the citizenship directive, which is explicitly limited to EU citizens who move to a Member State other than their own.¹⁷ They had to rely on the Treaty itself, and the Court found, for the first time, that this grants Union citizens a right to live in the Union which may be enforced even against a citizen’s home Member State. A number of commentators have suggested that this is an extension of the scope of Union citizenship, and have asked whether it presages the end of the constitutionally important doctrine of the wholly internal situation. (Ankersmit & Geursens, 2011; Kochenov, 2011; Wiesbrock, 2011; Hailbronner and Thym; Van Elsuwege)

The situation is somewhat more nuanced. The concept of an ‘internal situation’ to which the Treaty does not apply is a child of economic law. The Treaty articles concerning the free movement of goods, workers, services, legal persons and capital all speak of movement between Member States, and of imports and exports, and of limits on these things.¹⁸ If a situation concerns only one Member State then it is simply very difficult to explain how it is connected to one of these articles.¹⁹ The ‘internal situation’ is not so much a judicial constitutional construction as a consequence of a literal and straightforward approach to the wording of the Treaty. These articles are worded to only apply to things moving between states.

However, the Treaty articles on citizenship are differently put together, and far more general. Article 21(1) TFEU provides that ‘Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.’ Article 20(2)(a) is almost identical: it provides that EU citizens have ‘the right to move and reside freely within the territory of the Member States’.

The traditional lawyer, prizing text above policy, will not read any internal situation into these articles. Their wording is quite different from the economic articles, and speaks of the whole EU, not of ‘other Member States’ or ‘Member States other than their own’ or ‘movement between states’. It is quite true that in the past the Court has excluded internal situations from citizenship rights,²⁰ but always where secondary legislation was involved which was, just as the current citizenship directive, explicitly limited to the cross-border situation.²¹ However, the existence of secondary legislation does not mean that the Treaty is no longer applicable. Secondary legislation is in general a step towards realizing the goals of the Treaty, but not a complete encompassing of these. In situations beyond the directives, the Treaty remains the relevant law. Where a citizen has not moved to another state he or she clearly falls outside the directives, and the question is therefore whether Article 20 or 21 TFEU applies.

¹⁵ See part 3 below.

¹⁶ Case C-200/02 *Zhu and Chen* [2004] ECR I-9925; Case C-413/99 *Baumbast*, [2002] ECR I-7091.

¹⁷ Directive 2004/38, Article 3.

¹⁸ Articles 34,49,56,63 TFEU.

¹⁹ Cases 133-136/85 *Rau* [1987] ECR 2289; Case C-64/96 *Uecker and Jacquet* [1997] ECR I-3171; Case C-212/06 *Government of the Walloon Community v Flemish Government* [2008] ECR I-1683.

²⁰ *Uecker*, *ibid.*

²¹ Regulation 1512/68.

Looking at the wording of these articles it is possible to apply them to a citizen in her home state by two paths of reasoning. One is to suggest, as the Advocate General in *Ruiz Zambrano* did, that they may comprise two separate rights: a right to move throughout the Union, and a right to reside in the Union.²² The other is to argue that if a citizen is forced to leave the Union then she will no longer be able to enjoy her other rights, such as the right to travel throughout the Union.

The Court does not make clear which of these ideas motivate its decision (Thym and Hailbronner), although it is suggested that the first is tidier and more convincing. However, ultimately it does not matter which path is chosen. In both cases the conclusion is that measures which lead to a Union citizen having to depart from the Union are prohibited, and it is to the meaning of ‘having to leave’, a situation described here as a ‘forced departure’, that this paper now turns.

3. Identifying national measures which compel departure from the Union

i. Forced departure as a normative balancing process rather than a purely factual assessment

The question whether a child – or other citizen – is forced to leave the union is deceptively simple. It appears to pose a tidy either/or factual question to the national judge. Yet evidence alone is unlikely to bring a resolution, for a citizen is, on a most literal approach to the law, never forced to leave the Union. There was no question in either *Ruiz Zambrano* or *Dereci* of expulsion orders being made against the Union citizens involved. As the Court noted in *McCarthy*, a case decided between *Ruiz Zambrano* and *Dereci*, a citizen always has the right to live in their own state.²³ There was no legal impediment to the family members in these latter cases leaving their Union citizen children behind. Had the *Ruiz Zambranos* gone without their children, no doubt the Belgian state would have stepped in to ensure that the abandoned young Belgians received care, shelter, education, and healthcare, and would have done its best to provide them with a decent life and prospects for the future. There is, in a sense, always an element of choice and voluntariness when a Union citizen accompanies a non-Union citizen out of the Union. In the case of children it may be the parents who make that choice, but it is still the case that the state does not literally compel the Union citizens to go.

If we find that argument unacceptable, and the Court clearly did not accept it in *Ruiz Zambrano*, then it is because we refuse to concede that the abandonment of children, or the separation from parents and children, comprise alternatives to departure that a court should consider. That refusal cannot be based on the contention that these alternatives are impossible, for they are clearly not impossible, but must be based on the contention that they are indecent, wrongful, inhuman, or unrealistic, and that the law somehow should take account of this. The proposition that Belgium would force the *Ruiz Zambrano* children to leave if it expelled their parents is therefore not a purely factual one; it is a normative assertion that the departure of the parents without the children is not a possibility that the law should accept.

The degree of normativity in *Ruiz Zambrano*’s apparently dry and empirical rule of law is exposed by thinking about some of the situations to which it would apply. That a parent might choose to leave without their child is not just technically and legally possible, but in some cases perfectly realistic and understandable. Consider for example Afghan parents, from a poor background, with a relatively westernized daughter aged 12 or 13. Perhaps the parents are integrated into the Afghan community in some large European city, and have friends there. Is it unthinkable that they would conclude that however painful, the best interests of their daughter are in leaving her in a state of which she is a citizen, and where she has friends, and where a functioning and civilized state apparatus will do its

²² Advocate General’s Opinion, 30th September 2010 (not yet reported) paragraphs 86-101. See also the opinion of the same Advocate General (Sharpstone) in Case C-212/06 *Flemish Insurance* [2008] ECR I-1683 at paragraph 141-144.

²³ Case C-434/09 *McCarthy*, judgment of 5 May 2011.

best to provide her with care and opportunities, rather than taking her to a poor and dangerous community where she may face oppression and little chance of a good life? Factors such as the age of the child, the presence of friends and family in the Member State in question, and the circumstances in the country of origin of the parents may mean that a decision to leave the child behind is plausible even in circumstances less extreme than those sketched here. Indeed, the link between parental expulsion and child departure may be equally weak at the other extreme of expulsion situations: where the parents are not being sent back to particularly unpleasant circumstances. Parents being expelled to a country not too far from Europe, where life is not too dangerous or unpleasant, may decide, for example, to let a teenage Union citizen finish their schooling in the EU, while living with family or friends, on the basis that the separation is mitigated by the chance for the child to visit them regularly, and by the realistic prospect of more extensive reunion at some point in the future. Perhaps finishing education in the Union is seen as a good foundation for a future career in the parents' home state, for example.

Yet in *Ruiz Zambrano* the Court did not appear to suggest that its principle was nuanced by such factors. It did not instruct the national court to investigate the circumstances of residence of the Ruiz Zambrano family in order to see how likely and realistic it was that the parents might in fact, if expelled, choose to leave their children behind. While in the more ethically unclear situations in *Dereci* it found that the consequences for the Union citizen did need investigation, in *Ruiz Zambrano* it appeared to establish a rule, which in turn must be based on a normative premise that the law will not consider the abandonment of minor children by the parents who care for them as an acceptable option legitimating the expulsion of those parents.

However, if the substantive finding of *Ruiz Zambrano* and *Dereci* is that a citizen will be considered to be forced to leave the Union when their remaining behind without their family members is normatively unacceptable, then the law unavoidably begins a complex and open-ended balancing process. How is that normativity to be filled in? When is remaining behind sufficiently human, decent, or realistic that it is to be seen as an option, and when not? What are the factors in this decision? A finding of a forced departure is not a simple question of fact, but the conclusion of a complex weighing of both factual and normative elements. It is herein that the importance of the cases lies: whether the Court realized this or not, it has established an open-textured principle that is nuanced, fact-specific, and potentially far-reaching, and capable of taking account of varied and varying perceptions about expulsion, family ties, and European values. In short, it has the potential to be as disruptive of national immigration law as the other, similarly open, principles of citizenship and free movement law have already been of other aspects of national law.

The next two parts of this paper consider how a court should approach the question whether a departure is forced. They consider the role of human rights, dependency, and proportionality. The first two concepts featured in the Court's reasoning in *Ruiz Zambrano* and *Dereci*, while the third has been part of earlier, similar cases, and is ubiquitous in EU law. Early signals from the Dutch courts, where a number of cases are now being litigated on the basis of the *Ruiz Zambrano* judgment, are used to provide examples of circumstances and approaches. The aim is to flesh out both the factual and normative aspects of when a citizen should be seen as 'having to' leave the EU.

ii. When is departure forced?

Where both parents are non-European and the family lives as a nuclear family, then to expel both those parents from the Union is arguably in substance to compel the child citizen to leave too: it is in most cases unrealistic to expect the child to remain alone, and if the parents are also the legal guardians then it may be legally impossible to require this. The parents will have the right to take the child with them. This is the *Ruiz Zambrano* situation, and at least some Member States would like to read the case as only applying to these very specific facts, either as a matter of political preference or legal conservatism. This is the situation in the Netherlands, where the minister has informed

parliament, after taking legal advice, that he does not consider the principles of the case to have any application outside of the very specific type of situation in the case.²⁴ The Dutch immigration service therefore takes the view that expulsion of one parent, where the other parent is capable of looking after the children is not contrary to the Treaty since the child is not forced to leave.²⁵ The substance of the reasoning offered is that expulsion of parents is only contrary to *Ruiz Zambrano* if there is no-one else acceptable to care for the child, so that the child is forced to accompany that parent outside of the Union. It is unlikely that the authorities would go so far as to offer an orphanage or foster home as an acceptable alternative to parental care, and use these to justify parental expulsion, but it does appear to be the case that they consider *Ruiz Zambrano* to only apply to situations where the parent is strictly necessary, in a literal sense, for the daily care of the child. If a child, for example, was living with an aunt or grandmother in a stable way, but enjoying regular contact with a father or mother, the view of the Netherlands appears to be that the Treaty does not prevent expulsion of that parent.

The Dutch courts are clearly still uncertain how to respond. In one recent case the Appeal Court of the Hague took the approach that *Ruiz Zambrano* might well prevent the expulsion of a father who was not a primary carer, if he was nevertheless involved with the child and his expulsion had a disproportionate effect on the child's family life and quality of residence.²⁶ By contrast, in an almost contemporaneous case from the same court, the father of a child with a mental handicap faced expulsion, and the court took a different approach. Here it was argued that although the child lived with the mother the father contributed in an important way to the care of the child and she would not be able to cope with this care alone. The court rejected this argument on the grounds that the care support which the mother required need not come from the father, but could be provided by social services.²⁷ This is a very narrow reading of *Ruiz Zambrano*, in which the relationship between the child and expelled parent must be one of the strongest dependency, without alternatives. It will suit the policy of many Member States to read the case in this way, and the question is whether the logic of the judgment, in the context of *Dereci* and other cases, supports or precludes such an approach.

The Dutch government's approach puts emphasis on the dependency of the children on the parent, a factor mentioned by the Court. The judgment can be read as implying that it is because the children were dependent on Mr Ruiz Zambrano that his expulsion would entail their own, with the implicit suggestion then that where children are not dependent on the parent in question this is not the case. However, on the one hand, dependency is an insufficient explanation – it does not on its own necessarily lead to children following their parents. As discussed above, it is imaginable, however unlikely and tragic, that in circumstances such as the Ruiz Zambrano's some parents might choose to leave their children behind, either in the care of friends or family, or at the mercy of the state. On the other hand, there could also be circumstances where a non-dependent child would also be forced to follow a parent. A child living with their mother might nevertheless have such a relationship with their father that the expulsion of the father would have such a devastating effect on the wellbeing of the child. The mother and child might then reasonably consider themselves to have no alternative but to follow the father. Or a mother being expelled to a country where she has extended family might wish to take her child, notwithstanding that she is not primarily or exclusively responsible for the daily care of that child in the Member State, who perhaps lives with other family members or friends. This decision might in the circumstances be understandable and in the interests of the child. It might even be unavoidable – the family or friends might not be prepared to retain the child without the mother's

²⁴ 'Brief van de minister voor immigratie en asiel', Tweede Kamer, vergaderjaar 2010-11, 19 637, nr. 1408. (available online at <https://zoek.officielebekendmakingen.nl/dossier/30573/kst-19637-1408.html>)

²⁵ See the arguments discussed in the two judgments of the appeal court of the Hague (Rechtbank 's Gravenhage) in case AWB 11/17559 *A v Minister voor Immigratie en Asiel*, 5th September 2011, and case AWB 11/844, 31st August 2011.

²⁶ Case AWB 11/17559, *ibid*;

²⁷ Case AWB 11/844 note 25 above.

presence, even if she is not the primary carer. If the mother is the legal guardian, then the state would be able to do nothing to prevent the departure of the child.

In any case, one may question whether dependency is a concept which will always add much to decision making: it is neither an all-or-nothing concept, nor is it a purely financial one. There can be emotional or practical dependency, and there can be degrees of dependency. It does not work as a conclusive evidential principle, and would seem to be no more - albeit no less - than a useful explanatory tool in investigating whether a departure is to be considered to be impelled.

Alongside factual matters such as the degree and type of dependency, the other aspect of that investigation is its normative framework: under what circumstances should the law consider that a child remaining behind without their parent is a sufficiently acceptable possibility that it legitimates that parent's expulsion? What are the relevant rules or legal principles to guide this?

The obvious basis for such a normative framework is the law on fundamental rights, in particular Article 8 ECHR. Manifestly, if the separation of child and parents amounts to a violation of that article then an argument that the child 'could' stay would seem to be legally excluded. In that case, expulsion of the parent must be seen as forcing the child to leave too. The circumstances in which a separation of parent and child would amount to such a violation is a complex question in itself, beyond the scope of this paper, but it may be noted that the issue acquires additional complexity in the context of EU citizenship. Most importantly, the Court in *Dereci* appeared to state clearly that the relevant source of human rights in such a situation is the Charter, rather than the ECHR. While Article 7 of the Charter is textually parallel to Article 8 ECHR it is by no means self-evident that it will be interpreted identically in all situations, and indeed it has been observed that it is at least arguable that the ECJ is prepared to take fundamental rights further in Luxembourg than the European Court of Human Rights is prepared to take them in Strasbourg (Hailbronner and Thym; Costello). The right to respect for family life may be stronger in the context of EU law than ECHR law.

This is partly caused by the presence of citizenship in the equation: the expulsion of a parent without their child will almost always be an interference with family life, and the legality of the measure will turn on its justification – whether it is prescribed by law and necessary in a democratic society. That justification is to a large extent a process of balancing public and private interests, and one of those interests, in a *Ruiz Zambrano* type situation, is in the protection of the citizenship rights of Union citizens, both for them as individuals, and for the EU as a whole. The Court, it may be expected, will be inclined to give this factor greater weight than the Court of Human Rights might do, and may be inclined to therefore more quickly find that an expulsion goes beyond what is 'necessary'.

Moreover, the Charter also contains Article 24, on the rights of the child, so that any decision to expel a parent must take account of the child's best interests and interest in regular contact with their parent. A decision that a child may remain behind without their parent must pass this legal test too.

Finally, there is evidence from past case law that the Court uses fundamental rights in a distinctive way in the citizenship context. The number of considerations relevant to expulsion of a family member – family rights, citizenship rights, immigration concerns and the rule of law – have led it in the past to use Article 8 ECHR not as a threshold, but as a factor. It has, in considering the legality of such an expulsion, not asked itself the question 'what would Strasbourg say' but rather the question whether the degree of interference with family life, combined with the degree of interference with citizenship rights, goes beyond what EU law in the circumstances can consider justified (Van Elsuwege).²⁸ There are reasons to think that the question whether a departure is to be considered forced, which reduces in turn to the question whether the alternatives to departure are legally acceptable, reduces ultimately to the question whether all the interests concerned have been balanced in a defensible way.

²⁸ See note 4 above.

iii. From forced departure to disproportionate interference with the right to reside

The analysis above comes close to a proportionality test, and it is suggested that in fact this is the correct legal test to apply to the expulsion of a parent of a child citizen: is it proportionate? (Hailbronner and Thym; Van Elsuwege) That would mean that it is not necessary to show that the expulsion necessarily leads in fact to the departure of the child, nor that there is a per se violation of Article 8 ECHR or Article 7 of the Charter.

This would be a conclusion about the law based on *Ruiz Zambrano* which would be of considerable practical impact, and yet it must be admitted that it is not what the Court in that case says. There is no mention of proportionality in the judgment. Nevertheless, it is suggested that there are three good reasons to think that proportionality is the correct test to apply to an expulsion:

a. Proportionality is the standard EU test for national measures interfering with rights

The innovation of *Ruiz Zambrano* is in the finding that there is a Union citizen's right to residence in the territory of the EU. Once that is established, there is no obvious reason why one cannot draw on the extensive jurisprudence concerning Member State interference with citizenship rights, all of which comes to the same conclusion: that such interference is prohibited unless justified by some over-riding need and proportionate.²⁹ This is also the approach in other contexts of EU law, so that one could go so far as to say that it is the standard EU law approach to regulating Member State impediments to the exercise of EU law rights.³⁰ Prima facie, one would then expect that disproportionate interference in the right to reside in the EU – including disproportionate expulsions of important family members – would be prohibited. Nothing in *Ruiz Zambrano* contradicts this. That case concerned the threat that this right would be in substance totally extinguished, and the possibility that the measure might be justified was therefore not even raised, and so proportionality was not in issue. However, just because this case was extreme does not mean that its principles do not extend to less extreme situations. The judgment is merely silent on this. *Dereci*, by contrast, is less supportive: here it would have been appropriate to mention the issue of proportionality, and the fact that the Court does not do so argues against a role for the concept. However, the force of this counter-argument is limited. First, proportionality may not have been raised in the case. Second, it can still play a role within the national court's assessment of when a child should be seen as 'having to leave' the EU.³¹

b. There is very specific support in other cases

It is not just the fact that proportionality is the central concept in adjudicating the interaction between national measures and citizenship rights generally which leads one to think it should have a role here. There is very specific case law support for this. *Chen* and *Baumbast* both concerned the residence right of a child, the derived residence right of their parent, and a Member State interference with this right. In both these cases the mother was to be expelled for not complying with substantive residence conditions in the directive – the resources issue in *Chen* and the sickness insurance clause in *Baumbast*.³² In each case, the Court emphasized that while the conditions in question could be applied, since secondary legislation specifically allowed for them, they must be applied in a proportionate way. The cases therefore provide very clear support for the proposition that conditions imposed on the residence of the non-European parent of a child Union citizen must be proportionate – which is, in substance, to say that any expulsion must be proportionate. The question is then whether there is any

²⁹ See e.g. *Baumbast*, note 2 above; *Bickel and Franz*, note 5 above; Case C-224/98 *D'Hoop* [2002] ECR I-6191; Case C-258/04 *Ionnadis*, [2005] ECR I-8275; Case C-135/08 *Rottmann*, judgment of 10 March 2010.

³⁰ Case C-158/96 *Kohll*, [1998] ECR I-1931; Case C-55/94 *Gebhard* [1995] ECR I-4165; Case 8/74 *Dassonville*, [1974] ECR 837.

³¹ See part 3(i)c below.

³² Note 2 above.

reason why this should be different if the right to reside in the EU is in issue, rather than the right to reside in another Member State. Firstly, one may note here that in fact both rights are expressions of the same Article 21 Treaty statement – that citizens have the right to ‘move and reside freely throughout the territory’ of the EU. The right to reside in the EU as a whole and the more specific right to reside in another Member State are both aspects of this one provision. A different approach to Member State interference with these two aspects is possible, but would require some explanation. Secondly, it may be noted that *Chen* in fact concerned both aspects: while the daughter was an Irish citizen in the UK, relying on the directive, she and her mother were threatened with expulsion to China. Their right to reside in the EU was in issue. The substance of the threat to them is precisely comparable with the threat to the *Ruiz Zambrano* family, and the fact that the Court found that a denial of residence rights to the mother must be based on a proportionate approach to the relevant interests is highly relevant. The fact that the particular condition in issue – sufficient resources – would not be applicable to a citizen in their home state does not appear to affect this conclusion in any way. If anything, the difference merely highlights that a right to live in another Member State should be a more qualified right than a right to live in one’s own state and thus in the EU as a whole. If anything expulsion from the EU as a whole should be somewhat harder to justify than expulsion within the EU.

That proportionality applies where the expulsion of carers is the issue is made most explicit in *Carpenter*.³³ This case addressed the situation of a non-European mother of European children in the UK. Despite having no right of residence under UK law, the Court found that she enjoyed a European right of residence, since her care for the children of the family made it easier for her husband to engage in his work, which involved travel, and the cross-border provision of services, and therefore fell within the Treaty. Her expulsion would amount to a restriction on his right to provide these services. The Court found that ‘A decision to deport Mrs Carpenter, taken in circumstances such as those in the main proceedings, does not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and public safety.’³⁴

Proportionality and the right to a family life are combined here. The question was not whether Mr Carpenter’s right to a family life was being violated as such, but whether the Member State had found the right balance between interests. This goes further than simply asking whether expulsion of Mrs Carpenter would infringe Article 8 (Costello, 2009). The Court acknowledges implicitly that impact on family life is a question of degree, and that the quality of this life may be relevantly reduced even where the impact falls short of a per se violation of Article 8. Reich and Harbacevica have said ‘*Carpenter*, *MRAX* and *Baumbast* are quite explicit in developing proportionality from a market integration argument to a procedural instrument of family protection....this strikes in particular against deportation orders, which are usually regarded by the Court as being disproportionate.’ (Reich and Harbacevica, 2003: 631)

Carpenter was about the freedom to provide services, not the citizen’s right of residence. Yet the latter right is at least as important and fundamental as the former, so there seems no obvious reason why a weaker logic should apply. Consider this suggested view of the law: ‘where expulsion of a family member makes the exercise of an EU right harder, albeit not impossible, the expulsion must be proportionate, in the sense that it reflects a fair balance of interests’. *Carpenter* explicitly supports that view where the right in question is the right to provide services. Is there any coherent reason why the position should be different if it is the citizen’s right to reside in the EU?

None of this, it must be emphasized, is to prejudge what is proportionate. In particular, all the cases above involved the primary carer, and so do not provide explicit support for the idea that a parent who does not have this role cannot be expelled. However, the essence of proportionality is that it depends

³³ Note 2 above.

³⁴ *Carpenter*, note 2 above, paragraph 43.

on the facts of the case, is fuzzy-edged and variable. If it is the concept for the job then however evidentially important the caring role of a parent may be, there will be no hard and fast lines: such lines are about legal convenience, not substantive interests, and it is the essence of proportionality that it puts these latter first.

c. Proportionality is the only conceptually coherent test

There are two sets of rights at issue where the parent of a child citizen is expelled. There are family rights, and citizenship rights. To reason to a conclusion as if once it is clear that the child will not necessarily follow the expelled parent the case becomes one which is purely about family and Article 8 ECHR is to marginalize the importance of Union citizenship and the right to live in the EU. It treats this right as if it is digital – either you are there or you are not – which is naïve and implausible. All rights know degrees of interference, and certainly citizenship rights, where the possibility of limitations is expressly mentioned in the Treaty itself.³⁵ A citizen may be deprived of his residence right, by measures forcing him to leave, but he may also see the quality of it diminished, by measures which make remaining painful, difficult, expensive, or uncomfortable.³⁶

On the other hand, to treat a parental expulsion case as if it is purely a matter of citizenship law, all about the degree of interference with a residence right, and the extent to which that interference can be justified, without even mentioning Article 8 and family is willfully obscure and will produce incomplete and unsatisfying jurisprudence.

Indeed, the structure of both Article 8 ECHR and Article 21 TFEU makes it almost impossible to consider them as independent rights. Each of the rights in these articles is non-absolute, and interference with the right is only a violation if it exceeds what is justified in the circumstances, while necessary and proportionate restrictions are permitted. Yet since both rights carry legitimacy in the EU law context, the degree to which a national measure interferes with one of these rights is at least relevant to the chances of justifying that measure in the context of the other. The greater the impact on family life, the harder it is to argue that an interference with a citizenship right is proportionate, while the greater the impact on the quality of citizenship rights, the harder it is to show that a measure is a justified and necessary measures for the purposes of Article 8 – or Article 7 of the Charter. This is not to say that the degree of impact on citizenship is conclusive, or even necessarily central, to the question of justification in the human rights context. Other public interests, such as immigration control, are also legitimate factors to take into account. The point is rather that where citizenship and family life meet, legal adjudication of either of these rights inevitably turns into a weighing and balancing of multiple factors – a complex proportionality test.

It is not surprising then that in cases where citizenship and family are both in issue the Court refers to both Article 8 ECHR and Article 21 TFEU, yet it does not treat them as sequential and independent tests, but rather as factors in asking the bigger question; has the state come to a defensible conclusion?³⁷ This is an example of a typically and recognizably EU law process of adjudication. EU law, in many fields, imposes a new set of public and private rights and interests onto those already established in national law. This inevitably creates tensions and a need for balancing. It is highly implausible that this process can occur *without* proportionality becoming the central concept (Davies).

³⁵ Articles 20 and 21 TFEU.

³⁶ See here for the same approach in a different field; Case C-55/94 *Gebhard* [1995] ECR I-4165.

³⁷ Note 4 above.

4. Applying Ruiz Zambrano: beyond the nuclear family

If *Ruiz Zambrano* and *Dereci* express a general principle about a citizen's right to reside in the EU, the abstract parameters of which have been explored above, then it becomes worthwhile to survey the sort of family arrangements and situations to which that principle may be applicable. Two specific situations of practical importance are (i) if a parent is threatened with expulsion and the other parent is a Union citizen, how does this change the legal situation, and (ii) what is the situation where the parent facing expulsion is not the sole or even primary carer of the child, but nevertheless involved with the child. How much care, involvement or dependency is necessary for expulsion to be constrained by EU law?

Before addressing the first of these questions, it is useful to engage in a simple thought experiment, and to ask what would have happened if Mrs Ruiz Zambrano had brought the law suit in that case rather than Mr Ruiz Zambrano. It seems pretty clear that this would have made no difference. His sex, as such, was irrelevant. The basis for his residence right was his responsibility for his children, a responsibility which was shared with Mrs Ruiz Zambrano. So what would happen if Mrs Ruiz Zambrano were now to begin an analogous law suit, claiming a residence document on the basis of the '*Zambrano* doctrine' established by her husband's case? Would she lose because he has already won? Could Belgium argue that now that he has established his rights he is able to remain in Belgium and the children can stay with him, so that expulsion of Mrs Ruiz Zambrano would not lead to their forced exit from the EU? Are residence documents for parents given out on a 'one per family, first come first served' basis? This seems overwhelmingly unlikely. The arbitrary character of such an approach – the parent whose case is heard first gets the permit, the other must go! Imagine if they applied simultaneously and their cases were heard in alphabetical order! – would violate concepts of fair administration. Quite aside from this, where children live with both parents the idea that it is acceptable to pick one for expulsion as long as the other remains would offend most people's understanding of the right to a family. It seems plausible to suggest that a consequence of *Ruiz Zambrano* is that Mrs Ruiz Zambrano is now also entitled to work and residence permits, and the *Ruiz Zambrano* rule can, in some circumstances at least, be applied to more than one parent. There is no principle that 'a child only needs one parent'.

But if this is the case, then there is no reason why the presence of a parent who is a national of the Member State should automatically prevent the other, non-European, parent from relying on *Ruiz Zambrano*. Consider the situation of a Dutch baby, living with a Dutch mother in the Netherlands, and a non-European father, illegally present in that country. Such situations will be far more common than the *Ruiz Zambrano* situation, since children can, in most Member States, acquire nationality from one parent, and it is not unknown for nationals of Member States to form relationships with those present without official permission.³⁸ It would seem that the non-European parent must in some circumstances be able to use *Ruiz Zambrano* to obtain papers. The residence right of one parent cannot be sufficient reason to a priori exclude the other parent from a *Ruiz Zambrano* claim. This is implicitly supported by the fact that *Dereci* did indeed concern the situation of an Austrian child with one Austrian and one non-European parent, and the Court, while not answering the question whether expulsion was prevented, did not exclude this possibility out of hand.

However, it is unlikely that all such non-European parents will be able to rely on *Ruiz Zambrano* to regularize themselves. In that case the children were financially dependent upon Mr Ruiz Zambrano, and his need to provide for them played a role in the Court's reasoning. Moreover, it appears that he lived with wife and children and had, with his wife, parental responsibility in general, not merely in a financial sense. A contrast may be made with a father who, for example, is merely the biological father of children, but does not live with them or provide for them and has only limited contact with them.

³⁸ See EUDO citizenship database, 'modes of acquisition' 'establishment of paternity' at <http://eudo-citizenship.eu/modes-of-acquisition/190/?search=1&idmode=A04>

Ruiz Zambrano would not be self-evidently applicable to this situation. However, between these extremes there may be a line to be drawn which is not necessarily easy.

The nature of the relationship between the parent and child is likely to be crucial. Where a Union citizen mother raises a child with little contact with the non-European father it might be difficult to argue that his expulsion would be a violation of the child's family rights or would compel the child to leave too. However, where the family live together and both parents contribute to the raising of the child then such a finding would be more plausible and *Ruiz Zambrano* would quite probably, depending always on the individual facts, be applicable.³⁹ Even if the non-European parent has a somewhat intermittent relationship with the child, so that a violation of family rights is not self-evident, it is still suggested that the Member State must seek to find the right balance between their interest in immigration control, and the interest of the child in contact with their parents.⁴⁰ The existence of Article 24 of the Charter may mean that there are few situations where expulsion is self-evidently permissible. There is always a case-specific balancing process to be carefully made, even in marginal cases.

There is of course a great deal of room for argument about the importance for a child that both parents play a role in their lives. If the non-European parent lives apart from the child, pays no money, doesn't come to school sports days, and forgets birthdays, what is the position? How strong is the child's interest in having this parent present in the Member State, rather than outside the EU? This is a fundamentally non-legal question, where one might expect a certain judicial deference to the policy-maker. There is of course the ECHR, which provides an important framework for legal reasoning, but it does not always prevent expulsion, and has shown in some cases a deference to national immigration concerns which somewhat reduces its impact (Hailbronner and Thym). It is the nature of human rights law, particularly an inter-state document such as the ECHR which has a margin of appreciation doctrine, that it merely sketches the outer limits of what is acceptable, but does not require a *Carpenter*-like optimal balance.

However, EU law provides a distinctive twist here. While it has no substantive autonomous doctrine on the importance of the parent-child relationship it does have a long-established doctrine of consistency, established by the Court. There are many judgments in which a Member State limits the rights of an individual in order to protect some other national interest. One reason which the Court has found not to accept the Member State position is because their claims about the extent and importance of the interests concerned are not supported by their actual policy or behaviour.⁴¹ For example, in *Carmen Media*, Germany wished to limit permits for certain kinds of gambling services on grounds of public order and the prevention of crime. The form of the argument was acceptable, and the Court was prepared to accept that these interests could be a legitimate basis for restricting gambling services.⁴² However, in the judgment it noted that in recent years the German government had been increasing the number of permits for other kinds of gambling services. The Court was therefore not prepared to accept the German government's claim that it regarded gambling as a threat to public order which needed to be restricted. Empty assertions of necessity, which are at odds with the actual conduct of the state, will not be accepted by the Court.

In the family rights situation, the relevant question to ask is how much importance national law and policy attaches to contact between children and parents. Here the answer will vary from state to state, but it is suggested that in general it is considered to be important that a child have the opportunity to maintain contact with parents, even to the extent that in many states anonymous sperm donation is no

³⁹ See *Carpenter*, note 2 above.

⁴⁰ *Carpenter*, note 2 above, paragraph 43; Case C-135/08 *Rottmann*, judgment of 10 March 2010, paragraphs 55-56.

⁴¹ Case 41/74 *Van Duyn* [1974] ECR 1337; Case 121/85 *Conagate* [1986] ECR 1007; Case 34/79 *Henn and Darby* [1979] ECR 3795; Case 115-116/81 *Adoui and Cornuaille* [1982] ECR 1665.

⁴² Case C-46/08 *Carmen Media*, judgment of 8 September 2010.

longer permitted. Where parents divorce, efforts are usually made by the authorities to ensure that children maintain contact with both parents. A non-resident father may once have been a scandalous figure from whom a child should be kept away, but this view has long been replaced by the consensus that it is generally advantageous for children to know their parents, whoever those parents may be, and that the interests of the child usually lie in the cultivation of a father-child relationship which is as involved and constructive as possible (Sarkadi, Kristianssen, Oberklaid & Bremberg, 2008).⁴³

There is no particular reason why this should be different where the parent is a non-EU citizen. If a Member State displays a different valuation of the parent-child relationship in the immigration context than it does in its family law and policy, then there is no reason why this should be accepted by the Court, or by courts. On the contrary, when seeking for the right balance between the interests of the state and the child that parent-child relationship must be assessed in the same way, and conceded the same importance, as it would be if a normal divorce between nationals was in issue. A consequence of this is that it may be difficult to expel the parent of a European child even where that parent is not the primary carer or even living with the child. It will often be possible to argue that on the basis of the Member State's own views, as expressed in its family law, the consequences would be severe enough to make the expulsion disproportionate.

5. The unborn citizen: is union citizenship a formal or a substantive concept?

A more speculative, perhaps apparently far-fetched, but ultimately important issue raised by *Ruiz Zambrano* is whether it creates rights in situations where a child has not yet established its nationality. This will typically arise where a non-European mother has borne a child by a European father. Since in some Member States a child can acquire nationality from a father who is a national of that state, in some cases even where father and mother are not married, that child may well meet the substantive criteria for Union citizenship, but only be able to acquire this if the mother can persuade or force the father to acknowledge paternity.⁴⁴ It may also be noted that in some states the process of acquiring nationality is evidential, not constitutive, so that one could say of the child not just 'the child has a right to become British' but 'the child *is* British' (or 'he *is* a Union citizen'), something which highlights the injustice of the position of the unacknowledged child.

This situation becomes important where the mother has no right of residence in the Member State in question, or in the EU. It may be that she is illegally present, or that she is in a non-EU state where she perhaps met the father as a tourist. In either situation she may have a significant motivation to try and gain residence rights in the EU. It is thus quite plausible that if threatened by expulsion she may say 'my child is or has a right to become a Union citizen, and I demand the right to prove that'. Alternatively, she may present herself, as an immigrant, and claim a right of residence on the basis that she is accompanied by a child who is, or has a right to become, a Union citizen. At an extreme, one may imagine the situation of a mother who arrives, or is detained, while pregnant, and tries to avoid expulsion on the basis that the father is a Union citizen and the child, once born, will have a right to Union citizenship too.

The question is whether the mother has any EU right to temporary residence in order to enable her to contact the father and establish paternity. One may put this another way: is a Member State permitted to prevent the mother from establishing that a child has a right to Union citizenship, by expelling her and the child? It is, put this way, quite obvious that such an expulsion prevents the child from enjoying a residence right to which they are substantively entitled quite as much as the expulsion threatened in *Ruiz Zambrano* would have done. Not just a substantive view of Union citizenship, but

⁴³ See also *Berrehab v Netherlands* (1988) 11 E.H.R.R. 322, to the effect that family life, as protected by Article 8 ECHR, is not confined to situations of cohabitation; also *Keegan v Ireland* (1994) 18 E.H.R.R. 342.

⁴⁴ See note 38 above.

doctrines such as effectiveness, particularly in the *Rewe/Comet* sense that national rules must not make the enjoyment of EU rights impossible, would suggest that there is at least as much to be said for the view that Member States do here have some obligations to the mother and child as for the view that they do not.⁴⁵ A look at the case law on Member State interference with EU rights, and the types of interference which the Court acknowledges, provides more systematic support for this suggestion.

There are, in general, three ways in which a Member State can limit the individual rights granted by the Treaty. It can adopt measures which limit the use of these rights, or it can adopt measures which (apparently) take these rights away, or it can adopt measures which prevent these rights from being acquired. All three share the characteristic that they influence, and limit, the consequences of the Treaty for people, states, and the world. They have an effect on the (f)actual scope of EU law. As such, there is a good argument that all three types of measures should be equally susceptible to judicial review by the Court of Justice. The reason why the Court reviews national measures which impact on the effectiveness of EU law is that without such review the scope and consequences of EU law would be in the hands of the Member States, who would be able to limit it, and thereby to escape from their Treaty obligations.⁴⁶ This would be contrary to the idea that EU law comprises a binding and autonomous legal order.⁴⁷

The case law of the Court demonstrates that review of the first type of measure, which limits the use of Treaty rights, is long established.⁴⁸ That such measures fall within the scope of EU law and the jurisdiction of the Court, because of their effects, has been established in many lines of case law, from that concerning medical care and migrating patients, to that concerning migrant citizens and the various forms of public assistance.⁴⁹ This might be enough for the child in the example above. It could be argued that taking away rights, or preventing rights being acquired, are both just indirect ways to limit the use of rights. Perhaps the second and third categories fall within the first.

However, there is more specific discussion of these situations in *Rottmann*:⁵⁰

39 It is to be borne in mind here that, according to established case-law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.

40 It is true that Declaration No 2 on nationality of a Member State, annexed by the Member States to the final act of the Treaty on European Union, and the decision of the Heads of State and Government, meeting within the European Council at Edinburgh on 11 and 12 December 1992, concerning certain problems raised by Denmark on the Treaty of European Union, which were intended to clarify a question of particular importance to the Member States, namely, the definition of the ambit *ratione personae* of the provisions of European Union law referring to the concept of national, have to be taken into consideration as being instruments for the interpretation of the EC Treaty, especially for the purpose of determining the ambit *ratione personae* of that Treaty.

41 Nevertheless, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter.

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⁴⁵ Cases 33 and 45/76 *Rewe/Comet* [1976] ECR 1989 and 2043.

⁴⁶ *Van Duyn*, note 41 above.

⁴⁷ Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 26/62 *Van Gend en Loos* [1963] ECR 1.

⁴⁸ Case C-274/96 *Bickel and Franz* [1998] ECR I-7637; Case C-158/96 *Kohll*, [1998] ECR I-1931; Case C-55/94 *Gebhard* [1995] ECR I-4165; Case C-224/98 *D'Hoop* [2002] ECR I-6191.

⁴⁹ *Ibid*

⁵⁰ *Rottmann*, note 40 above.

48 The proviso that due regard must be had to European Union law does not compromise the principle of international law previously recognised by the Court, and mentioned in paragraph 39 above, that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law.

The case itself concerned denaturalization of a German citizen, and thereby removal of EU citizenship, and the Court found that this denaturalization was only permissible if account was taken of EU law. The deprivation of EU citizenship and its associated rights is thus clearly within the scope of EU law, and subject to review by the Court for proportionality. However, the paragraphs above are more generally worded. The Court speaks of the competence of Member States over the ‘acquisition and loss’ of nationality, and says that these national competences are within its review. Denaturalisation is but an example of the ways in which a Member State can influence the ‘ambit ratione personae’ (the personal scope) of EU law, and all forms of such influence, according to *Rottmann*, are subject to EU law review. This entails that all national measures which make it difficult or impossible to get EU citizenship must be compatible with EU law and are subject to review by the Court.

It is admittedly so that in the paragraphs cited above the Court refers to situations ‘in respect of citizens of the Union’, and it is possible to argue that while such citizens are involved where removal of EU citizenship is the issue (there is a citizen who may lose that status) this is not the case where measures prevent acquisition of EU citizenship in the first place (there is no citizen yet!). There is perhaps a principled difference between removing citizenship and measures preventing it being acquired in the first place, and perhaps the first fall within *Rottmann* and EU law while the second do not. However, there are two reasons why this argument is somewhat unconvincing. Firstly, the Court explicitly mentions the conditions for acquiring nationality in the judgment in *Rottmann*. It seems very unlikely that it would now rule that as a matter of principle such conditions are outside of EU law. That would be a reversal of position. Secondly, the ideas that emerge from the *Rottmann* judgment, as quoted, support a broad approach to the relevant issues. The Court addresses in this judgment the difficult question of who determines the personal scope of the Treaty. Who decides who gets to enjoy Treaty rights? On the one hand, it acknowledges that this is a sensitive matter for the Member States, and that they are primarily responsible for constructing the conditions of access to national and EU citizenship. But then it adds that this national competence must always be subject to EU law, precisely because it determines the personal scope of that law. This clear and logical approach, consistent with its approach to competence allocation in other areas,⁵¹ leaves little room for the argument that EU law only applies to loss of EU citizenship rights, and not to the conditions for their acquisition.

The important question is then which substantive conditions EU law imposes on the national measures affecting acquisition of nationality, and thereby of EU citizenship. It is in no way surprising that in *Rottmann* the standard which then national measures were required to meet was proportionality. National decisions with the consequence that EU citizenship is lost must be proportionate. The Member State must weigh the consequences for and interests of the individual and his or her family against other interests, such as the interest of the state in preventing citizenship being gained by fraud.⁵²

The application of proportionality is often difficult and subjective. In *Rottmann* there was some doubt whether Mr Rottmann would be able to regain his previously surrendered Austrian nationality if he lost his new German nationality. This was very relevant for the EU law consequences of the denaturalization. As an Austrian he would still be an EU citizen. The Court found that even if a

⁵¹ See *Bickel and Franz*, note 48 above; *Kohll*, note 30 above.

⁵² Paragraphs 51-58 of the judgment.

denaturalization would be proportionate – he was after all a fraudster – he must be given a ‘reasonable period of time’ to see if he could regain that Austrian nationality before the denaturalization was implemented, in order to reduce the chance of statelessness and loss of EU citizenship.⁵³

If the Court were to look at the mother and child in the example above in the spirit of *Rottmann*, and there is no reason to think that it would not do so, (Hailbronner and Thym; Van Elsuwege) then it would probably find that the child (and mother) must have a ‘reasonable period of time’ to find the alleged father and establish paternity, and thereby acquire Union citizenship, before measures could be taken to expel them. One might expect it also to say that the Member State should provide reasonable support for this process, or at least should not obstruct it. In *MRAX* a non-EU citizen entered Belgium as a partner of an EU citizen but without valid identity documents or a visa. The Court found that Belgium could not expel him, but was obliged to help him obtain the relevant documents as quickly as possible.⁵⁴ As ever, the Court does not like to see national formalities stand in the way of substantive Treaty rights.⁵⁵ It is a very small step to the conclusion that a Member State must offer reasonable support to the mother and child above in the process of establishing their legal rights.

The challenge is to identify the limits of these rather general and open ideas. If the woman is one month pregnant, does the Member State need to give her a one-year residence document? And a work permit? Social assistance? How much evidence can the Member State require from the mother that the father actually is the person that she claims? On the one hand, there is no way to draw a clear and objective line, and establish easily applicable rules. On the other hand, this is often the case where rights are concerned, particularly EU law rights. Member States are often asked to look at each case individually in the light of open and general principles, for example where it is necessary to establish if someone has ‘sufficient resources’.⁵⁶ That this is sometimes difficult for the civil servants on the front line is clearly not sufficient reason why it cannot be the law.

It is suggested that (i) where there is good reason to believe that a child, or a soon-to-be-born child, meets the substantive conditions for nationality of a Member State, the Member State must not make it impossible for the child to establish this, but (ii) where the possibility is distant or only speculative, they are not obliged to admit persons to their state or refrain from expulsion purely on these grounds. Where a woman is eight months pregnant, has a photo and a name of a man claimed to be the father, and a coherent story about the paternity, then the ‘right balance’ of interests entails that the Member State investigates whether the man exists, whether he, for example, has travelled to the country in question, and gives the woman a reasonable time to locate him, with the same rights as she would have were she a citizen of that state, for example to oblige him to undergo DNA tests where necessary and where national law permits this. But where a woman stands in the airport or police station with a new pregnancy, or even with a child, and can only say ‘his father is a citizen of your country’ then EU law does not perhaps grant her rights. Firstly, the existence of a future EU citizen is further away, and less certain, and secondly, if the woman has no more details then it seems unlikely that it will ever be possible to establish whether the claim is true. Additional relevant considerations might be the consequences of expulsion or denial of entry. For some women, from some non-Member States it might be realistic to say ‘you can come back after the child is born’ or ‘you can present your claim at the embassy in your state and we will do a preliminary investigation’. For other women in other circumstances it will probably be the case that requiring them to ‘come back at a later date or present the claim elsewhere’ is unrealistic and amounts to a denial of any rights that their (future) child may have.

⁵³ Paragraph 58.

⁵⁴ Case C-459/99 *MRAX* [2002] ECR I-6591.

⁵⁵ Case C-456/02 *Trojani* [2004] ECR I-7573; Case 196/87 *Steynmann* [1988] ECR 6159; Case 48/75 *Royer* [1976] ECR 497; Case C-85/96 *Martinez-Sala* [1998] ECR I-2691.

⁵⁶ Directive 2004/38 Article 8(4); Case C-398/06 *Commission v Netherlands* [2008] ECR I-56.

6. Conclusion

Ruiz Zambrano establishes a Union citizen's right of residence in the Union, and thus in their own state. The question which remains is what degree of interference with this right can be tolerated by EU law. Conceivably the answer may lie in the limits of Article 8 ECHR, or Article 7 of the Charter, but it is more probable that the answer is a compound of the right to family life, the interests of the child, Union citizenship, the imperatives of integration, and whatever other interests Member States can find to throw into the pot, leading to the inevitable question of whether the right balance of them all has been found: proportionality. This makes *Ruiz Zambrano* potentially a far-reaching case. Many child citizens of the Union will have a non-European parent with a fragile residence status but who is involved in their life in important, if not necessarily narrowly functional, ways.

The way this discrepancy in nationality between parent and child arose in *Ruiz Zambrano* itself, involving imminent statelessness, is the exception, and several states have already changed their law to prevent it happening in the future. However, it has been argued here, in line with *Dereci*, that the principles of the case should be applicable even where one parent has Union citizenship and the other does not. Moreover, the principle of effective protection of EU rights should mean that the obligation on states goes beyond respecting the rights of child citizens and parents, and requires them to take a reasonably constructive and facilitative approach to children whose citizenship is yet to be conclusively established.

This may all seem surprising to the lawyer who sees cases as narrow factual precedents, rather than expressions of underlying principle, but in the context of past case law it is really not surprising at all: there are two words which have long functioned as a red flag for EU lawyers: 'citizenship' and 'child'. The Court attaches enormous importance to EU citizenship and has been prepared to inflict quite some pain and humiliation on the Member States in order to give the concept teeth and protect the rights with which it is associated. The Court has also shown a great concern for the rights of children, particularly European children. In cases where the interests of a child have conflicted with the preferences of a national authority the Court has consistently acted to protect the child. It would thus be a distinct deviation for the Court to permit a Member State to expel the parents of a European child citizen.

It would also be out of tune for it to accept that a child who fulfils all the substantive conditions for EU citizenship may never be able to enjoy that citizenship because national immigration rules do not grant the time or support necessary to establish the relevant facts and paternity. If EU citizens are a community linked by a mix of history, descent, birth, and preferences, then the substance of these things must be protected from national formalities and rules which would prevent that citizenship from being expressed and acknowledged in one of its rightful owners. To not do so would be to treat the substance of EU citizenship and the community to which it adheres as unimportant, as irrelevant to the law, and it is hard to imagine the Court doing this.

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