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Author(s): Nathan Cambien
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Abstract:

The free movement of Union citizens hinges on three 'classic' requirements, namely the possession of Member State nationality, the inter-State element and the condition of self-sufficiency. Recent case law of the ECJ seems to shake the traditional conceptions of these requirements and, as a consequence, to widen the scope of application of the free movement rules. This in turn will have significant consequences for the immigration laws of the Member States. On the one hand, Union law will increasingly influence the Member States' rules on acquisition and loss of nationality. On the other hand, the Member States will have to accord residence rights to certain categories of Union citizens and their family members who would previously not have been entitled to invoke Union law. The resulting financial burdens for the Member States are potentially very significant, although it is not yet possible to ascertain the precise reach of the principles articulated by the ECJ.

Essay

UNION CITIZENSHIP AND IMMIGRATION: RETHINKING THE CLASSICS?

Dr Nathan Cambien*

TABLE OF CONTENTS

1. INTRODUCTION: 'CLASSIC' ELEMENTS OF FREE MOVEMENT 10
2. MEMBER STATE NATIONALITY 10
2.1 Traditional Approach 10
2.2 The Rottmann Case and its consequences 12
2.2.1 The Case 12
2.2.2 Analysis 12
a. Nationality Rules within the Scope of Union Law 13
b. Limitations Deriving from Union Law 14
2.3 Consequences for the Member States' Immigration Laws 15
3. INTER-STATE MOVEMENT 16
3.1 Traditional Approach 16
3.2 Developments regarding purely internal situations 17
3.2.1 *Member State nationality* 18
3.2.2. Genuine enjoyment of Union Citizenship Rights 19
3.2.3 But not in all circumstances? 20
3.3. Consequences for the Member States' Immigration Laws 23
4. REQUIREMENT OF SELF-SUFFICIENCY 24
4.1. Traditional Residence Requirements 24
4.2. The Ibrahim and Teixeira Cases and their Consequences 25
4.2.1 The Cases 25
4.2.2 Analysis 26
b. Residence Rights for School-going Children 27
c. Residence Rights for the Primary Carer 27
d. Children of Non-economically Active Persons and Their Primary Carer? 28
4.3 Consequences for the Member States' Immigration Laws 30
5.CONCLUSION 31

* Research fellow, Institute for European law, University of Leuven; Visiting Research Fellow, Columbia Law School. I am grateful to Janek T. Nowak and Timothy Roes for their valuable comments and suggestions. All mistakes remain my own.

1. INTRODUCTION: 'CLASSIC' ELEMENTS OF FREE MOVEMENT

In the most basic terms, the right to free movement enjoyed by Union citizens is rather straightforward: every Union citizen is entitled to move to another Member State and reside there if he can prove that he is either economically active or has sufficient financial resources at his disposal. This general sketch already reveals that the free movement of Union citizens is centred on three basic elements, which can be labelled 'classic' elements of free movement. First of all, it is clear that the right to free movement is only enjoyed by Union citizens, i.e. persons who have acquired and retained the nationality of a Member State in accordance with the nationality rules of that Member State. Second, it can only be invoked by Union citizens once they leave their Member State and move to another Member State. Static Union citizens, i.e. Union citizens who have never resided in a Member State other than that of their nationality, cannot normally invoke the benefits related to the right to free movement. Third, Union citizens can only reside in another Member State for longer periods of time if they are self-sufficient, i.e. if they have a job or can fall back on sufficient personal means.

These three classic elements are embedded in the Treaties and in secondary Union law, most notably Directive 2004/38, [1] and have been consistently confirmed by the ECJ. Nonetheless, recent case law of the ECJ seems to shake the traditional conceptions of these elements and to considerably reduce their importance as requirements for the application of the free movement rules. As a consequence, the scope of these rules is widened. This in turn, I will demonstrate, will have significant consequences for the immigration laws of the Member States. In the following, I briefly discuss for each of the classic elements the traditional approach and its underlying reasons, before analysing the recent evolution in the case law and its likely consequences for the immigration laws of the Member States.

2. MEMBER STATE NATIONALITY

2.1 Traditional Approach

It follows from Article 20(1) TFEU that every national of a Member State is also a citizen of the Union. Traditionally, it is assumed therefore that the Member States autonomously determine the personal scope of Union citizenship, since the Member States have exclusive competence to regulate nationality. Union law, it is traditionally accepted, does not apply in the field of nationality legislation.

The competence to lay down the rules regarding acquisition and loss of nationality is a key competence of sovereign States. Understandably, the Member States have jealously guarded this competence and have never been prepared to transfer any competence in this field to the EU. Precisely for this reason, the Member States opted in the Maastricht Treaty to define Union citizenship by reference to Member State nationality. As such, the Member States arguably intended to prevent Union citizenship from competing with or even superseding Member State nationality.

[1] Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

Furthermore, the Member States explicitly stipulated in a declaration annexed to the Treaties[2] and in a decision of the Heads of State or Government meeting within the European Council[3] that Member State nationality is to be determined solely by reference to the national law of the Member State concerned. Accordingly, there simply seemed to be no room for arguing that Union law applied in the field of nationality rules.

Still, it must be remarked that it has been accepted for some time that Union law, through the provisions on Union citizenship, indirectly influences the nationality rules of the Member States. Even before the introduction of Union citizenship, the Court had proclaimed that the Member States have to respect unconditionally nationality measures adopted by other Member States.[4] This duty of unconditional recognition can set in motion a subtle interplay between the Member States, whereby rules and practices regarding nationality in one Member State may have significant consequences for other Member States. Indeed, Member States with flexible nationality rules make it easy for third country nationals to acquire Union citizenship, which in turn entitles them to claim rights and benefits in all other Member States. For this reason, Member States with flexible rules may come under pressure from other Member States to restrict their rules. The most famous case in point is the restriction of Irish nationality rules in 2004 after the flexible Irish nationality laws had come under pressure in circumstances that gave rise to the *Zhu en Chen* case[5].

Besides, the Court had held in its *Micheletti* judgment, in a famous *obiter dictum*, that it is for each Member State, *having due regard to Union law*, to lay down the conditions for the acquisition and loss of nationality.[6] However, while in the almost 20 years following *Micheletti*, the ECJ repeated this dictum in a number of cases,[7] it had never clarified its meaning by stating what principles of Union law Member States must respect in this connection or found a Member State's nationality legislation to be in breach of Union law. This led to a vivid debate in legal literature about the possible meaning and significance of the dictum.[8] In its *Rottmann* judgment

[2] Declaration (No 2) on nationality of a Member State, annexed to the Treaty on European Union [1992] OJ C191/98.

[3] Decision of the Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union [1992] OJ C348/1. For a discussion, see Deirdre Curtin and Ronald van Ooik, 'Denmark and the Edinburgh Summit: Maastricht without Tears' in David O'Keeffe and Patrick M. Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing 1994) 349-365.

[4] This principle was articulated for the first time in Case C-369/90 *Micheletti* [1992] ECR I-4239.

[5] Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, with a case note by Kristien Vanvoorden in (2005) Colum. J. Eur. L. 305-321. See the discussion in Bernard Ryan, 'The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland' (2004) 6 Eur. J. Migration & L. 173-193.

[6] Case C-369/90 *Micheletti* [1992] ECR I-4239, para 10 (emphasis added).

[7] Case C-179/98 *Mesbah* [1999] ECR I-7955, para 29; Case C-192/99 *Kaur* [2001] ECR I-1237, para 19; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, para 37.

[8] See, for instance, the longstanding debate in the Netherlands between De Groot (see *inter alia* Gerard-René De Groot, 'Towards a European Nationality Law' (2004) 8.3 EJCL <http://www.ejcl.org/83/art83-4.PDF> and the literature cited therein) and Jessurun d'Oliveira (see *inter alia* Hans Ulrich Jessurun d'Oliveira, 'Nationality and the European Union after Amsterdam' in David O'Keeffe and Patrick M. Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing 1999) 395-412).

of 2 March 2010,[9] the ECJ for the first time clarified to some extent the meaning of the phrase 'having due regard to Union law'.

2.2 The *Rottmann* Case and its Consequences

2.2.1 The Case

The facts of the case are rather peculiar. Mr. Rottmann was an Austrian national who was prosecuted in Austria on account of suspected serious fraud in his profession. While the judicial investigation was ongoing, he moved to Germany and acquired the German nationality. When the competent German authority learned of the pending proceedings against Mr. Rottmann, it reacted by withdrawing his naturalisation with retroactive effect, considering that, by failing to disclose this relevant information, Mr. Rottmann had obtained the German nationality by deception. The withdrawal decision had rather disastrous consequences for Mr. Rottmann. As a consequence of his naturalisation he had lost his Austrian nationality, in accordance with both Austrian and German law. The withdrawal decision would strip him of his only remaining nationality, the German nationality. Consequently, the interplay of Austrian and German provisions on nationality in the circumstances of the case threatened[10] to render Mr. Rottmann stateless.

The question the ECJ had to answer was whether this outcome was in accordance with Union law, in particular with the provisions on Union citizenship. The Court started by tackling the question of admissibility, namely by determining whether Union law was applicable to the dispute at all.[11] It famously stated that the situation of Mr. Rottmann fell, 'by reason of its nature and its consequences', within the ambit of Union law.[12] This is a point of paramount importance to which I will come back in more detail below.[13] Next, the Court assessed whether the withdrawal decision was taken in accordance with Union law.[14] The Court accepted that withdrawal of nationality for reasons of deception could be compatible with Union law, since such corresponds to a reason relating to the public interest, namely the protection of the special relationship of solidarity and good faith between a Member State and its nationals. It added, however, that, where the withdrawal of nationality has for a consequence that the person concerned loses his Union citizenship, this decision must respect the principle of proportionality. It was necessary, therefore, to balance the consequences of the withdrawal decision for the person concerned and his or her family members with regard to the loss of the rights enjoyed by every Union citizen against the gravity of the offence committed by that person, the lapse of time between the naturalisation decision and the withdrawal decision and the possibilities for that person to recover his original nationality.

2.2.2 Analysis

[9] Case C-135/08 *Rottmann* [2010] ECR I-1449, with case notes by Dimitry Kochenov in (2010) 47 CML Rev. 1831-1846; Nathan Cambien in (2011) 17 Colum. J. Eur. L. 375-394.
[10] The effects of the withdrawal decision were suspended by the appeal brought against it by Mr. Rottmann. Accordingly, the effects of the decision under Austrian and German law had not yet materialised when the ECJ delivered its judgment.
[11] Case C-135/08 *Rottmann* [2010] ECR I-1449, paras 37-45.
[12] Case C-135/08 *Rottmann* [2010] ECR I-1449, para 42.
[13] See under III.B.1, *infra*.
[14] Case C-135/08 *Rottmann* [2010] ECR I-1449, paras 46-59.

a. Nationality Rules within the Scope of Union Law

In *Rottmann* the Court for the very first time directly assessed Member State nationality rules in the light of Union law. The Court justified its competence for carrying out this validity assessment by pointing at the intrinsic link between Member State nationality and Union citizenship. Every national measure entailing the loss of Union citizenship automatically entails for the person concerned the loss of his most fundamental status under Union law[15] and has for a consequence that this person can no longer exercise his citizenship rights in the different Member States. Consequently, such a decision will fall 'by reason of its nature and its consequences' within the scope of Union law. This justification seems to confirm the expectation that the Court will henceforth be prepared to screen Member State rules and decisions on loss of Member State nationality. This will probably be different only in cases where the person losing his Member State nationality preserves or at the same time acquires the nationality of another Member State because under such circumstances there will be no impact on the Union citizen status of that person.

An important question left unanswered by the *Rottmann* judgment is whether the Court's reasoning should be confined to cases of loss of nationality or should be held equally applicable in cases of acquisition of nationality, or the refusal thereof.[16] By its very nature, the acquisition of Member State nationality confers upon an individual the most fundamental status of nationals of the Member States[17] and this automatically has Union wide consequences, in the sense that the person concerned will be entitled to exercise certain rights in all Member States. Accordingly, cases of acquisition of Member State nationality now arguably fall within the scope of Union law to the extent that they entail Union citizenship. Matters are less clear-cut in case of decisions refusing the grant of Member State nationality. On the one hand, such decisions clearly have consequences that go beyond the remit of the Member State concerned. Indeed, where an individual is denied the nationality of a Member State, this has for a consequence that he will not be able to enjoy the rights attached to Union citizenship. These are the very same rights that a Member State national would lose if his (only) Member State nationality were to be withdrawn. On the other hand, it is not possible to argue that a decision refusing nationality impacts negatively on the citizenship rights of the person concerned, for the simple reason that this person will never have enjoyed these rights in the first place. [18] Be that as it may, once it is agreed that the Member States' rules on acquisition of nationality come under the scrutiny of Union law, it would be somewhat illogical to distinguish between conferral and refusal of nationality, since the very same rules will embody the criteria that determine both.

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[15] According to settled case law, Union citizenship is 'destined to be' or 'intended to be' the most fundamental status of nationals of the Member States (see eg Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31).

[16] See the discussion in Gareth T. Davies, 'The entirely conventional supremacy of Union citizenship and rights' (2010) EUDO Citizenship Forum <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2>.

[17] Except, of course, where the person concerned already possessed the nationality of a Member State.

[18] This accords with the reasoning followed in Case C-192/99 *Kaur* [2001] ECR I-1237. In that case, the Court considered that the non-conferral of Union citizenship on the applicant was valid because there was no question of any deprivation of rights under Union law since those rights had never arisen in the first place.

In conclusion, it arguably follows from the *Rottmann* judgment that the Member States' competence regarding both acquisition and loss of nationality falls within the scope of Union law to the extent that it has an impact on the status of Union citizenship.[19] This broad interpretation of the scope of Union law finds some support in the wording of the *Rottmann* judgment. The famous *Micheletti* dictum, which is cited by the Court, refers to the conditions for the *acquisition and loss* of nationality. Besides, the Court in *Rottmann* held that the principles announced in the judgment apply to both the Member State of naturalisation and the Member State of the original nationality.[20] One could deduce from this that a possible refusal of the Austrian authorities to grant or revive Mr. Rottmann's Austrian nationality will only be valid if it is in accordance with fundamental principles of Union law. Future case law will have to clarify this point.

b. Limitations Deriving from Union Law

In *Rottmann* the Court for the very first time gave concrete guidance on the significance and scope of its *Micheletti* dictum, as far as the conditions for loss of Member State nationality are concerned. The Court explained that such conditions have to be in accordance with the principle of proportionality, which requires a delicate balancing act between the interests of the Member State and those of the individual concerned.[21] The scope and effect of this limitation will depend on how stringently it is applied, a task which pertains first and foremost to the national courts of the Member States. It is submitted that it is probably only in extreme cases, i.e. where the interests of the individual *manifestly* outweigh those of the Member State concerned, that the principle of proportionality can be considered to be violated. Such would seem necessary in order to safeguard the Member States' principled competence in the field of nationality. Safeguarding that competence is arguably also necessary to protect the national identities of the Member States,[22] given that nationality is without any doubt one of the elements central to that identity. In any event, a Member State is not obliged to refrain from withdrawing its nationality merely because the person concerned has not recovered the nationality of his Member State of origin. At the same time, the principle of proportionality may require the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin. [23]

In *Rottmann* the Court only explicitly mentioned the principle of proportionality as a limitation deriving from Union law. However, other general principles of Union law could equally serve as limitations to the Member States' competence regarding nationality, as was observed by AG Poiares Maduro in his Opinion in the case.[24] In particular, the duty to respect fundamental rights[25], the principle of legitimate

[19] See in that sense Davies (n 16).
[20] Case C-135/08 *Rottmann* [2010] ECR I-1449, paras 60-64.
[21] The principle of proportionality is a general principle of Union law which also figures in art 52(1) of the Charter of fundamental rights. See the discussion in Koen Lenaerts and Piet Van Nuffel (Robert Bray and Nathan Cambien (eds)), *European Union Law* (3rd edn, Sweet & Maxwell 2011) 141ff.
[22] See art 4(2) TEU, which provides that the 'Union shall respect the equality of Member States before the Treaties as well as their national identities'. This provision was explicitly relied upon by the Court in order to justify a rather broad construction of Member State competence (see Case C-208/09 *Sayn-Wittgenstein* (ECJ, 22 December 2010), para 92).
[23] Case C-135/08 *Rottmann* [2010] ECR I-1449, paras 57-58.
[24] Case C-135/08 *Rottmann* [2010] ECR I-1449, Opinion of AG Poiares Maduro, paras 29-32.
[25] See art 6(3) TEU and art 51(1) of the Charter of Fundamental Rights. For a discussion, see Lenaerts and Van Nuffel (n 21), 821ff.

expectations[26] and the freedom of movement and residence[27] could act as limitations in a way similar to the principle of proportionality. The principle of legitimate expectations and the duty to respect fundamental rights could even be said to 'feed' the principle of proportionality in the sense that a measure concerning nationality will be more likely to be disproportionate if it infringes one of them. The freedom of movement and residence, for its part, could be violated if a Member State's nationality law were to provide that nationals of that Member State would lose their nationality after having lived in another Member State during a certain period of time.[28] It will be for the Court to clarify the precise scope and meaning of these principles in this context.

Another principle which may be very important in this context is the principle of sincere cooperation.[29] That principle might require the Member States to take account of each other's nationality rules and the combined effect they may have for an individual in particular circumstances.[30] In this connection, it must be remarked that the referring court in the *Rottmann* case has in the meantime ruled that the German withdrawal of nationality was in accordance with the principle of proportionality and therefore valid.[31] One may wonder whether the Austrian authorities are under an obligation to take into account that Mr. Rottmann has now definitively lost his German nationality and are, on that ground, obliged to revive his Austrian nationality and his Union citizenship.[32] Sincere cooperation in this sense would enable Germany to apply the provisions of its nationality law while avoiding the definitive loss of Mr. Rottmann's Union citizenship[33] and, as such, be apt to further the aims of the provisions on Union citizenship.[34]

2.3 Consequences for the Member States' Immigration Laws

The foregoing makes it clear that it can no longer be doubted that the nationality rules of the Member States have to be in accordance with a number of fundamental principles of Union law. This requirement evidently has consequences for the immigration laws and policies of the Member States, since the criteria for granting

[26] There is a large body of case law mentioning the principle of legitimate expectations as a general principle of Union law. See eg Joined Cases C-181/04 to C-183/04, *Elmeka*, [2006] ECR I-8167, para 31. For a discussion, see Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 251ff.

[27] See art 21(1) TFEU. For a discussion, see Lenaerts and Van Nuffel (n 21), 184-189.

[28] Gerard-René De Groot, 'The Relationship between the Nationality of the Member States of the European Union and European Citizenship' in Massimo La Torre (ed), *European Citizenship: an Institutional Challenge* (Kluwer Law International 1998) 136-139.

[29] See art 4(3) TEU. For a discussion, see Lenaerts and Van Nuffel (n 21), 147ff.

[30] See in this connection Case C-165/91 *van Munster* [1994] ECR I-4661, in which the Court held that the principle of sincere cooperation may require a Member State, when applying its legislation, to take into account the legislative provisions of another Member State.

[31] BVerwG 5 C 12.10., Judgment of 11 November 2010.

[32] The BundesverwaltungsGericht in fact explicitly made a suggestion in this sense (Case C-135/08 *Rottmann* [2010] ECR I-1449, para 34).

[33] Somewhat ironically, it would seem that better coordination between the Austrian and German authorities would have prevented the possibility of Mr. Rottmann losing his Union citizenship in the first place. If the Austrian authorities had been quicker to inform the German authorities about the pending criminal proceedings against Mr. Rottmann, the latter would presumably never have acquired the German nationality at all.

[34] AG Ruiz-Jarabo Colomer has remarked that 'Citizenship of the Union…must at least guarantee that it is possible to change nationality within the European Union without suffering any legal disadvantage' (Case C-386/02 *Baldinger* [2004] ECR I-8411, Opinion of AG Ruiz-Jarabo Colomer, para 47).

nationality to third country nationals now appear to fall within the scope of Union law. The precise scope of the requirement is at present, however, far from clear. Do the principle of proportionality and the principle of legitimate expectations require, for instance, that a Member State grant its nationality to third country nationals long time resident on its territory? And does the Commission have the power to bring an infringement action against a Member State whose criteria for the acquisition of nationality appear contrary to certain fundamental rights? An oft-discussed case in this connection is the nationality legislation of Estonia and Latvia, which makes it very hard for Russian-speaking minorities to acquire the nationalities of these countries.[35] The Commission has in the past expressed its concern over this situation, but it has never taken concrete action. [36] The Union institutions have so far adopted a low profile in nationality matters, given the traditional view that Union law had no say in these matters. The increasing importance of Union citizenship and the bold case law of the ECJ just discussed may lead to a more proactive approach on their part in the near future.

At the same time it must be emphasised that the *Rottmann* judgment in no way changes the fact that the Member States remain exclusively competent to adopt the rules on acquisition and loss of nationality. The Court in *Rottmann* only confirmed that this competence has to be exercised in accordance with Union law as far as situations falling within the scope of Union law are concerned. This holding has nothing extraordinary in itself. The same duty to comply with Union law applies in other fields falling outside the Union's regulatory competence, such as *inter alia*, criminal legislation,[37] direct taxation,[38] rules governing a person's name,[39] and the organisation of social security schemes[40]. The Court's reasoning on the scope of Union law, by contrast, was very innovative. This will be discussed in more detail in the following point.

3. INTER-STATE MOVEMENT

3.1 Traditional Approach

It is trite law that Union law is only applicable to situations which fall within the scope of Union law. Traditionally, it has consistently been held that the situation of a Union citizen falls within the scope of Union law only where a link with two or more Member States –often referred to as a 'cross-border dimension' or 'inter-State element'– is present.[41] This link is most commonly provided by the fact that a Union citizen has exercised his right to free movement by moving from his home Member State to another Member State. In other words, movement between two Member States allows a Union citizen to bring his situation within the scope of Union law. This entitles the citizen concerned to invoke the right to equal treatment in the host Member State. Conversely, the home Member State is precluded from treating a

[35] See the discussion in Annelies Lottmann, 'No Direction Home: Nationalism and Statelessness in the Baltics' (2008) 43 Tex. Int'l L.J. 503-520.
[36] See Fifth Report from the European Commission of 15 February 2008 on Citizenship of the Union, COM(2008)85 final, 2.
[37] *See* eg Case 186/87 *Cowan* [1989] ECR 195, para 19.
[38] See eg Case C-520/04 *Turpeinen* [2006] ECR I-10685, para 11.
[39] *See* eg Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639, para 16.
[40] *See* eg Case C-135/99 *Elsen* [2000] ECR I-1049, para 33.
[41] For a discussion, see Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 CML Rev. 13-45.

national less favourably on ground of the fact that he has exercised his right to free movement.[42] However, the ECJ has been prepared to give a lenient interpretation to the inter-State element. Accordingly, movement between Member States was not always required by the Court. In *Zhu and Chen*, for instance, the fact that a Union citizen resided in a Member State other than her Member State of nationality sufficed to bring her situation within the scope of Union law.[43] In *Schempp*, the Court even considered that Union law was applicable in a situation in which not the Union citizen himself but his spouse had exercised her right to free movement.[44]

In all the situations mentioned, the Court considered a sufficient inter-State element to be present because the applicant in each case could point at a link with two or more specific Member States. Cases where such a link is not present, by contrast, are traditionally considered to be 'purely internal' situations, in which no reliance on Union law is possible. Consequently, the traditional approach followed in the case law gives rise to instances of 'reverse discrimination', i.e. Union citizens who find themselves in a purely internal situation being treated less favourably than Union citizens who can demonstrate a sufficient link with Union law.[45] The reason is that Union citizens in a purely internal situation cannot rely on the rights conferred by Union free movement law, but only on the possibly less favourable rights conferred by the national law of their Member State of residence. Instances of reverse discrimination do not infringe the Union principle of non-discrimination because the latter is not applicable to purely internal situations.

3.2 Developments Regarding Purely Internal Situations

The traditional approach towards the required link with Union law has been fiercely criticised, in particular because it entails the possibility for reverse discrimination. It is sometimes argued that such is incompatible with the concept of the internal market as an 'area without internal frontiers'[46] because in a true internal market the crossing of a border between Member States should not be a relevant distinguishing factor for the application of Union law.[47] More broadly, the traditional approach can be said to be contrary, for the same reason, to the idea of the Union as an 'area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured'.[48] Besides, the traditional approach is sometimes said to be at odds with the provisions on Union citizenship.[49] In this connection it is argued that the distinction drawn in the case law between Union citizens who can demonstrate

[42] See eg Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451.
[43] Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.
[44] Case C-403/03 *Schempp* [2005] ECR I-6421.
[45] For a critical analysis of the doctrine, see, *inter alia*, Alina Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International 2009) 271 pp.; Niamh Nic Shuibhne, 'Free movement of persons and the wholly internal rule: time to move on?' (2002) 39 CML Rev. 731-771; Miguel Poiares Maduro, 'The Scope of European Remedies: The Case of Reverse Discrimination and Purely Internal Situations' in Claire Kilpatrick, Tonia Novitz and Paul Skidmore (eds), *The Future of Remedies in Europe* (Hart Publishing 2000) 117-140.
[46] See art 26(2) TFEU.
[47] This idea was cogently put forward, *inter alia*, in Hans Ulrich Jessurun d'Oliveira, 'Is Reverse Discrimination Still Permissible Under the Single European Act?' in Th. M. De Boer (ed), *Forty Years On: The Evolution of Postwar Private International Law in Europe* (Kluwer 1990) 71-86. See also Joined Cases 80/85 and 159/85 *Edah* [1986] ECR 3359, Opinion of AG Mischo.
[48] See art 3(2) TEU.
[49] See *inter alia*, Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 L.I.E.I. 43-67; Nic Shuibhne (n 45), 731-771. See also Francis G. Jacobs, 'Citizenship of the European Union - A Legal Analysis' (2007) 13 E.L.J. 591-610.

an even tenuous inter-State element and those who cannot is arbitrary and that Union citizenship should, as the most fundamental status of nationals of the Member States, embody a guarantee to equal treatment of Union citizens regardless of any further link with Union law. Accordingly, in the most extreme version of this argument, all instances of reverse discrimination of Union citizens should be held in violation of Union law.

Despite these longstanding criticisms, the ECJ has consistently repeated the 'wholly internal rule' and has refused to apply Union law to situations which do not present a link with two or more specific Member States. The Court's position is grounded on the need to respect the division of competences between the Union and the Member States. Union law has a limited scope of application and cannot be relied on, therefore, in situations that fall outside this scope. However, it does not necessarily follow that Union law, and the provisions on the free movement of Union citizens in particular, do not apply in situations lacking a link with two or more specific Member States.[50] It would be possible to accept a more abstract link with the Union Legal order as a sufficient link with Union law. A number of Advocate-Generals, most notably Advocate-General Sharpston, have made suggestions which go in that direction.[51] In a number of very recent cases, the Court seems to have adopted for the first time a similar reasoning, be it in a highly nuanced form and restricted to a limited set of circumstances. In these cases, the Court appears to have accepted Union citizenship in itself as a sufficient link with Union law, thereby applying Union law in situations hitherto considered to be purely internal.

3.2.1 *Member State Nationality*

The first revolutionary case concerning the link required with Union law is the *Rottmann* case discussed above. In its judgment, the Court did not examine whether the traditional requirement of an inter-State element was satisfied, even though such appeared to be the case in the circumstances before the Court. As AG Poiares Maduro explained in his Opinion to the case, Mr. Rottmann had exercised his right to free movement by moving from Austria to Germany and this exercise, indirectly, gave rise to the disadvantage suffered, namely the loss of the status of Union citizen and the attached rights.[52] The Court decided to take a different approach however, holding that the situation fell within the scope of Union law 'by reason of its nature and its consequences'. Accordingly, the Court accepted Member State nationality and the possible loss thereof, given the inextricable links with Union citizenship, as sufficient in itself to consider the withdrawal of nationality as falling within the scope of Union law. Any further connection with Union law appeared unnecessary for the situation to fall within the scope of Union law.

This approach is very innovative. Although the Court confirmed that Union law only applies to situations presenting a link with Union law, it conceptualised this

[50] It must be remarked that, in any event, a number of provisions on Union citizenship apply regardless of such a link. This is the case for the right to petition the European Parliament, the right to apply to the Ombudsman and the right to write to any of the institutions or bodies of the Union in an official language and have an answer in the same language (see art 24 TFEU).

[51] See Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-1683, Opinion of AG Sharpston, paras 112-157; Case C-34/09 *Ruiz Zambrano*, Opinion of AG Sharpston, paras 67-122. For an earlier example, see Case C-214/94 *Boukhalfa* [1996] ECR I-2253, Opinion of AG Léger, para 63.

[52] Case C-135/08 *Rottmann* [2010] ECR I-1449, Opinion of AG Poiares Maduro, paras 11-13.

link in a different way. It did not require a link with two specific Member States, but rather a more abstract link with the Union legal order. This abstract link was offered by Union citizenship. Indeed, each national measure affecting the Union citizenship status of an individual will automatically affect his most fundamental status under Union law and entail potential consequences for all the Member States.

It could be wondered to what extent the outcome of the judgment was predicated on the facts of the case. The fact should not be overlooked that in *Rottmann* the Court was confronted with a situation in which, due to the lack of coordination between the nationality laws of two Member States, a person risked becoming stateless and losing his Union citizenship for having committed an offence which was in many ways not extraordinary. It could be suggested that the Court was principally concerned with avoiding these negative consequences from happening all too readily, and that the Court's reasoning should not, therefore, be extrapolated to cases with a different set of circumstances. One could speculate that the fact that the nationality legislation of two specific Member States was at stake induced the Court to find that Union law was applicable.[53] Besides, it is clear that *Rottmann* was a dispute about nationality rules. Nationality rules are a particular set of national rules because they directly regulate the access to Union citizenship and therefore determine the applicability of a significant part of the Union *acquis*. For that reason, one could argue that a dispute concerning nationality rules will by its very nature have a more significant link with the Union legal order than disputes concerning other sets of national rules.

In my view, these observations relating to the specific circumstances of the *Rottmann* case are rather beside the point. It is clear from the Court's reasoning that the crucial element in deciding that the situation fell within the ambit of Union law was the fact that the national measure threatened to cause the loss of the applicant's Union citizenship and the enjoyment of the attached rights. Hence, the Court's reasoning should be held to apply more broadly, even where only the legislation of one Member State is at stake. Moreover, it can apply to national rules outside the field of Member State nationality. This is clearly illustrated by the *Ruiz Zambrano* judgment.[54]

3.2.2. Genuine Enjoyment of Union Citizenship Rights

Mr. Ruiz Zambrano was a Colombian national who came to Belgium together with his Colombian spouse and their first child. Although his request for asylum was rejected by the Belgian authorities, he nevertheless remained in the country and even managed to become gainfully employed. He did not, however, satisfy the conditions under Belgian law for obtaining a residence permit or a work permit. The question to be answered by the ECJ was whether Mr. Ruiz Zambrano could derive a right of residence in Belgium from Union law and whether Union law would exempt him from the obligation to hold a work permit. The crucial element in this regard was that, during his stay in Belgium, Mr. Ruiz Zambrano's spouse gave birth to a

[53] This would appear from a literal reading of para 42 of the *Rottmann* judgment and, more in particular, of the phrase 'after he has lost the nationality of another Member State that he originally possessed'. See the discussion in Gerard-René De Groot, 'Invloed van het Unierecht op het nationaliteitsrecht van de Lidstaten: Overwegingen over de Janko Rottmann-beslissing van het Europees Hof van Justitie' (2010) Asiel & Migratierecht 295-296.

[54] Case C-34/09 *Ruiz Zambrano* (ECJ, 8 March 2011), with case notes by Kay Hailbronner and Daniel Thym in (2011) 48 CML Rev. 1253-1270; Janek T. Nowak in (2011) Colum. J. Eur. L. 673-704.

second and third child, who acquired the Belgian nationality on grounds of their birth in Belgium.[55] In *Zhu and Chen* the Court had ruled that a young Union citizen was entitled to be accompanied in the host Member State by the parent who is his or her primary carer.[56] It seemed problematic, however, to apply an analogous reasoning to the facts of the *Ruiz Zambrano* case since, in contrast with baby Chen, the children of Mr. Ruiz Zambrano had never resided in a Member State other than that of their nationality. For that reason, it seemed that the situation of Mr. Ruiz Zambrano was a purely internal one, in which no reliance on Union law was possible. This point of view was defended before the ECJ by no less than eight Member States and by the Commission.

The ECJ disagreed and held that Union law was applicable to the circumstances of the case. In a remarkably short judgment, the Court pointed out that the children of Mr. Ruiz Zambrano were undeniably Union citizens and that Union citizenship was, according to settled case law, the fundamental status of nationals of the Member States.[57] Referring to paragraph 42 of the *Rottmann* judgment,[58] the Court stated that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the 'genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.[59] The Court held that the refusal of a residence permit and of a work permit to a person in a situation like Mr. Ruiz Zambrano had precisely this effect. The reason was that a refusal of a residence permit would require Ruiz Zambrano's children to accompany their parents to a third country. Similarly, the refusal of a work permit would entail the risk that Ruiz Zambrano would not have sufficient resources to provide for himself and his family, which would also result in the children having to leave the territory of the Union. In both circumstances, the children would, as a result, be unable to exercise the 'substance of the rights conferred on them by virtue of their status as Union citizens'.[60] That outcome would be at variance with Article 20 TFEU.

3.2.3 But not in All Circumstances?

Although the *Ruiz Zambrano* judgment was remarkably short and lacking in elaborate reasoning,[61] it did appear to confirm the landslide in the Court's case law which was initiated with the *Rottmann* judgment. Indeed, the Court found Union law to be applicable despite the fact that the traditional requirement of an inter-State element was not satisfied. The Court accepted the fact that the national measure deprived a Union citizen of the genuine enjoyment of his citizenship rights as a sufficient connection with Union law, regardless of any further such connection. The question which arose immediately after the judgment was how broadly the new approach of the Court will apply. The precise scope of the judgment was impossible to infer from its succinct wording. Some clarity was restored by the subsequent

[55] Pursuant to art 10(1) of the Belgian Nationality Code, in the version applicable at that time, children born in Belgium acquired the Belgian nationality if they would otherwise be stateless.
[56] Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.
[57] Case C-34/09 *Ruiz Zambrano* (ECJ, 8 March 2011), paras 40-41.
[58] Case C-135/08 *Rottmann* [2010] ECR I-1449, para 42 (in which the Court held that the withdrawal of the applicant's nationality in the circumstances of the case fell 'by reason of its nature and its consequences' within the ambit of Union law).
[59] Case C-34/09 *Ruiz Zambrano* (ECJ, 8 March 2011), para 42.
[60] Case C-34/09 *Ruiz Zambrano* (ECJ, 8 March 2011), paras 43-44.
[61] See Niamh Nic Shuibhne, 'Seven questions for seven paragraphs' (2011) 36 EL Rev. 162.

McCarthy case and *Dereci and Others* cases, in which the Court appears to have given a rather narrow interpretation to the reasoning followed in *Ruiz Zambrano*.

The applicant in the *McCarthy* case, Mrs. McCarthy, held both the Irish and the UK nationality, but had lived her whole life in the UK. In 2002, she married a Jamaican national, who was not, however, entitled to reside in the UK in accordance with the British immigration rules. Relying on her Irish nationality, Mrs. McCarthy and her husband argued that they were entitled to residence on the basis of Union law, namely in their capacity of Union citizen and husband of a Union citizen, respectively. Mrs. McCarthy had never exercised her right to free movement and, consequently, her situation seemed to amount to a purely internal situation. Yet, such was far from certain after the Court's judgment in *Ruiz Zambrano*. Moreover, the question arose whether the fact that Mrs. McCarthy possessed the nationality of another Member State than the Member State in which she resided could provide a sufficient link with Union law. Some earlier cases, the *Garcia Avello* case[62] in particular, appeared to confirm that the possession of the nationality of two Member States was sufficient in order to enable a Union citizen to invoke Union law.

Contrary to what some commentators had expected in view of the recent *Ruiz Zambrano* judgment, the Court ruled that Union law was not applicable in the circumstances of the case. According to the Court, Mrs. McCarthy could not invoke Article 21 TFEU because the contested national measure did not have the effect of depriving her of the genuine enjoyment of the substance of her citizenship rights or of impeding the exercise of her right of free movement and residence.[63] The Court explicitly distinguished the circumstances of the *McCarthy* case from those at stake in *Ruiz Zambrano*. It held that, in contrast to the case of *Ruiz Zambrano*, the contested national measure did not have the effect of obliging Mrs McCarthy to leave the territory of the European Union. The fact that Mrs. McCarthy possessed the nationality of two Member States could not change anything with regard to these findings, as it did not trigger the application of national measures depriving her of the genuine enjoyment of the substance of her citizenship rights or impeding the exercise of her right of free movement and residence.[64]

The *Dereci and Others* case provided the ECJ with an ideal opportunity to further clarify the scope of its holdings in *Ruiz Zambrano* and *McCarthy*.[65] The reference of the Austrian V*erwaltungsgerichtshof* in fact concerned five cases in which a third country family member[66] of a static adult Austrian national were refused a right of residence in Austria. The referring court wanted to know, essentially, whether these refusal decisions were precluded under Article 20 TFEU. This required the ECJ to clarify whether such decisions were to be considered as having the effect of depriving the EU citizens concerned of the genuine enjoyment of the substance of their citizenship rights. The ECJ firmly stated that this criterion is only satisfied in situations in which the EU 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 EU as a whole".[67] It emphasised that this criterion would only under exceptional circumstances

[62] Case C-148/02 *Garcia Avello* [2003] ECR I-11613.
[63] Case C-434/09 *McCarthy* (ECJ, 5 May 2011), paras 44-56.
[64] Case C-434/09 *McCarthy* (ECJ, 5 May 2011), para 54.
[65] Case C-256/11 *Dereci and Others* (ECJ, 15 November 2011).
[66] Namely the spouse of an EU citizen in three cases and the adult children of an EU citizen in the two other cases.
[67] Case C-256/11 *Dereci and Others* (ECJ, 15 November 2011), para. 66.

preclude a refusal of a right of residence. In this connection, the Court explained that the mere fact that it might appear desirable to an EU citizen, for economic reasons or in order to keep his family together, for his third country family members to be able to reside with him in the territory of the EU, is not sufficient in itself to support the view that the EU citizen will be forced to leave EU territory if such a right is not granted.[68]

The picture resulting from the judgments just discussed is rather nuanced. In *Ruiz Zambrano* the Court departed from its traditional Union citizenship case law, which was centred on the presence or absence of an inter-State element. As a consequence, a large number of situations could seem to fall henceforth within the scope of Union law which would previously have fallen outside that scope. That would have drastic consequences for the vertical division of competences between the Union and the Member States. On a closer look, however, it seems that the judgment does not entail such wide consequences. As the Court clarified in *McCarthy* and *Dereci and Others*, it is willing to apply Union law only where the 'substance of' citizenship rights is at stake. In such circumstances an inter-State element will no longer be required. In essence, the Court is merely drawing the consequences from its *Rottmann* judgment. If a measure taking away one's Union citizen status falls within the scope of Union law in the absence of a cross-border dimension, the same should be the case for a national measure completely rendering it impossible for someone to exercise the rights attached to that status. Put differently, national measures which *de iure* or *de facto* annihilate one's Union citizenship should be treated equally and be held to fall within the scope of Union law even in the absence of a cross-border dimension.[69]

It appears from these cases that the Court accepts that a refusal of a right of residence to the parent of a minor Union citizen makes it impossible for that citizen to exercise the substance of his citizenship rights. The impossibility for Mrs. McCarthy to be joined by her husband, by contrast, did not have this consequence because it did not oblige her to leave the territory of the Union.[70] The same was true, presumably, for the applicants in *Dereci and Others*.[71] Consequently, the Court appears to limit its extensive interpretation of the scope of Union law to children who face the impossibility to be joined by their parent(s).

Two observations may explain the Court's narrow interpretation. First, it must be pointed out that Union law has traditionally paid special attention to the position of young children.[72] Already in previous cases, the impossibility for children to reside independently in a Member State appears to have inspired the Court to recognise for their family members more extensive rights than those enjoyed by family members

[68] Case C-256/11 *Dereci and Others* (ECJ, 15 November 2011), paras 67-68.
[69] Nathan Cambien, 'Case Note: Case C-34/09 *Ruiz Zambrano*' (2011) Sociaal-economische wetgeving 410-43.
[70] Case C-434/09 *McCarthy* (ECJ, 5 May 2011), para 50.
[71] Somewhat curiously the Court in *Dereci and Others* did not make a final assessment of compliance with Article 20 TFEU, explicitly leaving this to the referring court (Case C-256/11 *Dereci and Others* (ECJ, 15 November 2011), para. 74). Yet the Court's emphasis on the limited applicability of Article 20 TFEU vis-à-vis static EU citizens and on the fact that *Ruiz Zambrano* concerned the right of residence of a third country national with dependent minor children clearly indicate that it was of the opinion that the applicants' argument under EU law would not succeed.
[72] See eg art 12 of Regulation 1612/68 and, more recently, art 24 of the Charter of Fundamental Rights of the EU.

of other Union citizens.[73] Second, the Court's holding in *Ruiz Zambrano* is arguably implicitly based on considerations relating to the need to respect fundamental rights, the right to respect for family life in particular. The relevant case law of the ECtHR is also more restrictive as far as minors are concerned.[74]

3.3 Consequences for the Member States' Immigration Laws

The foregoing makes it clear that the classic inter-State requirement will no longer apply in some cases involving Union citizenship. Union citizens who are confronted with a national measure *de iure* or *de facto* taking away the genuine enjoyment of their Union citizenship rights will be able to invoke Union law against their home Member State, even in the absence of a link with any other Member State. This development in the case law can have significant consequences for the immigration laws of the Member States.

On the one hand, Member States will have to accord some categories of their static nationals exactly the same rights regarding family reunification as are conferred by Union law on moving Union citizens. At present, this duty applies with certainty to young Union citizens. They should be accorded the right to reside in their home Member State together with their parent primary carer. Consequently, Member States which deny this right to static nationals will have to change their legislation. This is important in those Member States which accord their static nationals a right to family reunifications under more burdensome conditions than those applicable to other Union citizens.[75] In Belgium, for instance, a recent legislative proposal introduces more burdensome rights for static nationals when compared to other Union citizens, but makes an exception for minor children and their parents.[76] However, many uncertainties remain concerning the exact scope of the new case law. First of all, it is not exactly clear precisely what categories of static nationals have to be accorded the said residence rights. For instance, must adult Union citizens who are dependent on a primary carer be equalled with young dependent Union citizens in this connection?[77] Besides, it is not clear whether Member States may, under the circumstances mentioned, refuse to accord a right to a Union citizen and their primary carer by relying on a legitimate Member State interest[78] and whether they may impose conditions relating to self-sufficiency[79]. These uncertainties will hopefully be settled by future cases.[80]

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[73] See, most recently, Case C-310/08 *Ibrahim* [2010] ECR I-1065 and Case C-480/08 *Teixeira* [2010] ECR I-1107 (see also the discussion under IV.B., *infra*).

[74] Hailbronner and Thym (n 54), 1268, referring to *Maslov vs. Austria* ECHR 2008 1638-03, paras 70-72.

[75] See the overview in Anne Walter, *Reverse Discrimination and Family Reunification* (Wolf Legal Publishers 2008) 78 pp.

[76] See the discussion in Nathan Cambien, 'Mogen statische Unieburgers worden gediscrimineerd? Enkele beschouwingen bij *Ruiz Zambrano* en *McCarthy*' (2011) Tijdschrift voor Vreemdelingenrecht 242-253.

[77] One can think, for instance, of disabled persons who need the presence of a primary carer (see in this context: Case C-303/06 *Coleman* [2008] ECR I-05603).

[78] The Court did not explicitly consider this point in *Ruiz Zambrano*, *McCarthy* or *Dereci and Others*, but one could argue that the parallel drawn by the Court with the *Rottmann* judgment leaves open the possibility that a refusal to accord a right of residence might in certain circumstances be justified.

[79] See the discussion under IV, *infra*

[80] A substantial number of references have already been made to the Court, asking for further clarification of the *Ruiz Zambrano* and *McCarthy* judgments. See, for instance, pending cases C-356/11 *O and S* and C-357/11 *L*, lodged on 7 July 2011.

On the other hand, this development will likely influence the criteria for the acquisition of nationality in the Member States. As was pointed out higher, it arguably follows from the *Rottmann* judgment that these criteria have to comply with Union law, even in situations in which no inter-State element is present. Moreover, the generous interpretation by the Court of the rights accruing to certain categories of static Union citizens and their third country family members, creates an incentive to restrict the criteria for the acquisition of nationality. It appears from the interventions of a large number of Member States in high profile cases before the Court that most Member States resist a wide interpretation of the Union citizenship provisions because they fear that such will render it impossible for them to control immigration, resulting in significant and uncontrollable financial burdens.[81] After the *Ruiz Zambrano* judgment, third country nationals who manage to obtain the nationality of a Member State for their child can claim a right of residence in that State as the primary carers of that child. As such, the judgments could result in an enormous increase in claims for residence permits. In order to prevent this scenario from happening too easily, Member States will probably restrict the possibilities for acquiring their nationality, thereby restricting the possibilities for Union citizenship based residence claims. A case in point is the Belgian nationality legislation, which was restricted in the context of a number of claims similar to the one in *Ruiz Zambrano*.[82] At the same time, it must be remarked that such restrictions are only valid as long as they do not contravene certain fundamental principles of Union law, such as the principle of legitimate expectations.

The potentially significant consequences of the wide interpretation of the Union citizenship provisions for the immigration laws and policies of the Member States is also cogently illustrated by the cases discussed under the next title, relating to the self-sufficiency requirement.

4. REQUIREMENT OF SELF-SUFFICIENCY

4.1. Traditional Residence Requirements

As was remarked higher, the conditions surrounding the right to free movement and residence are now comprehensively laid down in Directive 2004/38, which repeals earlier directives governing the free movement and residence rights of specific categories of Union citizens and their family members.[83] The Directive also replaces a number of provisions of Regulation 1612/68 on the free movement of workers.[84] It must be emphasised, however, that the latter Regulation was not repealed. Some of its key provisions remain in force. This is the case, for instance, for Article 12, which grants children of a migrant worker the right to access to education in the host Member State under the same conditions as nationals of that State. That provision has been interpreted by the ECJ as granting a right of residence to school-going

[81] See eg Case C-127/08 *Metock and Others* [2008] ECR I-6241, paras 71-72.
[82] Whereas traditionally the Belgian Nationality Code provided that a child born in Belgium acquired the Belgian nationality if it would otherwise be stateless, after an amendment in 2006 such is no longer the case 'if, by appropriate administrative action instituted with the diplomatic or consular authorities of the country of nationality of the child's parent(s), the child's legal representative(s) can obtain a different nationality for it'.
[83] See the discussion in Anastasia Iliopoulou, 'Le nouveau droit de séjour des citoyens de l'Union et des membres de leur famille: la directive 2004/38/CE' (2004) RDUE 523-557.
[84] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] JO L257/2.

children of migrant workers which is independent from the right of residence of their parents. [85] I will come back to this point below.

The central conditions stated in Directive 2004/38 are those relating to the financial situation of the Union citizen. Union citizens are only entitled to reside in the host Member State for more than three months if they are either economically active or have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance cover in that State.[86] The underlying idea is that Union citizens can only move to another Member State if they are financially independent, in order to avoid moving Union citizens and their family members becoming a burden for the social assistance system of the host Member State. This condition of self-sufficiency can, like the possession of Member State nationality and the inter-State element, be labelled a classic element of the free movement of Union citizens. However, this element too has to be nuanced in view of recent case law of in which the ECJ has recognised a right of residence for certain categories of Union citizens, despite the fact that they did not at all fulfil the requirements regarding self-sufficiency.[87]

4.2. The *Ibrahim and Teixeira* Cases and their Consequences

4.2.1 The Cases

The facts of the *Ibrahim* and *Teixeira* cases are very similar.[88] The applicants in both cases entered the UK as the spouse of a Union migrant worker, together with their children. Consequently, both women separated from their husband and continued to live in the UK independently, together with their children. At some point in time, both women applied for housing assistance for themselves and for their children. Their application was rejected because, according to the competent UK authority, they were not entitled to reside in the UK under Union law.[89] This view was based on the fact that the applicants were not self-sufficient or covered by comprehensive sickness insurance and depended on social assistance to cover the living expenses of themselves and their children. In both cases, the applicants submitted, however, that they did derive a right of residence under Union law from the fact that they were the primary carer of school-going children.

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[85] *Inter alia* Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723; Case C-413/99 *Baumbast and R* [2002] ECR I-7091.

[86] See art 7 of Directive 2004/38. Students only have to 'assure' the host Member State that they have sufficient resources for themselves and their family members (see art 7(1)c).

[87] In earlier cases the Court had already adopted a restrictive interpretation of the possibilities for Member States to impose these requirements, *inter alia* by holding that they have to be interpreted in accordance with the principle of proportionality (Case C-413/99 *Baumbast and R* [2002] ECR I-7091, para 91).

[88] Case C-310/08 *Ibrahim* [2010] ECR I-1065; Case C-480/08 *Teixeira* [2010] ECR I-1107, with case notes by Matthew Starup and Peter Elsmore in (2010) 35 EL Rev. *571-1160*; *Charlotte* O'Brien in (2011) 48 CML Rev. 203-225. The most important factual difference between the two cases was that Ms. Ibrahim was a third country national, whereas Ms. Texeira was a Union citizen who had previously been employed in the UK. Furthermore, Teixeira's daughter was over 18 years old, whereas Ibrahim's children were young minors.

[89] It follows from the *Housing Act 1996* and the *Allocation of Housing and Homelessness (Eligibility) Regulations 2006* that a person is not eligible for housing assistance unless he has a right of residence in the United Kingdom conferred by Union law (Case C-310/08 *Ibrahim* [2010] ECR I-1065, para 14).

The ECJ essentially confirmed its holding in *Baumbast and R* and held that the primary carer of school-going children was entitled to reside in the host Member State for the period of his or her children's education. It confirmed that school-going children of a (former) migrant worker derive an independent right of residence from Article 12 of Regulation 1612/68.[90] Furthermore, it explained that, precisely in order to guarantee the effectiveness of this independent right of residence, residence rights must be extended to the primary carer of these children, without whom the latter cannot realistically exercise this right. The Court was prepared to go far in its protection of the *effet utile* of the residence rights of school-going children and their primary carer by holding, first, that these residence rights were not subject to the conditions regarding self-sufficiency. The Court held, moreover, that these residence rights cannot be made subject to a condition of age. Accordingly, the primary carer of a school-going child is entitled to reside in the host Member State even after that child reaches the age of majority for as long as the child continues to need his presence and care in order to be able to pursue and complete his or her education.

4.2.2 Analysis

The *Ibrahim* and *Texeira* cases confirm that school-going children of a (former) migrant worker and their primary carer derive a right of residence in the host Member State, even if they are not self-sufficient. This outcome is surprising in view of the fact that Directive 2004/38, which codifies the rules on the free movement of persons, mentions no such right.[91] One could have expected the Court to hold that the Directive, which to a large extent incorporates predating ECJ case law[92], has implicitly overruled *Baumbast and R*. Still, as the Court correctly pointed out, one cannot ignore the fact that the Directive did not repeal Article 12 of Regulation 1612/68, in contrast with Articles 10 and 11 of that Regulation. This probably means that the Union legislator did not intend to change the meaning and consequences of that provision. As the Court pointed out in *Ibrahim* and *Teixeira*, if Article 12 of Regulation 1612/68 could no longer be interpreted as conferring a right of residence on school-going children and their primary carer but only as conferring the right to equal treatment with regard to access to education, it would have become superfluous with the entry into force of Directive 2004/38, which lays down in its Article 24(1) a general right to equal treatment, which is applicable to access to education. Besides, one can agree with the Court that the aim of that Directive is *inter alia* to simplify and strengthen the right of free movement and residence of all Union citizens[93] and that it must not be interpreted therefore as a 'step back' as far as the rights of school-going children and their primary carer are concerned.

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[90] Accordingly, the Court held that that right is not lost where the parents of the children concerned have meanwhile divorced, and that the fact that only one parent is a Union citizen and the fact that that parent has ceased to be a migrant worker in the host Member State are irrelevant in this regard (Case C-310/08 *Ibrahim* [2010] ECR I-1065, para 29 and Case C-480/08 *Teixeira* [2010] ECR I-1107, para 37, referring to Case C-413/99 *Baumbast and R* [2002] ECR I-7091, para 63).

[91] Except under the exceptional circumstances foreseen by art 12(3) of the Directive (see also text to n 104).

[92] This appears from a number of recitals in the preamble to the Directive (see *inter alia* recitals 9 and 27). See also Samantha Currie, 'EU Migrant Children, their Primary Carers and the European Court of Justice: Access to Education as a Precursor to Residence under Community Law' (2009) 16 Journal of Social Security Law 81.

[93] See recital 3 in the preamble to the Directive.

The Court based the residence rights for school-going children and their primary carer on Article 12 of Regulation 1612/68. Since that Article does not explicitly confer such rights, the question arises, again, exactly what categories of persons can invoke the said rights. The Court's case law gives a number of important clues.

a. Residence Rights for School-going Children

The first category of persons deriving a right of residence from Article 12 of Regulation 1612/68 are children of a migrant worker who have resided with him in the host Member State for a certain period of time. These children will normally derive their initial residence right in that Member State from their status of family member of a migrant worker. Once they start schooling in the host Member State, however, they acquire an independent right of residence for the duration of their education. In this regard it is not required that their parent had the status of migrant worker on the date on which the child started its education.[94] Moreover, the children's right of residence does not end when their parent stops working or when they no longer live together with this parent. Article 12 of Regulation 1612/68 applies to all types of education, including higher education and university education. Accordingly, school-going children continue to enjoy a right of residence when they attain the age of majority and for as long as their schooling lasts, even if they are not financially dependent on their parents. Consequently, their right of residence extends even further than the residence rights enjoyed by children in the host Member State in their capacity as family members of a Union citizen. The latter category only enjoys a right of residence if they are under 21 years old or dependent.[95]

b. Residence Rights for the Primary Carer

The second category deriving a right of residence from Article 12 of Regulation 1612/68 are primary carers of school-going children. Naturally, this right too only lasts as long as the child's schooling continues. Moreover, the Court has ruled that this right will normally end when the child reaches the age of majority, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education.[96]

The Court recognised the residence right just mentioned only for the *parent* who is the primary carer of his children. The Court's reasoning could presumably, however, also apply to other categories of primary carers, for instance where the primary carer of a child is not his parent but another family member or even a non-family member like a legal guardian. [97] Indeed, the very reason for which the Court recognised a right of residence on behalf of the primary carer is that such is necessary in order to guarantee the *effet utile* of the right to education of the children concerned. *Prima facie* it cannot be seen why this *effet utile* should not be guaranteed if the primary

[94] Case C-480/08 *Teixeira* [2010] ECR I-1107, paras 71-75.
[95] See art 2(2) of Directive 2004/38. The dependency condition is interpreted by the Court as referring to financial dependency (see Case C-1/05 *Jia* [2007] ECR I-1, para 35 and the case law cited).
[96] Case C-480/08 *Teixeira* [2010] ECR I-1107, paras 84-87.
[97] Interesting to note is that the Court in some paragraphs refers to the *person* who is the primary carer of children (eg Case C-310/08 *Ibrahim* [2010] ECR I-1065, para 31).

carer is not the parent of the child concerned.[98] A broad interpretation can further be based on the need to comply with the right to respect for family life[99]. Furthermore, the possibility cannot be excluded that a child has multiple primary carers, who should be accorded a right of residence on the basis of Article 12.[100]

An interesting question is whether the primary carer is entitled to equal treatment in the host Member State.[101] Directive 2004/38 confers the right to equal treatment on both Union citizens and their family members, with certain derogations for *inter alia* students (see Article 24). However, this right only applies to persons 'residing on the basis of this Directive in the territory of the host Member State' (see Article 24(1)). The residence right of the primary carer is not, however, based on the Directive, but on Regulation 1612/68. One could assume therefore that primary carers cannot invoke the Union principle of equal treatment in order to claim access to social assistance, for instance. However, that view is not tenable in the light of the reasoning followed by the Court in *Ibrahim* and *Teixeira*. The conferral of a right of residence on the primary carer without at the same time conferring a right to equal treatment would put in peril the *effet utile* of the residence rights of the children, as is clearly illustrated by the facts of these cases. In both cases the mother primary carer was jobless and fully dependent on welfare benefits. It should be clear that, in the absence of a right to claim equal access to social assistance, the mother could not realistically reside with her children in the UK. Besides, it must be remarked that legal residence in the host Member State in accordance with the national laws of that State may enable a person to invoke the general principle of equal treatment laid down in Article 18 TFEU.[102]

c. Children of Non-economically Active Persons and Their Primary Carer?

It can be wondered whether the residence rights enjoyed by school-going children and their primary carer only pertain to children of (former) migrant workers. Does the case law discussed also apply to school-going children of other categories of Union citizens –like self employed persons or, more importantly still, non-economically active Union citizens– and their primary carer? This question has no obvious answer.

On the one hand, a strict reading of the *Ibrahim* and *Teixeira* cases leads to the conclusion that the question must be answered in the negative. Since Article 12 of Regulation 1612/68 only applies to migrant workers and their families, it seems not possible for children of other categories of Union citizens and their primary carer to rely on this case law. On the other hand, the reasoning followed by the Court provides some support for a positive answer. As was pointed out above, the Court's main concern was to preserve the *effet utile* of the right of access to education for children of migrant workers. It should be clear that children of non-economically active Union citizens equally enjoy a right of access to education in the host Member

[98] Annette Schrauwen, 'Zelfstandig verblijfsrecht van schoolgaande kinderen van werknemers en hun verzorgers: ontbreken van bestaansmiddelen niet relevant' (2010) Nederlands tijdschrift voor Europees recht 236.
[99] See in particular Case C-60/00 *Carpenter* [2002] ECR I-6279 (in which the Court recognised a right of residence for the stepparent who was the primary carer of children of a Union citizen).
[100] Starup and Elsmore mention the possibility of recognising a 'secondary carer' besides the 'primary carer' (Starup and Elsmore (n 88), at 584).
[101] See also Schrauwen (n 98), at 236-237.
[102] See Case C-456/02 *Trojani* [2004] ECR I-7573.

State.[103] It could be argued that, once such children have obtained a right of residence in the host Member State and attend school there, they should similarly obtain an independent right of residence for themselves and for their primary carer which cannot be made subject to restrictive conditions such as those concerning self-sufficiency.

In fact, the Union legislator has (partially) confirmed this point of view in Article 12(3) of Directive 2004/38, to which the Court explicitly referred to support its reasoning in *Ibrahim* and *Teixeira*.[104] That Article states:

The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

The right laid down in Article 12(3) applies to school-going children of all categories of Union citizens covered by Directive 2004/38 – i.e. economically active and non-economically active Union citizens – and is not subject to the classic residence conditions regarding self-sufficiency.[105] However, Article 12(3) is only applicable in the event of death or departure of a Union citizen from the host Member State. It does not, on its face, apply in the case of a non-economically active Union citizen who continues to reside in the host Member State after no longer fulfilling the requisite conditions.[106] All the same, it could be argued that the non-application of the substance of Article 12(3) in such circumstances would undermine the aim pursued by that provision, namely safeguarding the right of access to education for school-going children of a Union citizen in the host Member State. One could argue, therefore, that the Court should adopt a wide interpretation of Article 12(3), going beyond its literal wording, and finding application in all circumstances where the Union citizen whose children attend an educational establishment in the host Member State loses his entitlement to residence in that State.[107] In all such circumstances, the right of residence in the host Member State for the children concerned would continue until they finish their education. The same would be true for their primary carer, at least until they reach the age of majority.

This reasoning is, of course, merely speculative. Strictly speaking, the *Ibrahim* and *Texeira* cases only apply to children of migrant workers. It is very well possible that the Court will refuse the wide interpretation suggested of Article 12(3) of Directive 2004/38 for it goes against the apparent will of the legislator, who limited Article 12(3) to cases of death or departure of the Union citizen concerned. Besides, the wider interpretation of Article 12(3) would take away much of the added value of Article 12 of Regulation 1612/68, a provision which was preserved by the Union legislator even after the adoption of Directive 2004/38. Still, as was pointed out, it cannot be fully excluded that in future cases the Court will enlarge its holding to

[103] See art 24 of Directive 2004/38, which also applies to access to education.
[104] See Case C-310/08 *Ibrahim* [2010] ECR I-1065, paras 57-58: Case C-480/08 *Teixeira* [2010] ECR I-1107, paras 68-69.
[105] This clearly ensues when art 12(3) is contrasted with arts 12(1) and (2) of the Directive.
[106] The most obvious example is that of a Union citizen who initially had sufficient resources and a comprehensive sickness insurance cover in the host Member State, but later lost one of these.
[107] See Starup and Elsmore (n 88), 583-584.

children of other categories of Union citizens and their primary carer. The Court has in past cases already been prepared to go past the strict wording of secondary Union law in order to guarantee the rights of Union citizens and their family members.[108]

4.3 Consequences for the Member States' Immigration Laws

While the *Ibrahim* and *Teixeira* cases are perhaps less discussed than the *Rottmann* and *Ruiz Zambrano* cases, their consequences for the immigration policies of the Member States could be more far-reaching. Indeed, vis-à-vis school-going children of migrant workers and their primary carer(s) Member States cannot impose the traditional requirements regarding self-sufficiency. Such persons have to be accorded a right of residence and equal access to social benefits. The resulting financial burden for the Member States could potentially be enormous, as can be gathered when one looks at the facts of the *Ibrahim* case. Ms. Ibrahim's husband had only worked for a very brief period in the host Member State.[109] This sufficed for him to qualify as migrant worker and hence for his family members to invoke the provisions of Regulation 1612/68. Given the young age of his children, this could imply a right of residence for a substantial period of time for Ms. Ibrahim and her children, during which they could fully rely for their subsistence on welfare benefits.

These consequences would be even more drastic if the reasoning is extended to school-going children of non-economically active Union citizens and their primary carer. As was pointed out higher, it cannot be totally excluded that the Court will do so in future case law. In that case all categories of Union citizens could, by moving to another Member State and enrolling their children in an educational establishment there, secure a right of continued residence in that State, even when they no longer satisfy the conditions regarding self-sufficiency.[110] This would result in a much greater number of potential 'welfare tourists'. Besides, granting an unconditional residence right to children of non-economically active Union citizens is more problematic from a financial point of view than granting such rights to children of migrant workers because the latter will in the past have contributed to the host Member State's social assistance systems by paying taxes and social assistance contributions.[111] This may be a further reason why the Court might in the future not be prepared to extend similar rights to school-going children of economically active Union citizens and their primary carer. If the Court should do so nevertheless, I submit, the ensuing financial consequences could be tempered by allowing sufficient scope to the Member States to tackle abuse of residence rights and by allowing Member States, in certain circumstances, to restrict the residence rights discussed to school-going children who are sufficiently integrated in their society.[112]

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[108] See eg Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

[109] He had only been employed in the UK for a total of about eight months and had claimed incapacity benefits in the UK for an additional nine months.

[110] Non-economically active Union citizens should, in order to obtain an initial right of residence, demonstrate to have sufficient financial resources. Once such a right obtained, however, they could then derive a right of residence even when these conditions would no longer be fulfilled.

[111] See, in this sense, explicitly, Case C-480/08 *Teixeira* [2010] ECR I-1107, Opinion of AG Kokott, para 81. It must be remarked, however, that this contribution appears to have been very limited on the facts of, in particular, the *Ibrahim* case. This was not problematic according to AG Kokott since financial contributions are made by migrant workers 'viewed as a group' (*Ibid.*).

[112] The Court could draw inspiration from a line of cases in which it held such 'integration' requirements to be valid (see eg Case C-209/03 *Bidar* [2005] ECR I-2119 and the discussion in

5. CONCLUSION

As this article has demonstrated, recent ECJ case law brings important changes to three basic elements of the free movement of Union citizens, which I have labelled the 'classics' of free movement. In the first place, it seems that Union law will increasingly influence the nationality rules of the Member States. The traditional assumption that Member States are exclusively competent to regulate the personal scope of Union citizenship can no longer be maintained therefore. In the second place, the benefits of Union free movement law, in particular those relating to family reunification, can now in some circumstances be invoked by Union citizens even if they have never resided in a Member State other than that of their nationality. Consequently, the traditional assumption that Union law can only be invoked by Union citizens who have moved between Member States is no longer valid. Lastly, recent case law appears to diminish the importance of self-sufficiency as a condition for legal residence in another Member State for longer periods of time.

There can be no doubt that the developments outlined will have significant consequences for the immigration laws and policies of the Member States. First, the Member States' rules on acquisition and loss of nationality will increasingly be tested on their compliance with certain fundamental principles of Union law. This might reduce their margin of discretion, for instance, for refusing to confer their nationality on third country nationals. Second, Member States will have to accord certain categories of static nationals a right of residence together with certain of their close family members. Third country family members of a Member State national thereby derive greater claims for residence than were traditionally conferred on them under the immigration laws of some Member States. Lastly, Member States will have to accord certain categories of Union citizens from other Member States residence rights even if they are fully dependent for their subsistence on welfare benefits. The resulting financial burdens for the Member States are potentially very significant.

It must be emphasised, however, that these remarkable evolutions in the ECJ case law on Union citizenship are in full development and that it is not yet possible therefore to ascertain their precise scope. Future case law will have to clarify the reach of the principles articulated by the Court in the recent cases discussed and make clear to what precise extent they reduce the discretion of the Member States in crafting their immigration policies.

Charlotte O'Brien, 'Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity' (2008) 33 EL Rev. 643-665.