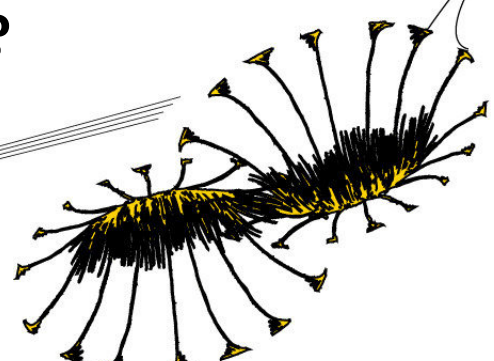



# EUROPEAN CITIZENSHIP – A NEW BOND BETWEEN THE EU AND THE CITIZENS OF THE MEMBER STATES?



**Nina Fehrenkamp (s1112929)**  
Bachelor Thesis European Studies  
Faculty of Management and Governance

**Examination Committee**  
Dr. Luisa Marin (1<sup>st</sup> supervisor)  
Prof. Dr. Ramses A. Wessel (2<sup>nd</sup> supervisor)



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### Summary

According to recent case law by the European Court of Justice, EU citizenship has been framed as destined to be the fundamental status of Member State nationals. It herewith departed from the former connection between citizenship and movement across Member States which has been a requirement in order to invoke EU citizenship rights. The purpose of this study is to assess the meaning of this case law within the institution of European citizenship in order to find out whether it implies a radical change on the nature of citizenship through the establishment of a direct bond between the Union and the Member State citizens or through the introduction of a new concept of integration respectively. I will therefore look at the development from its introduction by the Treaty of Maastricht in 1993 until 2011. Particular attention will be paid to early cases which were the first that put aside the requirement of having exercised free movement rights, the pivotal rulings in *Grzelczyk* and *Zambrano* as well as the case law in between them, and following cases that are useful to examine the normative dimension of citizenship as fundamental status. The conclusion of this work will indicate that Union citizenship is indeed becoming more and more emancipated from a purely economic paradigm, moving towards being the fundamental status of Member State nationals. Notwithstanding, it will be demonstrated that in a number of cases, the rulings by the Court result from particular situations that facilitated the extension of the Treaty provisions. This implies that in other situations, especially when financial implications are at stake, the European Court of Justice seems to avoid taking further approaches to develop the concept of EU citizenship.

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## List of Abbreviations

AFSJ	Area of Freedom, Security and Justice
CFREU	Charter of Fundamental Rights of the European Union
EAW	European Arrest Warrant
EAWFD	European Arrest Warrant Framework Decision
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
EP	European Parliament
EU	European Union
TEC	Treaty establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

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# EUROPEAN CITIZENSHIP – A NEW BOND BETWEEN THE EU AND THE CITIZENS OF THE MEMBER STATES?

## 1. Introduction

“Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for”<sup>1</sup>.

This is the statement the European Court of Justice made in the case of *Rudy Grzelczyk* in 2001. It herewith followed the approach taken in the case of *Martinez Sala*<sup>2</sup> which paved the way to emancipate EU citizenship from a purely economic paradigm, because it sees it as a status unconnected from movement across Member States in order to carry out economic activity. In that sense, recent cases shaped the fundamental paradigm shift of citizenship.

The ECJ jurisprudence has thus experienced significant developments in terms of substantial content since 1993 when the European citizenship concept became part of the EU Treaty. Since the Court seems to apply an incremental approach to define the meaning of EU citizenship, it will be quite interesting to look at recent cases since *Grzelczyk*. More specifically, I will assess the Court’s statement in *Sala* and *Grzelczyk* in the light of cases such as *Zambrano*<sup>2</sup>, *McCarthy*<sup>3</sup>, *Dereci*<sup>4</sup> and other important case law.

With regard to the normative dimension of EU citizenship, the Commission in its third report on Citizenship of the Union states that “Citizenship of the Union is both a source of legitimation of the process of European integration, by reinforcing the participation of citizens, and a fundamental factor in the creation among citizens of a sense of belonging to the European Union and of having a genuine European identity”<sup>5</sup>. Contrarily to the Commission, the Court does not develop a mere rhetorical understanding of being a citizen of the Union, but focuses on opening national citizenships to each other (Magnette, 2007, p. 670). In practice, this means that not the Member States, but the Court judges whether states may deprive nationals of other Member States that are on their territory of social rights whatever their economic situation might be. In that sense, the ECJ plays a significant role for the development of EU citizenship and at the same time represents an important factor of European integration as citizenship rights encourage Member States to further harmonize laws and cooperate with each other.

As long as social benefits as the expression of social rights do not constitute an unreasonable burden for national social budgets, the ECJ forbids discrimination in matters of social welfare, family benefits, or on issues unrelated to social economic conditions like the right to change last names (Magnette, 2007, p. 670). This has been confirmed in several cases and will be elaborated within the framework of this thesis. The important aspect of this is however in which situations social rights represent a financial burden for a specific Member

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<sup>1</sup> Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-06193, para. 31.

<sup>2</sup> Case C-85/96, *María Martínez Sala v Freistaat Bayern*, [1998] ECR I-02691.

<sup>2</sup> Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, [2011] ECR I-01177.

<sup>3</sup> Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, [2011] ECR I-03375.

<sup>4</sup> Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, [2011] ECR I-00000.

<sup>5</sup> European Commission, *Third Report on Citizenship of the Union*, Brussels, 7 September 2001, COM (2001) 506 final, p. 7.

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State and whether the circumstances of the individual actually allow for depriving that person of invoking his or her citizenship rights.

The *Ruiz Zambrano* judgment will be dealt with in particular because it offers more than the extension of *Sala* which is considered the first step towards a social dimension of EU citizenship, having in mind its implications for social benefit reception of citizens that have not moved for the purpose of carrying out economic activity. Regarding the facts of the case, what seems to emerge from *Zambrano* is the notion of integration within the territory of the Union taken as a whole (Azoulai, 2011a). Europeans, irrespective of where they are and what they are doing within the EU, seem to enjoy a new fundamental status. *Zambrano* therefore contributed to a high extent to the unique nature of EU citizenship and the perspectives of its development.

To a certain extent, this work will as well be dedicated to posterior case law after *Zambrano* which in fact confirm the judgment by the ECJ but apply it in a different way. It will be interesting to put it into perspective in order to find out how to interpret *Zambrano*, taken into account that this case is often considered a unicum that touches on migration issues and the sovereignty of Member States.

In short, the core of this thesis will be the examination of legal developments, as the European Court of Justice rulings concerning EU citizenship are not always unidirectional. In some cases it has ruled that citizens can only invoke their citizenship rights once they are moving. In other cases though, it has ruled that movement across Member States is not a decisive factor and that equal treatment is accorded on the basis of EU citizenship. The problem with citizenship is that it usually touches upon sensitive issues such as migration, discrimination on the basis of nationality or Member State sovereignty. As already indicated, a particular challenge for the ECJ is to balance non-discrimination and the fair assignment of social benefits.

The general purpose of the study is to find out by the interpretation of relevant case law, whether the link between the European Union and its citizens has changed. In that way, we will learn more about the true nature of EU citizenship. In this respect, the role of the Union as a protective polity is of great importance because the EU is not a state, but a political concept, and the meaning of citizenship seems to remain unclear. Thus, the study also aims at looking at the longer term evolution of the concept of citizenship for the emergent Euro-polity.

The relevance of the study is obvious regarding recent debates about the development of European citizenship from being embedded within a purely economic paradigm to becoming a new fundamental status of nationals of the Member States. As the concept of Union citizenship is closely related to other basic concepts, including free movement of persons, the prohibition of discrimination on grounds of nationality and the protection of fundamental rights, there have been vivid debates about what added value citizenship has brought to the Treaties and what the potential and the proper limits of the concept might be. Furthermore, with the entry into force of the Treaty of Lisbon, citizenship has extended to areas other than traditional cooperation, such as judicial cooperation within the Area of Freedom, Security and Justice. Although in the AFSJ Member States still retain the power to discriminate against individuals according to their status personae, proven on the basis of

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recent case law such as Wolzenburg dealing with the issue of European Arrest Warrants, the AFSJ nevertheless offers space for EU citizenship to develop further, especially with regard to the non-discrimination principle. Consequently, speculations about the future of the dynamic concept of EU citizenship may become more concrete.

In the following section, the research questions and methodology will be presented.

## 2. Research Questions and Methodology

### 2.1. Research Question and Sub-Questions

The specific research question I intend to answer within the framework of this bachelor project will be:

*To what extent has recent ECJ case law had an impact on the normative dimension of EU citizenship as fundamental status of nationals of the Member States?*

This research question is descriptive. In order to answer this question, a few sub-questions have been made. These will be:

*What is the normative dimension of EU citizenship as the fundamental status of EU citizens?*

*To what extent does the Ruiz Zambrano judgment represent a radical change in the normative dimension of EU citizenship as the fundamental status of Member State nationals?*

*To what extent can the Ruiz Zambrano judgment be considered a stable legal acquis?*

### 2.2. Methodology

In the following, I will outline how the research was carried out. In order to answer the research questions in the best possible way, I mainly reflected on scientific articles and legal documents that deal with the actual meaning of the specific case law and its implications for citizenship rights. The most important legal documents are:

- The Treaty of Maastricht which introduced European citizenship
- The Treaty on the European Union, together with the Treaty of the Functioning of the European Union, as in force since the Lisbon Treaty
- Case law documents provided by the European Court of Justice

I also used scientific literature and articles of scholars who deal with the concept of citizenship for a governance entity like the EU. Relevant scholars are Azoulai, Eeckhout, Kochenov, Schrauwen, Shaw, Nic Shuibhne and Spaventa. However, there is a variety of authors who dedicated their work to the actual meaning of the notion of EU citizenship, thus a broad range of literature helped answering my research question and sub-questions. Another source of literature concerns the web platform EUDO CITIZENSHIP, embedded within the European Union Observatory on Democracy, hosted at the Robert Schuman Centre of the European University Institute in Florence.

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In sum, the data collection primarily concerned collecting qualitative data from articles from scientific journals analyzing and interpreting law, the Treaties, and ECJ case law. I particularly looked for cases that deal with citizenship and that have added substantial changes to the concept.

Finally, I would like to mention the threats that are inevitably with a literature review, such as research reviewer subjectivity that may lead to inaccurate conclusions, and, which is a specific threat for this thesis, the case inclusion criteria. I might have included cases that are not that relevant and excluded those that are very relevant. I tried to take care of this by thoroughly studying scientific literature.

### **3. Theoretical constructions of citizenship in the EU polity**

In this part of the thesis, I will discuss the theoretical dimension relevant to the topic of EU citizenship.

#### **3.1. Complementary and additional citizenship**

Since a conceptual analysis of the meaning of EU citizenship will be part of the core of this thesis, here only a short, basic note on the construction and introduction of the concept will be given.

The legal concept of citizenship of the European Union was formally introduced into the EC Treaty with the Treaty of Maastricht in 1993. Any person who holds the nationality of an EU country is automatically also an EU citizen, which implies that EU citizenship is “additional” to national citizenship, replacing the earlier expression that it is “complementary”<sup>6</sup>. Each country can decide for itself which conditions have to be met for the acquisition and loss of nationality. Art. 20 TFEU<sup>7</sup> is the central article since it establishes EU citizenship and summarises the associated rights. The rights EU citizens are entitled to via citizenship of the Union include for instance the right to move and reside freely within the EU, to vote for and stand as a candidate in European Parliament and municipal elections, and the right to be protected by the diplomatic and consular authorities of any other EU country. These rights establish a direct link between the EU and its citizens. Besides, with Art. 18 TFEU the Treaty prohibits discrimination on the basis of nationality<sup>8</sup>. This provision is the most relevant one because it has triggered constitutionally relevant case law, as we will see later on.

Furthermore, another crucial legal provision concerning citizenship rights is the Citizenship Directive<sup>9</sup> which provides the framework for almost all legal issues concerning the free movement of persons. It basically sets out the right of citizens to move and reside in other Member States, bring their families to live with them and participate in socio-economic life without experiencing discrimination. According to the Directive “Union citizenship is the fundamental status of nationals of the member states when they exercise their right of free

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<sup>6</sup> Cf. Art. 20 TFEU (ex Art. 17 TEC).

<sup>7</sup> Ibid.

<sup>8</sup> Cf. Art. 18 TFEU (ex Art. 12 TEC).

<sup>9</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004).



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movement”<sup>10</sup>. That implies that the ordinary enjoyment of EU Citizenship rights like residence and non-discrimination is still dependent on mobility, as EU citizenship is the fundamental status of a Member State national only when he or she has moved.

Accordingly, Member State nationals must show a clear cross-border element in order to fall under the provisions of EU citizenship. However, as we will see, the case law significantly departs from the provisions of the Citizenship Directive. Recently, the ECJ ruled several times on the basis of citizenship in the absence of a cross-border element. This thesis is also dedicated to identify a certain type of situation in which the ECJ applies this approach.

Although in early citizenship cases, such as *Sala* and *Grzelczyk*, the Court did not rely solely on the free movement provisions, the most significant case has certainly been *Zambrano*, where two Belgian children who had never exercised their free movement rights could not be denied residence and work permits where it would have the effect of “depriving the Union citizens the genuine enjoyment of the substance of the rights”<sup>11</sup> conferred by their status as EU citizens. Herewith *Zambrano* effectively redefined the scope of application of EU law, extending its reach to an otherwise purely internal situation by dispensing with the cross-border element usually required to trigger EU law.

The next section will provide more detailed explanation of the personal and material scope of the citizenship provisions.

### **3.2. Ratione personae and ratione materiae of the citizenship provisions applied to Sala, Morgan, D’Hoop and Garcia Avello**

Article 17 (1) TEC<sup>12</sup>, now Art. 20 (1) TFEU<sup>13</sup>, has significantly broadened the personal scope of the citizenship provisions because it entails that there is no need to satisfy any other requirement but that of nationality of a Member State to claim citizenship rights under the Treaty, implying that it is not necessary to have exercised the right to move.

In *Martinez Sala*, this Art. 17 was proven of having legal effects (Spaventa, 2008, p. 19 ) as the case does not provide a free movement element. So if Union citizens fall within the personal scope of the Treaty by virtue of Art. 20 TFEU (ex. Art. 17 TEC), then any citizen, and not only the migrant, falls within the personal scope of the Treaty and is therefore able to rely on it whenever the situation falls within its material scope. In that way, for the first time static citizens acquire general Community law credentials (Spaventa, 2008, p. 22). This has also been confirmed in several other cases such as in *Morgan*<sup>14</sup> and *D’Hoop*.

In *Morgan*, a German citizen, who wanted to go and study in the United Kingdom, applied for German study finance which was refused because the German rules only permitted export of study finance when the course to be followed was a continuation of a course already followed for at least one year in Germany. The Court found that the German

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<sup>10</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004), para. 3.

<sup>11</sup> Case C-34/09, Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm), [2011] ECR I-01177.

<sup>12</sup> Cf. Art. 17 TEC.

<sup>13</sup> Cf. Art. 20 TFEU (ex Art. 17 TEC).

<sup>14</sup> Case C-11/06, Rhiannon Morgan v Bezirksregierung Köln, [2007] ECR I-09161.

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provisions discouraged students in Germany from going abroad and therefore comprised a restriction on movement contrary to Art. 21 TFEU and could therefore not be adequately justified<sup>15</sup>. So even if the student had not yet exercised his free movement rights, he could nevertheless rely on the citizenship provisions.

*D’Hoop* concerned the Belgian tide-over allowance, available to job-seeking school-leavers if they have been to school in Belgium. For Ms D’Hoop, a Belgian citizen who had been to school in France and was denied to receive the tide-over allowance, it was not possible to say that she was being discriminated against on grounds of nationality<sup>16</sup>. The preliminary question was whether Community law precludes a Member State from refusing to grant the tide-over allowance to one of its nationals on the sole ground that that student completed her secondary education in another Member State<sup>17</sup>. The Court ruled that Belgian legislation granting tide-over allowances to Belgian nationals, who have completed their secondary education in Belgian establishments, contravenes articles 12<sup>18</sup> TEC, establishing the prohibition of discrimination on grounds of nationality, and 18 (1) TEC<sup>19</sup>, providing for the right to move and reside freely in the Union. So here as well the complainant could rely on the citizenship provisions without the requirement to establish a cross-border element.

Also in the case of *Garcia Avello* one can observe “a willingness to find even a relatively marginal cross-border connection sufficient to invoke EU law” (Chalmers, et al., 2010, p. 464). The children were born in Belgium, had a Spanish and a Belgian parent, and obtained both nationalities. When they challenged Belgian rules on family names, the Belgian state claimed that the situation was internal since they were Belgians who had never been abroad. However, the mere fact that they had Spanish nationality and that they were lawfully resident citizens of another Member State was sufficient to engage EU law.

In that sense, EU citizenship acquires powerful potential to shape the scope of EU law and protect the rights of those in possession of this status in the situations unrelated to any additional considerations besides being an EU citizen, such as the existence of a cross border situation (Kochenov, 2012, p. 2).

Despite its transformative character in terms of legal rights that becomes visible while studying case law, EU citizenship has a long time been a purely “decorative and symbolic” (Kostakopoulou, 2005, p. 234) institution. That is because in the early 1990s, European integration was progressing in an economic direction and citizenship was added in compensation to that direction. This context led to the association with the pre-Maastricht image of “market citizenship” (Kostakopoulou, 2005, p. 234) as in that period only citizens who have exercised their right to free movement in order to carry out economic activity could rely on the citizenship rights. Now with the recent case law attaching citizenship rights to persons who are static, EU citizenship develops a new dimension, namely drifting away from a decorative institution towards a fundamental status for nationals of EU Member States. However, this change of the meaning of the concept of Union citizenship cannot happen without any barriers. This will be discussed at a later stage though.

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<sup>15</sup> Ibid.

<sup>16</sup> Case C-224/98, Marie-Nathalie D’Hoop v Office national de l’emploi, [2002] ECR I-06191.

<sup>17</sup> Ibid.

<sup>18</sup> Cf. Art. 12 TEC.

<sup>19</sup> Cf. Art. 18 TEC.

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Having seen the legal provisions of EU citizenship, I will now have a look at citizenship being framed as fundamental status.

### 3.3. EU citizenship framed as the fundamental status of Member State nationals

In order to evaluate in how far the concept of citizenship can be framed as the fundamental status of nationals of the Member States, we will again have a look at the rights that are implied into this concept and the situations in which they can be invoked.

When stating that “Union citizenship is destined to be the fundamental status of nationals of the Member States”<sup>20</sup>, the Court broadened the scope of application of the principle of non-discrimination on the ground of nationality. That is because it used the principle to say that, if they are Europeans, they should enjoy the same treatment irrespective of their nationality, especially with regards to social benefits. The reference to the status is presented as the “real source of the rights and duties conferred to EU citizens and to their family members” (Azoulai, 2011a) and this source of rights can be invoked at any moment and wherever these citizens and their family members are in the Union. The consequence of that is that the status in itself has to be protected in order to protect the rights attached to it. On the one hand, these rights refer to the rights of citizenship already mentioned in the previous section, like the free movement, voting in EP elections and non-discrimination, on the other hand, one can also see a reference to the fundamental rights protected under the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights<sup>21</sup>, as well as social rights. Azoulai calls this the “invention of the status of Union citizen” (Azoulai, 2011a).

Hence with recent ECJ case law, citizenship has developed another dimension, namely “the protection of the rights of Union citizens as genuine Europeans committed to the European Union, its territory and its common values, and not only to the Member State” (Azoulai, 2011b). Azoulai herewith makes an attempt to depict the consequence from the *Zambrano* judgment. Free movement is not a necessary element anymore, so it does not matter where citizens are in the Union. The judgment therefore stresses the importance of the territory of the Union as a whole in contrast to a Union of territories of Member States. Besides using citizenship to broaden the scope of the non-discrimination principle in general, it is now used for different purposes, either to broaden the scope of the non-discrimination principle in the context of market freedoms or to use it as an independent source of rights (Jacobs, 2007, pp. 593-596).

However, the problem with the concept of EU citizenship as provided in the Treaties lies in its lack of independence. The condition upon which Union citizenship is acquired, nationality of a Member State, refers to a legal status different from it and beyond its reach, because nationality rules remain the power of Member States (Prentoulis, 2001). That makes it a complicated issue, especially when having in mind that it is meant to be the fundamental status of Member State nationals. If that is indeed the future aim of citizenship, than the way of acquiring it has to be reassessed.

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<sup>20</sup> Case C-184/99, Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, [2001] ECR I-06193, para. 31.

<sup>21</sup> Charter of Fundamental Rights of the European Union (2000) and European Convention on Human Rights (1950).

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Taken into account what has been said by Prentoulis, Niamh Nic Shuibhne provides a useful conceptual scheme of Union citizenship from a legal perspective, putting emphasis on the “normative [...] limits” of EU citizenship (Shuibhne, 2004, p. 5). These normative limits can be understood as the restricted capacity of the EU to “carry a concept of citizenship given that it is not a state” (Shuibhne, 2004, p. 5). Herewith Nic Shuibhne alludes to the assumption that a political entity like the EU cannot provide a concept of citizenship similar to that of a state simply because the EU is not a state. On grounds of the EU nevertheless being a state-like entity with characteristics such as its legal system and constitutional structure, the question that arises is what sort of citizenship EU citizenship should eventually be.

With reference to the first sub-question of this thesis, we observe that the normative dimension of EU citizenship is crucially influenced by the political circumstances. The EU being a unique political construct limits the normative implications that national citizenship possesses. Hence, it simply cannot be of the same nature as national citizenship and therefore has to focus on different aspects. Certainly it is important to provide for political rights, but when it comes to social rights there will be inevitable inconsistencies. EU citizenship should be subject to better assessment of the situation of an individual.

Having seen the conceptual terms of reference, we will now turn to the evolution of the concept of Union citizenship. It will be demonstrated how citizenship has evolved from a compensatory element to the economic dimension of European integration to a status that may be invoked, under certain circumstances and in contrast to the Treaty provisions on free movement, even in the absence of a cross-border element.

### **4. The conceptual evolution of EU citizenship**

As already indicated, before the European Court of Justice has strengthened the constitutional and normative importance of European citizenship, it had a quite different understanding of it, a one that privileged economic activity over citizen status.

Although scholars in 1993 deliberated on what European citizenship might mean in a supranational context and what its transformative potential might be, minimalist conceptions of European citizenship, which point out that Union citizenship had added little substantially new to existing Community law, with the exception of electoral rights at EP and local elections and the right to diplomatic and consular protection, prevailed. The main argument was that since EU citizenship has merely been designed to facilitate economic integration, it would only be relevant to some nationals of the Member States, namely those who possess the necessary resources required for movement within the EU (Kostakopoulou, 2005, p. 235). The general assumption was that citizenship has been introduced as compensatory element for the economic dimension. Thus, one could argue that there were not even the ambitions to emancipate citizenship from the economic dimension.

#### **4.1. Evolution of the concept of Union citizenship in the period 1993-2003**

According to Kostakopoulou, three phases may be distinguished in the process of the displacement of the “market citizenship template” (Kostakopoulou, 2005, p. 233): *Judicial minimalism* (1993-1997), *signalling intentions* (1998-2000) and *engineering institutional change* (2001-2003) (Kostakopoulou, 2005).

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### 4.1.1. 1<sup>st</sup> period (1993-1997) – Judicial minimalism

In the first phase, the European Court of Justice opted for a “consolidating, rather than constitutionalising approach to Union citizenship” (Kostakopoulou, 2005, p. 244), that is, European citizenship was used as basis to reaffirm existing Community law. The cases the ECJ considered between 1993 and 1997 did not provide an opportunity for institutional change because there was no actual conflict between European citizenship norms and reality. Hence, there was neither an interest nor an opportunity for bringing about qualitative change in the meaning and implications of Union citizenship (Kostakopoulou, 2005, p. 245).

### 4.1.2. 2<sup>nd</sup> period (1998-2000) – Signalling intentions (Sala and Kaba)

In the second phase, the European Court of Justice highlighted the constitutional importance of European citizenship by bringing citizens within the scope of the protection afforded by the non-discrimination clause.

The first time when the ECJ ruled on the supposedly symbolic value of the notion of EU citizenship was in the case of *Martinez Sala*<sup>22</sup>. The case concerned a Spanish woman living in Germany who wanted to get a child-raising allowance on the basis of her European citizenship. Mrs Sala was required to produce a formal residence permit in order to receive the allowance, whereas German nationals had only to show that they were residing in the country. This has been regarded as discrimination on grounds of nationality which is prohibited to be applied to EU citizens who lawfully reside in another Member State. First, the ECJ held that the child-raising allowance was a family benefit and therefore fell under the material scope of the EC Treaty. However, Mrs Sala tried to come within the personal scope of the EC Treaty by relying on her former status of worker. The ECJ then considered whether her EU citizenship could bring her within the scope of the application of the EC Treaty. Although Mrs Sala did not fall under the general provisions on free movement of persons, because she was not a worker anymore, but resided lawfully in Germany, the ECJ ruled that equal treatment is accorded on the basis of EU citizenship<sup>23</sup>. *Martinez Sala* therefore first enabled the concept of citizenship to evolve independently of the existing constraints of the free movement rights of the Treaty.

Nevertheless, equal treatment and social assistance being at stake in *Sala*, the Court made ambiguous statements with regard to similar cases. Generally, it pursues the principle that EU citizens are entitled to equal treatment with nationals where benefits are concerned. However, it accepts the principle of restrictions of Member States because “the financial and social realism make it unavoidable that some benefits are only available to society members” (Chalmers, Davies, & Monti, 2010, p. 456). Nevertheless, it pursues strict view of proportionality and whether the restriction is genuinely suited to the particular benefit.

For instance, a few years later in *Kaba*,<sup>24</sup> the Court stated that national legislation, which imposes differential residency requirements for the spouses of Community nationals and the

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<sup>22</sup> Case C-85/96, *María Martínez Sala v Freistaat Bayern*, [1998] ECR I-02691.

<sup>23</sup> *Ibid.*

<sup>24</sup> Case C-466/00, *Kaba v Secretary of State for the Home Department*, [2003] ECR I-02219.

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spouses of nationals of the United Kingdom for the grant of indefinite leave to remain, does not constitute discrimination on the grounds of nationality.

Mr Kaba was a Yugoslav national married to a French woman, who obtained a five-year residence permit in the UK because she was working. Consequently, in his capacity as the spouse of an economically active Community national, Mr Kaba was granted leave to remain for the same period. However, when he applied for indefinite leave, the latter was not granted to him on the grounds that he did not fulfil the requirements of British Immigration Rules, according to which spouses of migrant workers who are nationals of other Member States are required to have resided in the territory of that Member State for four years before they become entitled to apply for indefinite leave, as his wife had remained in the United Kingdom for a total of only one year and 10 months. Mr Kaba appealed against that decision, arguing that the provisions of the Immigration Rules applicable to persons "present and settled"<sup>25</sup> in the United Kingdom were more favourable than the provisions that applied to his wife and to himself. The Court ruled that this specific UK legislation does not constitute discrimination contrary to Regulation No. 1612/68<sup>26</sup>.

The Court's rulings in this phase show that institutional change is not a linear process with a clear direction. That is because in *Sala*, the Court gave more substance to Union citizenship because nationality would not justify differential conditions in the enjoyment of an allowance, whereas in *Kaba* it acknowledged the Member States' power to define the scope of the right of residence on the basis of nationality because nationality was a relevant factor (Kostakopoulou, 2005, pp. 249-250).

In a broader context, one could therefore suppose that *Kaba* supports the view that the ECJ has in a way diminished its effort to develop the institution of Union citizenship.

### 4.1.3. 3<sup>rd</sup> period (2001-2003) – Engineering institutional change

It was only in the third phase that the Court started to acknowledge the fundamental status of Union citizenship.

According to Schrauwen, national citizenship is a political bond between the citizens and the state. It is the status of those who belong to the people of the state. European citizenship by analogy is supposed to express the political bond between those who belong to the people of the European Union (Schrauwen, 1999). Feelings of solidarity and belonging, which are usually connected to national citizenship, find their expression mainly in political and social rights. However, European citizenship is built on the principle of free economic movement and is "definitely not the expression of belonging to a political or a social community" (Schrauwen, 1999, pp. 793-794). Hence, Schrauwen concludes that the only way the Union will be able to engage its citizens is "the creation of a political and social community that goes beyond economic integration" (Schrauwen, 1999, p. 794). She adds that "giving lawfully residing citizens equal access to social benefits [as in the case of *Sala*] is only a very minor step in that direction" (Schrauwen, 1999, p. 794). A general trend Schrauwen points out is the assumption that the importance of the citizenship provisions "lies not in their content, but rather in the promise they hold out for the future" (Schrauwen, 1999, p.788).

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<sup>25</sup> Case C-466/00, *Kaba v Secretary of State for the Home Department*, [2003] ECR I-02219, para. 49.

<sup>26</sup> *Ibid*, para. 27.

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Important cases of the third period are *Grzelczyk*<sup>27</sup> and *Baumbast*<sup>28</sup> which went beyond settled law in order to realise the promise inherent in Union citizenship and to bring about institutional change. According to Jo Shaw, these and other cases show that “changes in the legal regulation of citizenship amount in sum to the emergence of a more independent and less complementary idea of EU citizenship” (Shaw, 2009, p. 108).

The next paragraph, having the purpose of analysing subsequent case law to the classification of *Kostakopoulou*, will show how these cases have impacted the normative dimension of EU citizenship as the fundamental status of Member State nationals.

### 5. Grzelczyk and its implications for the normative dimension of EU citizenship as fundamental status

#### 5.1. The crucial statement made in Grzelczyk

In *Grzelczyk*<sup>29</sup>, the ECJ clearly demonstrated why the institution of European citizenship matters and how it has matured. *Grzelczyk*, a French national studying in Belgium, applied for a minimum subsistence allowance paid in Belgium, which at first was granted to him. However, when the institution applied to the Belgian state authorities for reimbursement of the payments, the application was refused on the ground that *Grzelczyk* was not a Belgian national.

The preliminary question in the case was “whether Articles 6 and 8 of the Treaty<sup>30</sup> preclude entitlement to a non-contributory social benefit, [...], from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation No 1612/68 when no such condition applies to nationals of the host Member State”<sup>31</sup>.

Advocate General Alber stated thereupon that “Citizenship of the Union took on greater significance, in contrast to the perception of individuals as purely economic actors which had underlain the EC Treaty. The conditions on which freedom of movement may depend are now no longer economic in nature, as they still were in the 1990 directives. The only ‘limitations and conditions’ attached to freedom of movement now are imposed on grounds of public policy, public security and public health”<sup>32</sup>.

Arguing in line with the Advocate General and rejecting the minimalist perspective of EU citizenship, that is associating it with the model of market citizenship, the ECJ stated that “Union citizenship is destined to be a fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in

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<sup>27</sup> Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-06193.

<sup>28</sup> Case C-413/99, *Baumbast and R v Secretary of State for the Home Department*, [2002] ECR I-07091.

<sup>29</sup> Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-06193.

<sup>30</sup> Cf. EC Treaty, Art. 6 and 8 (Art. 12 TEC and 17 TEC as amended by the Treaty of Amsterdam, in force since 1 May 1999).

<sup>31</sup> Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-06193, para. 19.

<sup>32</sup> Opinion of Mr Advocate General Alber delivered on 28 September 2000, para. 52, Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-06193.

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law irrespective of their nationality, subject to such exceptions as are expressly provided for”<sup>33</sup>.

The case of *Grzelczyk* was the first to establish that citizenship is “destined to be the fundamental status”<sup>34</sup> but already in *Micheletti*<sup>35</sup> and *Garcia Avello*<sup>36</sup> the Court stated that “national laws on citizenship must have due regard to Community law” (Shaw et al., 2011, p. 5). In order to better understand the Court’s reasoning in favour of fundamental status, I will shortly reflect on *Micheletti* and *Garcia Avello*.

### 5.1.1. Dual nationality (Micheletti) and prohibition on nationality discrimination (Garcia Avello)

The Court’s approach established in *Micheletti* was that Member States’ decisions concerning the conferral and withdrawal of nationalities are to be taken with “due regard to Community law”<sup>37</sup>.

Spanish law at issue in *Micheletti* provided that, where foreign nationals had dual nationality, the nationality corresponding to the place of habitual residence prior to the residence in Spain took precedence and the other nationality was ignored. *Micheletti* was Argentinean and Italian, but his previous habitual residence had been Argentina. As a result, Spain refused to treat him as Italian, thus as an EU citizen, recognising only his Argentinean nationality.

However, the Court ruled that once a citizen has established his EU citizenship, by showing his citizenship of a Member State, it is not open to another Member State to challenge that status or refuse to recognise it because to do so would not only undermine the rights and freedoms associated with EU citizenship, but would also mean that whether dual nationals could benefit from such citizenship would vary from state to state<sup>38</sup>. In that way, EU citizenship became somewhat of a fundamental status as it could not be challenged nor refused anymore.

In *Garcia Avello*, a case dealing with the prohibition of nationality discrimination, a Belgian-Spanish couple residing in Belgium used EU law to force the Belgian state to allow their dual-national children to be named on their Belgian passports according to Spanish naming conventions<sup>39</sup>.

The rules governing a person’s surname usually fall within the exclusive competence of the Member States rather than the Community. However, according to the ECJ, the fact that the

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<sup>33</sup> Case C-184/99, Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, [2001] ECR I-06193, para. 31.

<sup>34</sup> Ibid.

<sup>35</sup> Case C-369/90, Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria, [1992] ECR I-04239.

<sup>36</sup> Case C-148/02, Carlos Garcia Avello v Belgian State, [2003] ECR I-11613.

<sup>37</sup> Case C-369/90, Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria, [1992] ECR I-04239, para. 10.

<sup>38</sup> Case C-369/90, Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria, [1992] ECR I-04239.

<sup>39</sup> Case C-148/02, Carlos Garcia Avello v Belgian State, [2003] ECR I-11613.



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EU citizens' children were residing in another Member State provided them with a sufficient link to Community law, enabling them to be afforded protection under articles 12 TEC<sup>40</sup> and 17 TEC<sup>41</sup>. Thus, the situation in *Garcia Avello* was not purely internal as the applicants held dual nationality.

### 5.2. Implications for EU citizenship as fundamental status

So what exactly did *Grzelczyk* change with regard to EU citizenship, except for the formal establishment of fundamental status in line with *Micheletti* and *Garcia Avello*?

Taken up from *Sala* and confirmed in *Grzelczyk*, social benefits, presumed to have been within the preserve of those who move to be economically active, could be claimed by EU citizens lawfully resident in a Member State other than that of their nationality, on the basis of equal treatment with nationals of the host state (Shuibhne, 2004, p. 357). Hence, as Eeckhout correctly summarises, with the approach taken in *Sala* and readopted in *Grzelczyk*, the principle of non-discrimination on grounds of nationality is clearly developing into a core component of European Union citizenship (Eeckhout, 2002, p. 969).

By calling into question the link between economic activity and residence in certain circumstances, *Grzelczyk* in particular gave the Court the opportunity to advance the normative debate on the meaning and implications of Union citizenship. This becomes visible by the fact that since *Grzelczyk*, case law is moving away from the grant of particular rights to particular groups of actors, namely those who are economically active, and is instead “embracing a powerful mission of protection of individual rights” (Kostakopoulou, 2005, p. 253).

The following paragraphs depict several subsequent cases. They all define certain aspects of citizenship, based on the ruling in *Grzelczyk*. The first case deals with the freedom of movement of workers.

#### 5.2.1. The right to move and reside within the Union (Baumbast)

In *Baumbast*<sup>42</sup>, a case shortly decided after *Grzelczyk*, the ECJ was asked to decide on the direct effect of article 18(1) TEC<sup>43</sup>, the right to move and reside within the Union.

Mr Baumbast was a German national who, after having pursued an economic activity in the United Kingdom, was refused to have a renewed residence permit as he ceased to work in the UK. However, his children still attended general education courses there.

The preliminary question of the case was “Are children of a citizen of the European Union who are themselves such citizens and who have installed themselves in primary education during the exercise by their father (or parent) of rights of residence as a worker in another Member State of which he is not a national (“the host State”) entitled to reside in the host

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<sup>40</sup> Cf. Art. 12 TEC.

<sup>41</sup> Cf. Art. 17 TEC.

<sup>42</sup> Case C-413/99, *Baumbast and R v Secretary of State for the Home Department*, [2002] ECR I-07091.

<sup>43</sup> Cf. Art. 18 TEC, para. 1.

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State in order to undergo general educational courses there, pursuant to Article 12 of Council Regulation No 1612/68?”<sup>44</sup>.

The ECJ ruled that the Treaty does not require that citizens of the Union pursue an economic activity in order to enjoy the rights provided by it. As a national of a Member State and consequently as a citizen of the Union, Mr Baumbast was entitled to invoke the right to reside within the territory of the Member State as laid down by Article 18 TEC<sup>45</sup>. The ECJ thus made clear that the right of residence under Article 18 (1) TEC was conferred directly on every citizen of the Union by virtue of a clear and precise provision of the Treaty.

The children were allowed to remain in the UK in order to complete their education even after their father has ceased to work there. Consequently, in order to protect the right to family life, a corresponding right to reside had to be granted to the primary carer of those children, even if the primary carer had no other right to reside under Community law. Even if the ECJ derived the right to education for children solely from Article 12 of the Regulation 1612/68<sup>46</sup>, it held that this article had to be interpreted in line with Article 8 ECHR<sup>47</sup>. The determining factor was whether the deportation of a parent would constitute a disproportionate interference with the right to respect for family life.

In *Chen*, the Court took a step further and crucially extended the scope of the Citizenship Directive<sup>48</sup>. The particularities of the case will be presented in the following paragraph.

### 5.2.2. Residence rights of children and carers (Chen)

In *Chen*<sup>49</sup>, a case that concerned the rights of children and carers, the Court ruled that baby Catherine Zhu, a minor who had Irish nationality, covered by sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor and who is that minor’s primary carer, has the right to residence for an indefinite period in the United Kingdom. In such circumstances, those same provisions allow a parent who is that minor’s primary carer to reside with the child in the host Member State.

The Court here adds a new category of family member to those in the Citizenship Directive, namely where EU children exercise their EU movement and residence rights, the person primarily responsible for their care is granted parallel rights of movement and residence, irrespective of the carer’s nationality. The crucial point in this case is, however, that there were sufficient resources avoiding the risk of financial burden for the United Kingdom.

In *Rottman*, a case dealing with the loss of nationality, Member State sovereignty is notably threatened.

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<sup>44</sup> Case C-413/99, *Baumbast and R v Secretary of State for the Home Department*, [2002] ECR I-07091, para. 28.

<sup>45</sup> Cf. Art. 18 TEC.

<sup>46</sup> Cf. Art. 12 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (1968).

<sup>47</sup> Cf. Art. 8 European Convention on Human Rights (1950).

<sup>48</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004).

<sup>49</sup> Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, [2004] ECR I-09925.

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### 5.2.3. Citizenship and Member State sovereignty in nationality law (Rottman)

*Rottman*<sup>50</sup> is considered a crucial case for the impact of Union citizenship upon Member State sovereignty over nationality law. The complainant, Mr Rottman, was threatened with the withdrawal of the citizenship of Germany which he gained through naturalisation, on the grounds that he committed a fraud during the application process because he failed to disclose criminal proceedings brought against him in Austria, his state of origin. Due to naturalisation in Germany, Rottman had lost his Austrian citizenship. By losing national citizenship a person will also lose EU citizenship rights (Shaw, 2010, p. 17).

The preliminary question posed in this case was whether it is contrary to Community law for Union citizenship to be lost as the legal consequence of withdrawal in one Member State of a naturalisation acquired by intentional deception<sup>51</sup>.

The ECJ ruled that while it is for each Member State to lay down the conditions for the acquisition and loss of nationality, they must none the less do so “having due regard to Community law”<sup>52</sup> in “situations covered by European Union law”<sup>53</sup>. Thus, the Court rejected the assumption that the case concerned a purely internal situation by stating that “[t]he situation of a citizen of the European Union who is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law”<sup>54</sup>. Nevertheless it confirmed that a Member State of the European Union may withdraw its nationality, granted by way of naturalisation, from a citizen of the Union, when that person has obtained it by deception, even if as a consequence the person concerned loses his citizenship of the Union because he no longer possesses the nationality of any Member State<sup>55</sup>. However, it stressed that the withdrawal decision must take into account the principle of proportionality.

In that sense, the Court made a very strong statement about the reach of Union citizenship and consequently the capacity of Member States to withdraw national citizenship where that results in the loss of Union citizenship. Therefore, the *Rottman* case is considered an important step in the “gradual absorption of national citizenship within Union citizenship” (Shaw, et al., 2011, p. 5) because although Member States retain the power to decide who belongs to their state and who does not, they are precluded from ignoring EU law.

Anyhow, the principle of proportionality required the national court to have regard to all relevant circumstances, when assessing the compatibility of the German decision to withdraw nationality with Union law, including any adverse consequences for the claimant and his family, the gravity of the deception offence, the time elapsed since naturalisation, and the possibilities for recovering the claimant’s original nationality (Dougan, 2010).

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<sup>50</sup> Case C-135/08, Janko Rottman v Freistaat Bayern, [2010] ECR I-01449.

<sup>51</sup> *Ibid*, para. 36.

<sup>52</sup> *Ibid*, para 39.

<sup>53</sup> *Ibid*, para 41.

<sup>54</sup> *Ibid*, para 42.

<sup>55</sup> Case C-135/08, Janko Rottman v Freistaat Bayern, [2010] ECR I-01449.

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In *Förster*, *Bidar* and *Wolzenburg*, the principle of proportionality also had to be respected. Recalling the Court's ruling in *Sala*<sup>56</sup> and *Grzelczyk*<sup>57</sup>, Member States which seek to justify restrictions on the rights of moving Union citizens, cannot rely exclusively upon residency requirements, but must also give due consideration to the personal circumstances of each individual claimant, such as the conditions of his or her stay, family ties and the economic situation, even if domestic legislation does not recognise these circumstances.

However, depending on the case law in question, the Court has been much more ambivalent about the scope of these personal circumstances. Some cases for instance offer Member States a relatively wide margin of discretion to use generalised criteria such as the residency requirement (Dogan, 2010).

### 5.2.4. Residence and integration requirements (*Förster*, *Bidar* and *Wolzenburg*)

In the case of *Förster*<sup>58</sup>, the Netherlands were not requested by the ECJ to examine the personal circumstances of the claimant in order to decide whether Ms *Förster*, a German national studying in the Netherlands, was entitled to obtain a Dutch maintenance grant.

The Court stated that a national of one Member State who goes to another Member State to follow a training course there is covered by Articles 18 TEC<sup>59</sup>, and therefore has the right of free movement, and 12 TEC<sup>60</sup> which protects him or her from discrimination on grounds of nationality. In principle, these provisions require the host state to award to the nationals of other Member States the same maintenance grants as those awarded to its own nationals.<sup>61</sup>

However, the host state is entitled to require a certain degree of integration into its society, as the Court previously recognised in *Bidar*<sup>62</sup>, to prevent an unreasonable financial burden emerging from covering the maintenance costs of students from other Member States. According to Dutch rules, a migrant Union citizen must have been lawfully resident for a continuous period of five years in the Netherlands in order to be sufficiently integrated into society and hence, in order to receive that grant.

The Court held the condition of 5 years' prior residence in the territory of the host state for the award of a maintenance grant to be justified and proportionate. That means the Court made no effort to require the Dutch authorities to examine the personal circumstances of the complainant, with a view to establishing whether her link to Dutch society could be verified by reference to factors other than the generalised five year residency requirement.<sup>63</sup>

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<sup>56</sup> Case C-85/96, *María Martínez Sala v Freistaat Bayern*, [1998] ECR I-02691.

<sup>57</sup> Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-06193.

<sup>58</sup> Case C-158/07, *Förster v Hoofddirectie van de Informatie Beheer Groep*, [2008] ECR I-08507.

<sup>59</sup> Cf. Art. 18 TEC.

<sup>60</sup> Cf. Art. 12 TEC.

<sup>61</sup> Case C-158/07, *Förster v Hoofddirectie van de Informatie Beheer Groep*, [2008] ECR I-08507.

<sup>62</sup> Case C-209/03, *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, [2005] ECR I-02119.

<sup>63</sup> Case C-158/07, *Förster v Hoofddirectie van de Informatie Beheer Groep*, [2008] ECR I-08507.

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The unusual aspect of *Förster* is that the Court did not see the Dutch rule as violating the principle of non-discrimination. Its conclusion is that Art. 18 TEC is not violated because the rule is justified. What *Förster* embodies is the idea that there remains a special bond between a citizen and their home state. In this respect, nationals and foreigners are different and thus may be treated differently without this being discrimination. For a foreigner, it takes time or work to integrate, but for a national, it does not (Chalmers, et al., 2010, p. 459).

In *Bidar*, a French student in London was not granted financial assistance to cover her maintenance costs on the grounds that she did not meet the complex UK requirements which included a three-year residence period and being settled in the United Kingdom. The Court ruled that financial assistance provided to students lawfully resident in the host Member State falls within the scope of application of the Treaty for the purposes of the prohibition of discrimination<sup>64</sup> and that it is indeed legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that state<sup>65</sup>.

However, while the three-year residence period applied to both UK and foreign nationals, the requirement to be settled, which entailed its own residence period, applied to foreigners only. The Court found that although the principle of a prior residence was acceptable, the fact that the being settled requirement applied unequally to UK nationals and foreign nationals was contrary to the Treaty's non-discrimination rule<sup>66</sup>.

In other words, here again the Court accepted the idea that benefits may be restricted by reference to integration-type requirements, as long as they are proportionate and equally applicable to foreign citizens and nationals.

Similarly, in *Wolzenburg*<sup>67</sup>, which concerned the principle of equal treatment with regard to national implementation of the European Arrest Warrant Framework Decision<sup>68</sup>, the Court did not ask to undertake more detailed scrutiny of the individual's personal circumstances and, in particular, the degree to which he might actually be integrated into the host society.

With the EAWFD, the ground for refusal of the execution of an EAW based on the nationality of the requested person has been formally abandoned. However, the nationality of the requested person still plays a role as a possible ground for optional refusal of an EAW, as the case of *Wolzenburg* in particular shows.

In this case, the German judicial authority issued an EAW against Dominic Wolzenburg, a German national, who lived in the Netherlands and who had committed several offences. Therewith Germany requested the Dutch executing judicial authority to surrender Mr Wolzenburg.

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<sup>64</sup> Case C-209/03, *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, [2005] ECR I-02119, para 48.

<sup>65</sup> *Ibid*, para. 57.

<sup>66</sup> *Ibid*, para. 61-63.

<sup>67</sup> Case C-123/08, *Dominic Wolzenburg*, [2009] ECR I-09621.

<sup>68</sup> Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (2002).

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Wolzenburg, as a migrant Union citizen, was surrendered while a Dutch national would not have been surrendered. That is because Dutch rules provide for the non-execution of a European Arrest Warrant in the case of migrant Union citizens only if he or she had been lawfully resident within the national territory for a continuous period of five years, which is contradictory to the anti-discrimination principle of the EU Treaty. Therefore, with reference to the meaning of European citizenship in relation to the principle of non-discrimination based on nationality within the AFSJ, we observe that the ECJ again has linked Union citizenship and equal treatment rights to lawful residence (Marin, 2011) and departed from the approach taken in *Grzelczyk*.

Reflecting on these cases, one should wonder about how far considerations of public expenditure and solidarity should be decisive for the limitation of anti-discrimination rights. Putting aside the issue of residence and integration requirements, we now turn to a case where citizenship rights conflict with constitutional provisions.

### 5.2.5. Constitutional provisions and citizenship (Sayn-Wittgenstein)

The case *Sayn-Wittgenstein*<sup>69</sup> deals with respect of constitutional identity in the EU. Ilonka Sayn-Wittgenstein, an Austrian citizen residing in Germany, was adopted by Lothar Fürst von Sayn-Wittgenstein under German adoption law. According to constitutional provisions on equality however, the passing on of the noble title “Fürst” was considered unconstitutional in Austria. Ilonka invoked the right of each European citizen to freedom of movement as protected by Article 21 TFEU<sup>70</sup>. The ECJ ruled that “in her capacity as citizen of the Union, she has made use of the freedom to move to and reside in another Member State, and is therefore entitled to rely on the rights conferred by Article 21 TFEU on all citizens of the Union”<sup>71</sup>.

The relation of *Sayn-Wittgenstein* with EU citizenship as an independent source of rights lies in the recognition of Article 21(1) TFEU as creating an independent right of free movement for all Union citizens.

According to Advocate General Sharpston, “[e]ven if a Member State’s national law is the sole law applicable to the determination of the name of one of its citizens, it must comply with European Union law [...] in order to change [...] an entry in a register of civil status when the citizen in question has relied on that entry in the context of the exercise of his or her rights as a citizen of the Union to move and reside freely within the territory of the Member States”<sup>72</sup>. Furthermore, Sharpston stated that “[a] rule having constitutional status in a Member State, based on fundamental considerations of public policy such as equality between citizens and the abolition of privilege, is in principle capable of justifying a prohibition on the [...] use by its citizens of noble titles or status [...], even if that prohibition might cause inconvenience to such a person exercising his or her rights as a citizen of the

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<sup>69</sup> Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, [2010] ECR I-13693.

<sup>70</sup> Cf. Art. 21 TFEU (ex Art. 18 TEC).

<sup>71</sup> Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, [2010] ECR I-13693, para. 39.

<sup>72</sup> Opinion of Advocate General Sharpston delivered on 14 October 2010, para. 39, Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, [2010] ECR I-13693.

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Union to move and reside freely within the territory of the Member States, provided that the principle of proportionality is respected”<sup>73</sup>.

According to Besselink, there are two particularities in this judgment. First, Article 21 TFEU<sup>74</sup> was invoked, “irrespective of whether the person concerned engaged in an economic activity” (Besselink, 2012, p. 676). Second, the ECJ framed the case as one “on the legitimacy of invoking national constitutional provisions in cases within the substantive scope of EU law” (Besselink, 2012, p. 676). It proceeded to determine the existence of a restriction of the citizenship right of free movement and residence since a person’s name is a constituent element of his identity and of his private life, as protected by Article 7 CFREU which states that “everyone has the right to respect for his or her private and family life, home and communications”<sup>75</sup> and Article 8 ECHR which states that “[e]veryone has the right to respect for his private and family life, his home and his correspondence”<sup>76</sup> and “[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”<sup>77</sup>.

Nevertheless the ECJ found that the fundamental principles implicated concerned a matter of national Austrian identity. It placed those values ahead of an individual’s right to her identity as a citizen of the EU. Therefore, the *Sayn-Wittgenstein* case presents “a step back from an ever-closer notion of European identity” (Jacobi, 2011, p. 643) and provides an example of “pushback against the European Court of Justice’s traditionally liberal interpretation of European Citizenship rights” (Jacobi, 2011, p. 643).

What this case also illustrates, together with *Rottman*, is that citizenship does not always play a role when it comes to rights to social and financial benefits, but also to non-economic, even symbolically important interests, like the use of personal names.

*Sayn-Wittgenstein* as well as *Rottman*, are interesting when viewed in the broader perspective of the overall judicial development of Union citizenship in that they widened the scope and effects of EU citizenship, but only the follow-up cases *Zambrano*, *McCarthy* and *Dereci*, which will be dealt with in the following chapter, gave a new legal meaning to the concept. In particular, we will have a look at the extent to which the case of *Zambrano* represents a radical change in the development of citizenship in the European Union.

### **6. Zambrano - A stable legal acquis or a mere transitional judgment?**

*Zambrano* is a well known case of the European Court of Justice because it extended the scope of application of EU law to an otherwise purely internal situation. However, with regard to the specifics of the case, one might assume that *Zambrano* is just a transitional

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<sup>73</sup> Opinion of Advocate General Sharpston delivered on 14 October 2010, para. 71, Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, [2010] ECR I-13693.

<sup>74</sup> Cf. Art. 21 TFEU (ex Art. 18 TEC).

<sup>75</sup> Cf. Art. 7 Charter of Fundamental Rights of the European Union (2000).

<sup>76</sup> Cf. Art. 8 European Convention on Human Rights (1950).

<sup>77</sup> *Ibid.*

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case, which can only be applied to specific situations, and not a stable legal *acquis* which fundamentally changes the notion of EU citizenship in the long run. The reasoning behind this assumption will be developed within the next few sections.

### 6.1. The facts of *Zambrano*

Mr and Mrs *Zambrano*, Columbian nationals who had come to Belgium, were denied asylum but continued to live there without a residence permit. During their stay, two children were born in Belgium and therefore had Belgian nationality. At various points in time, Belgian authorities had rejected Mr and Mrs *Zambrano*'s applications for residence permits and had denied Mr *Zambrano* unemployment benefits on grounds that he had been employed without a work permit. Mr *Zambrano* challenged these decisions arguing that he enjoys a right to residence and access to employment directly by virtue of the EU Treaty.

The ECJ agrees in his decision that Article 20 TFEU precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attached to the status of European Union citizen<sup>78</sup>.

In other words, the Court held that Mr *Zambrano* cannot be denied the right of residence and a work permit by the Belgian state on the basis of EU citizenship. The Court's reasoning can be explained by the fact that Mr *Zambrano*'s departure from EU territory would have meant that his children are deported outside Europe, because they were not independent, which is prohibited by EU law. This means that the right of residence of the children was sufficient on its own to grant residence to the parents who take care of them.

Now I will point to the features turning *Zambrano* into a landmark case.

### 6.2. Distinctive features of *Zambrano*

Recent case law, such as *García Avello* and *Rottman*, required to demonstrate a clearly identifiable physical cross-border movement in order to rely on the rights derived from Union citizenship (Wiesbrock, 2011). Now in *Zambrano* the Court invokes Article 20 TFEU<sup>79</sup> in a completely internal situation. The citizenship status is attached to people wherever they happen to be and whatever they are doing, thus it is not dependent on mobility anymore, setting aside Directive 2004/38<sup>80</sup>. The implications of abandoning the restriction to rely on the rights derived from Union citizenship in an internal situation are immense, as the percentage of Union citizens who exercise their free movement rights is still marginal. *Zambrano* thus extends the reach of Union law to a large number of potential beneficiaries (Wiesbrock, 2011).

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<sup>78</sup> Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, [2011] ECR I-01177, para. 42.

<sup>79</sup> Cf. Art. 20 TFEU (ex Art. 17 TEC).

<sup>80</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004).



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The reference to the “territory of the Union”<sup>81</sup> is a central reference in the judgment, implying a “new common space [...] of rights and [...] values” (Azoulay, 2011b, p. 34). The Court recognizes a status to “specific categories of individuals, [namely] European citizens and the persons connected to them as dependents [...]” (Azoulay, 2011b, p. 34). In this respect, there is a strong normative dimension implicit in the reasoning. To reside in Europe means not only to be physically located in its territory but also to be granted a number of rights and ultimately to be under the protection of certain values of personal welfare and moral security (Azoulay, 2011a).

So at this point, *Zambrano* could be considered a stable legal acquis. Azoulay confirms this assumption in that he argues that the *Zambrano* judgment remains the one in which “a new status” was given to EU citizen (Azoulay, 2011b, p. 38). In that sense, *Zambrano* does more than emancipating from an economic paradigm since it is capable of establishing a new bond between the European Union and the Member State nationals (Azoulay, 2011b, p. 39).

However, the generalisability of the case and in particular the exportability of this solution to other types of situations remains questionable because it is “a case of care limited to situations concerning dependent persons like children” (Azoulay, 2011b, p. 38) which has not been transposed to adults having family members outside the territory of the Union.

This argument is supported by the *McCarthy*<sup>82</sup> case, in which the Court rejected the transposition of this solution to the situation of an adult having a family member outside the territory of the Union (Azoulay, 2011b, p. 38). *McCarthy* will be discussed in more detail in the following subchapter.

For this reason, one should be sceptical about whether *Zambrano* is an exceptional ruling that could also be applied to other cases opening up new possibilities for static citizens who are not dependent on others. Based on the legal facts of the case, *Zambrano* can be considered a landmark case but its impact remains limited, not least because given the concept of substance of rights, which was introduced with *Zambrano*, the Court was expected to give some basic guidelines for its application, meaning a more clear definition of when these essential rights are at risk, which eventually were not provided.

Furthermore, it is interesting to think about the referral itself because it is questionable whether the European Court of Justice was supposed to deal with the case of *Zambrano*, or whether it could have been solved under national, thus Belgian, law, since a state cannot expel their own citizens as it would have been the case of Mr Zambrano’s children if the case was not solved on the grounds of the citizenship provisions. I owe these reflections to a conversation held with Dr. Luisa Marin.

These thoughts would imply that the ECJ gave a ruling it was not supposed to give, which should be taken into account as a factor for its reasoning. Exclusion from a Member State would only be possible in the event of a serious threat to the fundamental interests of society. Art. 27 of the Citizenship Directive sets out certain circumstances in which EU citizens can be expelled from a Member State: “Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of

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<sup>81</sup> Ibid, para. 44.

<sup>82</sup> Case C-434/09, Shirley McCarthy v Secretary of State for the Home Department, [2011] ECR I-03375.

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nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends”<sup>83</sup>.

A second factor, that has been part of the same conversation with Dr. Luisa Marin and that might be of equal importance, concerns the nationality of the children of Mr Zambrano, because Mr Zambrano was accused of not having requested Colombian nationality for his children at birth. Colombian law does not automatically recognise Colombian nationality of children born abroad to Colombian national parents, unless these take specific actions. However, the fact that Mr Zambrano did not take any action cannot be framed as an abuse of law because it is not a duty and according to Belgian law, the children are Belgians on the sole ground of being born on Belgian territory (*jus soli*).

In order to see whether the ruling in *Zambrano* has been applied to other cases involving different situations, we will now examine follow-up cases.

### 6.3. Subsequent cases related to Zambrano

The cases of *Zambrano*, *McCarthy* and *Dereci*, where the very status of EU citizenship and the ability of parties to enjoy EU citizenship rights under the Treaty was at stake, build a coherent line and are considered “revolutionary cases” (Kochenov, 2011b, p. 75) in that they outlined the possibility of moving certain EU citizens’ situations within the scope of EU law without having to establish a cross-border link.

*Zambrano* was the first case to regard the Union border as fundamental for establishing the scope of application of EU law inside the Union (Kochenov, 2011b, p. 84). *McCarthy* confirms the assumption that the old cross-border requirement will continue to apply in a number of situations (Kochenov, 2011b, p. 84). The importance of *Dereci* lies, on the one hand, in the confirmation of *Zambrano* in that it requires to test whether the genuine enjoyment of the substance of rights had been deprived, and, on the other hand, in the limitations that the Court places upon the scope of that test (Lansbergen, 2011). Both cases, *McCarthy* and *Dereci*, emphasized that cross-border movement remained a pre-requisite, unless the enjoyment of substance of rights is threatened.

#### 6.3.1. Clarification of the decision taken in Zambrano (McCarthy)

Mrs McCarthy, a dual Irish-UK national who had lived her entire life in the UK and neither worked nor was self-sufficient and therefore relied on social welfare benefits, could not rely on the family reunification provisions found in Directive 2004/38<sup>84</sup>, neither could she rely on her EU citizenship while trying to get a residence permit for her Jamaican husband. Directive 2004/38 was not applicable because Mrs McCarthy had never exercised her right of free movement. However, with regard to recent developments in ECJ case law on citizenship, the sole fact that she had not moved would not have precluded her from relying on her status as EU citizens. The crucial factor was that “the very enjoyment of the substance of rights conferred by the status of EU citizenship” (Coutts, 2011) was not at stake, especially with

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<sup>83</sup> Cf. Art. 27, Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004).

<sup>84</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004).

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regard to the fact that the third country national was not a dependent person. Only in that specific situation the case would have fallen within the scope of EU law.

So in *McCarthy*, the ECJ found that EU citizenship does not involve the right to live in the EU with one's life partner and not having such a right does not deprive the Union citizens of the genuine enjoyment of the substance of their citizenship rights<sup>85</sup>. That ECJ decision suggests that EU rights to family reunification yet depend on the exercise of free movement rights and only in very specific situations on the fact of EU citizenship (Wray, 2011) as ruled in *Zambrano*. In that way, *McCarthy* confirms but refines certain aspects of the recent decision of *Zambrano*.

### 6.3.2. Dereci – Limiting the impact of *Zambrano*?

In *Dereci*<sup>86</sup>, the Court attempted to clarify the scope and application of *Zambrano* for the right of residence of third country national family members of static EU citizens.

Mr Dereci, a Turkish national who entered Austria illegally and married an Austrian citizen, had three children, all of whom were Austrian minor citizens. His application for residence permit was rejected because the provisions under Directive 2004/38/EC<sup>87</sup> for family members of EU citizens could not be applied on the grounds that the Union citizen concerned had not exercised the right of free movement.

Since Mr Dereci was not able to establish a cross-border element, the Court emphasised that for *Zambrano* to be applied, the Union citizen must be in a situation where he has 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<sup>88</sup>, or, put differently, only in that specific situation where the genuine enjoyment of the substance of rights would have been at risk, the Court would have come back to *Zambrano*. This was not the case because all Union citizens capable of exercising their right to free movement have the option to reside with their family members in a second Member State and Member States are prohibited from applying immigration control to third country national family members of migrant EU citizens following the decision of the Court in the case of *Metock*<sup>89</sup>.

*Metock* thus dealt with the scope and applicability of the Citizenship Directive<sup>90</sup> to Member States' family unification rules for their migrant citizens. Usually, as a logical consequence of the right to free movement, migrant citizens can move their family from one Member State to another. But it was not clear before *Metock* whether migrant citizens should have the right to bring their family into a Member State when the family members are entering the European Union for the first time.

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<sup>85</sup> Case C-434/09, Shirley McCarthy v Secretary of State for the Home Department, [2011] ECR I-03375, para. 56.

<sup>86</sup> Case C-256/11, Murat Dereci and Others v Bundesministerium für Inneres, [2011] ECR I-00000.

<sup>87</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004).

<sup>88</sup> Case C-256/11, Murat Dereci and Others v Bundesministerium für Inneres, [2011] ECR I-00000, para. 11.

<sup>89</sup> Case C-127/08, Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform, [2008] ECR I-6241.

<sup>90</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004).

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The applicants in the *Metock* case were refused the right of residence in Ireland on the grounds that they did not satisfy the condition of prior lawful residence in another Member State laid down in Irish law although the Citizenship Directive<sup>91</sup> imposes no condition that family members can only join on first entry if they are already resident within the European Union. The preliminary question therefore was “whether Directive 2004/38 precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive”<sup>92</sup>.

The Court ruled that national rules making the right of residence of non-EU national spouses of Union citizens resident in a Member State but not possessing its nationality under the Citizenship Directive conditional on prior lawful residence in another Member State were unlawful<sup>93</sup>.

Hence the main point of the *Metock* judgment concerns that the right of a family member coming from outside the Union to live with an EU citizen is simply dependent upon compliance with the definitions and conditions in the Directive, implying that a state may impose no other conditions, such as previous lawful residence in another Member State (Chalmers, et al., 2010, pp. 470-471). Therewith the potential of the notion of fundamental status has been demonstrated in this case in that the Court relied upon citizenship as an instrument to extend the residence right of non-national family members.

In sum, the decision of the Court in *Dereci*<sup>94</sup> highlights the exceptional nature of those situations in which EU citizens will be deprived of the genuine enjoyment of the substance of their rights through a refusal of a residency permit to their third country national family member. It offers a limited clarification to the scope of application of *Zambrano*, stating that the desirability of residing together with a family member is insufficient to prove that the EU citizen will be forced to leave Union territory in the event that that right is not granted.

What is fundamental about both *McCarthy* and *Dereci*, however, is that the Court did not depart from the *Ruiz Zambrano* approach, namely investigating whether the essence of rights of EU citizens at issue has been infringed and acknowledging that should this be the case, the construction of a cross-border situation would not be required for moving the factual situation at issue within the material scope of EU law (Kochenov, 2012, p. 11).

After the analysis of the particularities of the *Ruiz Zambrano* judgment and similar case law, I would like to refer back to the sub-questions presented in the methodology part of the thesis.

We can state that *Zambrano* does to a certain extent represent a radical change in the construction of EU citizenship, because it abolishes the requirement of a cross-border

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<sup>91</sup> Ibid.

<sup>92</sup> Case C-127/08, Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform, [2008] ECR I-6241, para. 48.

<sup>93</sup> Case C-127/08, Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform, [2008] ECR I-6241.

<sup>94</sup> Case C-256/11, Murat Dereci and Others v Bundesministerium für Inneres, [2011] ECR I-00000.

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situation when the genuine enjoyment of rights is at risk. Although there were cases before *Zambrano* where a situation fell within the material scope of the citizenship provisions without the presence of a cross-border element, the Union border was not considered as fundamental for establishing the scope of application of EU law inside the Union.

Furthermore, *Zambrano* does not necessarily represent a stable legal acquis, as subsequent cases clarified but did not entirely confirmed it, and as the ECJ still seems to avoid going further to strengthen the concept of Union citizenship in order to take account of financial implications.

### **7. Developments after Zambrano – Towards a new concept of European integration?**

When speculating on the further development of EU citizenship, it will be very interesting to look at it in the context of the emergent Euro-polity which will be done in the next subchapter.

#### **7.1. Citizenship in the context of a Euro-polity**

A fact that has to be considered when dealing with European citizenship is the context in which it is evolving. It is important to take into account that the European Union is not a state and that the concept of Union citizenship differs substantially from national citizenship because not being a state but rather a “non-state polity” brings forward “fractured state and individual identities” (Shaw, 1998, p. 294) which crucially shape the concept of Union citizenship.

With respect to the nature of this polity, also regarded as Euro-polity, the role of the people needs to be clarified for that the citizenship concept becomes more tangible. This is in line with what Shaw says on the main purpose of citizenship, namely “if the EU now represents a form of (emergent) polity (if not a state), then it must have a membership and a relationship to the people who are its members” (Shaw, 1998, p. 295).

But the question that emerges from this view is whether there is more to belonging to a class of persons who are the primary subjects of the legal order of the EU than simply being a citizen of one of the Member States who enjoys certain legal rights under EU law (Shaw, 1998, p. 295). Destined to be the fundamental status, citizenship should certainly offer more than non-discrimination, political and free movement rights. It should also provide for social rights. That implies that to a certain extent, a spill-over to the social dimension would be desirable. Jo Shaw claims that in addition, the political dimension of EU citizenship should be developed further than it has been done in the past (Shaw, 2006, p. 2568). Herewith she alludes to strengthening the link between EU citizens and the Union itself via political rights that exceed the right to vote in EP elections.

Taking into account what has just been said, we will now look, as promised before, at the implications of citizenship case law on European integration.

#### **7.2. EU citizenship and European integration**

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Approaching the final stage of this work, having analysed different aspects of Union citizenship by means of important yet debatable case law, an important question comes up: What are the actual drivers of European integration? Is it the Commission, initiating legislation and implementing decisions, the Council as legislative body, or is it the European Court of Justice which through its case law rulings on citizenship created a new concept of European integration as we have seen within the framework of this thesis?

By means of Treaty amendments and ECJ case law, European rights have substantially grown in scope from their initial aim of economic integration to the political project of building a true European community. The transnational political rights inherent in Union citizenship facilitate integration of Member State nationals residing in a different EU country with their host environment and enhance their status as compared with third country nationals. In this sense, EU citizenship has created closer relations of Member State nationals with the authorities of their state of residence and has strengthened their position in the host country, thus contributed to the process of European integration (Rostek & Davies, 2006, p. 7).

Jo Shaw particularly points to those cases that have resulted in protections against deportation for the third country national family members of EU citizens, [such as in the cases of *Zambrano* or *Chen*], in order to explain why EU citizenship has in recent years become one of the driving forces of integration (Shaw, 2012, p. 6). So in that way one could say that the ECJ plays a significant role in deepening European integration brought about by the growing importance of EU citizenship and the explosion of the personal scope of EU law (Kochenov, 2011a, p. 80) but of course the other EU institutions considerably contribute as well.

### 8. Concluding remarks

In the final section of this thesis, a few concluding remarks will be made. Generally, one can observe a considerable increase of the body of case law on Union citizenship, giving citizenship a content going beyond the express Treaty provisions. However, this case law is highly complicated and the Court's reasoning is often complex and not always clear and persuasive. That is because the Court's rulings very much depend on the situations present in the specific case law. Especially those cases where financial expenditure is at stake are problematic.

Referring back to the initial research question, namely to what extent recent ECJ case law has had an impact on the normative dimension of EU citizenship as fundamental status of nationals of the Member States, I would like to point out several aspects.

On the one hand, the European Court of Justice has linked the main citizenship rights and the right to non-discrimination on grounds of nationality together in its case law, which certainly extended the normative dimension of EU citizenship and moved the concept towards being a fundamental status. It did this first in the case of *Martínez Sala*, when it chose to adopt an approach to protect the rights of a longstanding and well integrated member of German society with Spanish citizenship, putting aside its previous case law on migrant workers. It has done so in a number of subsequent cases, as we have seen, although not always internally consistent.

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Furthermore, the ECJ extended the categories of protected persons beyond the traditional groups of economically active persons and it put in place a proportionality-based scrutiny of national restrictions on free movement and practices discriminating against a wider range of EU citizens present in other Member States, such as students or work-seekers. Hence, Union citizenship has notably affected the scope of the Treaty in that it has broadened both, *ratione personae* and *ratione materiae*. That also implies that at least some of the cases presented had an impact on the normative dimension of EU citizenship as fundamental status of Member State nationals, although at this particular time the impact remains rather fragile and not yet fully enforced.

On the other hand, the Court seems to stop taking further approaches towards the inclusion of all kinds of groups of people. One decisive factor could be that it might risk its legitimacy. Although *Zambrano*, *McCarthy* and *Dereci* open up a new approach for the development of EU law, they threaten legal certainty and send contradictory signals “as to the essence of the EU citizenship status and the role it ought to play in the system of EU law” (Kochenov, 2012, p. 1). This becomes visible through recent debates among scholars about whether EU citizenship has been treated as a relatively autonomous legal basis for “‘solving’ certain types of hard cases involving ‘citizens of the Union’ who are faced with denial of rights under Treaties where other legal instruments are insufficient” and whether “EU citizenship has been used as ‘backstop legal status’ that can be invoked if no other instruments of EU law will avail them” (Shaw, et al., 2011, p. 34).

Moreover, although lawfully present migrant citizens and their families enjoy a right to equal treatment with nationals in their host state, equal access to public benefits and support remains a sensitive issue as it is sometimes conditional upon a period of prior residence or some degree of integration into society which would constitute nationality discrimination. Therefore, Union citizenship is often considered only a limited success. With regard to the incidental exclusion of the poor and sick from migration rights, EU citizenship is also criticised of being still “a quasi-economic policy as opposed to a proper constitutional citizenship embodying solidarity, equality and universality” (Chalmers, et al., 2010, p. 440). Despite the problem of sensitive social issues, the ECJ should try to establish a more coherent way of ruling in order to clarify the social dimension of EU citizenship.

Indeed the ECJ usually pleads for assessing an individual’s situation before a judgment is given, but against all criticism and contradictory to the sense of a community of Europeans, it finds that the conditions set up by Member States are acceptable if they are justified and proportionate. However, it is always difficult to say whether a denial of residence rights on the basis of an application for social assistance or a defect in sickness insurance is proportionate or not. It is of course as much “unreasonable for a migrant to ask too much, [as it is] unreasonable for a state to accept only those who need nothing at all” (Chalmers, et al., 2010, p. 451).

With these final reflections in mind, EU citizenship has the function to enable the enlargement of non-discrimination rights and hence also to bring forward the concept of citizenship as the fundamental status of Member State nationals. It would therefore be an interesting task to observe the further development of European Union citizenship, especially with regard to its social dimension.

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