Revisiting *Ruiz Zambrano*: A Never Ending Story?

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1 Introduction

The *Ruiz Zambrano* judgment of the European Court of Justice (ECJ), delivered on 8 March 2011, is certainly one of the most controversial decisions of the last decade.¹ All intervening Member States and the European Commission unequivocally argued that the issue at stake, i.e. the possibility for a third country national parent of a minor EU citizen to obtain a residence right, clearly fell outside the scope of application of EU law in the absence of any cross-border element.² The Court relied on Article 20 TFEU and the fundamental status of

1 Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124; e.g. K. Hailbronner and D. Thym, 'Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONem), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011', (2011) 48 *CMLR*, 1253; P. Van Elsuwege, 'Shifting the Boundaries-European Union Citizenship and the Scope of Application of EU Law', (2011) 38 *Legal Issues of Economic Integration*, 263; H. Van Eijken and S.A. De Vries, 'A new route into the promised land? Being a European citizen after *Ruiz Zambrano*', (2011) 5 *European Law Review*, 704; J.T. Nowak, 'Case C-34/09, Gerardo Ruiz Zambrano v. Office National de L'Emploi (Onem) & Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department', (2010) 17 *Columbian Journal of European Law*, 673. D. Kochenov, 'A real European citizenship: a new jurisdiction test: a novel chapter in the development of the Union in Europe', (2011) 18 *Columbian Journal of European Law*, 55; N. Nic Shuibhne, '(Some of) the Kids are Alright: Comment on McCarthy and Dereci', (2012) 49 *CMLR*, 349; M. Van den Brink, 'EU citizenship and EU fundamental rights: taking EU citizenship rights seriously', (2012) 39 *Legal Issues of Economic Integration*, 273.

2 Case C-34/09 *Ruiz Zambrano*, *op. cit.*, para 37.

EU citizenship to decide otherwise. Based on a cross-reference to its earlier *Rottmann* judgment,³ the Court (in)famously concluded that:

Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.⁴

The refusal to grant a residence right and a work permit to a person in the situation of Ruiz Zambrano had such an effect, since it would force minor EU citizens to leave the territory of the Union.⁵ With *Ruiz Zambrano* the Court introduced a new jurisdiction test⁶ to decide whether or not a situation falls within the scope of EU law – known as ‘the genuine enjoyment’ test, ‘substance of rights’ test or the ‘severity of interference’ test.⁷ This test examines the implications of national measures for the effective enjoyment of EU citizenship rights to decide whether or not EU law is applicable.

The ECJ’s ruling in *Ruiz Zambrano* sparked a lot of academic debate. On the one hand, the more constitutional interpretation of EU citizenship has been welcomed as ‘a new route into the promised land’ of a true, supranational citizenship.⁸ The new doctrine tackles the most problematic examples of reverse discrimination in the EU legal order,⁹ and potentially provides an answer to the heavily criticised and often artificial distinction between ‘cross-border’ and ‘purely internal’ situations.¹⁰ On the other hand, it has been pointed out that the Court’s poorly motivated decision only reinforced the

3 Case C-34/09 *Ruiz Zambrano*, *op. cit.*, paras 40–42; Case C-135/08 *Rottmann*, EU:C:2010:104.

4 Case C-34/09 *Ruiz Zambrano*, *op. cit.*, para 42.

5 Case C-34/09 *Ruiz Zambrano*, *op. cit.*, para 44.

6 D. Kochenov 2011, ‘A real European citizenship’, *op. cit.*; C. Rauceau, ‘European Citizenship and the Right to Reside: No One on the Outside has a Right to be Inside?’, (2016) 22(4) *European Law Journal*, 470, 473.

7 P. Van Elsuwege and D. Kochenov, ‘On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights’, (2011) 13 *European Journal of Migration and Law*, 443, 450; sometimes reference is also made to the ‘*Ruiz Zambrano* test’. See: D. Sarmiento and E. Sharpston, ‘European Citizenship and Its New Union: Time to Move On?’, in: D. Kochenov (ed.), *EU Citizenship and Federalism. The Role of Rights* (Cambridge University Press 2017), 229.

8 See, amongst others, Van Eijken and De Vries 2011, *op. cit.*; Kochenov 2011, *op. cit.*; M. Hailbronner and S. Iglesias Sánchez, ‘European Court of Justice and Citizenship of the European Union: New Developments towards a Truly Fundamental Status’, (2011) 5 *Vienna Journal on International Constitutional Law*, 498.

9 Van Elsuwege 2011, ‘Shifting the Boundaries’, *op. cit.*

10 See, in particular, the Opinion of Advocate General Sharpston in *Ruiz Zambrano*, who argued that on the basis of such a distinction ‘lottery rather than logic would seem to be

legal uncertainty about the precise scope of application of EU law, leading to numerous new problems of interpretation and delimitation.¹¹ Despite their differences, most authors agreed that the judgment was opaque and extremely concise in its reasoning – limited to seven short paragraphs.¹² As observed by Thym and Hailbronner in their comments to the *Ruiz Zambrano* judgment, ‘it is left to national judges and academic observers to reconstruct the Court’s reasoning by themselves’.¹³ The present special issue contributes to this exercise. It looks back at the discussions and questions raised at the time of the *Ruiz Zambrano* judgment and deals with the outstanding questions regarding its implications for the understanding of EU citizenship and family reunification.

2 Looking Back: A Judgment Providing More Questions than Answers

The Court’s judgment in *Ruiz Zambrano* provided an answer to the Zambrano family, and revealed that art. 20 TFEU can be a direct source of (family reunification) rights. The judgment’s fame, however, is based on the extensive amount of questions it raised, rather than the (spare) answers it gave. Subsequent scholarly work voiced many of those questions. Among these were principled – maybe even rhetoric – questions, such as: ‘How can the Court possibly think that such a brief and opaque articulation of its reasoning is remotely adequate or acceptable?’ And: ‘Thus, even if the outcome is right, has too high a price been paid?’¹⁴ In addition, there were practical questions: What is the meaning of ‘the substance of rights conferred by EU citizenship’?¹⁵ How does the judgment impact the division of competences and the wholly internal rule?¹⁶

governing the exercise of EU citizenship rights’. Opinion of AG Sharpston in Case C-34/09, *Ruiz Zambrano*, EU:C:2010:560, para 88.

- 11 See, amongst others, N. Nic Shuibhne, ‘Seven Questions for Seven Paragraphs’, (2011) 2 *European Law Review*, 161; Hailbronner and Thym 2011, *op. cit.*; A. Lansbergen and N. Miller, ‘European Citizenship Rights in Internal Situations: An Ambiguous Revolution?’, (2011) 7 *European Constitutional Law Review*, 287.
- 12 See: D. Kochenov, ‘The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?’, (2013) 62, *International and Comparative Law Quarterly*, 97.
- 13 Hailbronner and Thym 2011, *op. cit.*, 1269.
- 14 Nic Shuibhne 2011, ‘Seven Questions’, *op. cit.*, questions 6 and 7.
- 15 Nic Shuibhne 2011, ‘Seven Questions’, *op. cit.*, questions 1 and 2; Hailbronner and Thym 2011, *op. cit.* 1256; Van Eijken and De Vries, *op. cit.* 710; D. Kochenov, ‘The Right To Have What Rights? EU Citizenship in Need of Clarification’, (2013) 19 *European Law Journal*, 502.
- 16 Nic Shuibhne 2011, ‘Seven Questions’, *op. cit.*, questions 1 and 2; Hailbronner and Thym 2011, *op. cit.*, 1257; Nowak 2010, *op. cit.*, 692; Van Elsuwege and Kochenov 2011, *op. cit.*, 450;

And is it possible to restrict residence rights derived from art. 20 TFEU in the interest of public policy and public security, or public finances.¹⁷

Ten years later, these questions are partially answered.¹⁸ Other questions continue to be debated, such as the relationship between two tracks of family reunification in EU law,¹⁹ and the role of fundamental rights protection in relation to art. 20 TFEU.²⁰ To construct a legally sound doctrine, however, takes some time. The Court is known for its 'stone-by-stone' approach, which implies that novel questions of constitutional significance are tackled progressively.²¹ This is, in itself, a logical consequence of the consensus-based nature of the Court's decisions and the judicial dialogue under the preliminary ruling procedure of Article 267 TFEU, but the very concise reasoning of *Ruiz Zambrano* left so many questions unanswered that the slow pace of case-law development could hardly be considered satisfactory. In particular, it takes quite some time before 'the essence of rights' that are attached to the fundamental status of EU citizenship is clarified. The legislator failed to step in as well, so a whole new doctrine – residence rights derived from art. 20 TFEU – had to be constructed on the basis of case-law alone. This situation not only tried the patience of those involved; it also requires a thorough understanding of the Court's jurisprudence, because only a combined reading of various judgments allows to make sense of the evolving EU citizenship doctrine. Clarifying and understanding the precise criteria as defined in the ever evolving case law of the Court of Justice is a constant challenge. This is particularly true in an area such as family reunification, which is characterized by highly fragmented legal regimes, depending in particular on whether the sponsor (that is the person already legally residing in the territory of a Member State) is an EU citizen or not.²² The price to be paid is an almost unavoidable degree of legal uncertainty

Van Eijken and De Vries 2011, *op. cit.*, 710; A. Tryfonidou, 'Redefining the Outer Boundaries of EU Law: The *Zambrano*, *McCarthy* and *Dereci* trilogy', (2012) 18(3) *European Public Law*, 493, 521 *et seq.*

17 Van Eijken and De Vries 2011, *op. cit.*, 710 and 714.

18 See section 3 of this contribution.

19 Nic Shuibhne 2011, 'Seven Questions', *op. cit.*, question 4; Van Elsuwege and Kochenov 2011, *op. cit.*, 450.

20 Nic Shuibhne 2011, 'Seven Questions', *op. cit.*, question 5; P. Van Elsuwege, 'European Union Citizenship and the Purely Internal Rule Revisited', (2011) 7 *European Constitutional Law Review*, 314, 322; Van den Brink 2012, *op. cit.*, 279; Van Eijken and De Vries 2011, *op. cit.*

21 See: K. Lenaerts, 'EU Citizenship and the European Court of Justice's "Stone-by-stone" Approach', (2015) 1 *International Comparative Jurisprudence*, 1.

22 S. Adam and P. Van Elsuwege, 'EU Citizenship and the European Federal Challenge through the Prism of Family Reunification', in: D. Kochenov (ed.), *EU Citizenship and*

about the precise boundaries of EU law and its implications for concrete cases at the national level.

3 The Post-*Ruiz Zambrano* Case Law: The ‘Genuine Enjoyment Test’ as a Last Resort

After ten years, we now know that the purely internal situation rule is not shattered, because the application of the genuine enjoyment test is merely exceptional.²³ After *Ruiz Zambrano*, the Court quickly pointed out that Article 20 TFEU only applies in exceptional situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.²⁴ The relevance of the ‘genuine enjoyment’ doctrine is limited to situations where Directive 2004/38 is not applicable, but a derived residence right cannot be refused to the third country national family member of an EU citizen, because it would undermine the *effet utile* of this EU citizen’s rights. The mere desire to live together as a family does not have such effect, and cannot justify the conferral of a derived residence right on an EU citizen’s family member.²⁵ The new jurisdiction test introduced in *Ruiz Zambrano* thus quickly became an option of last-resort.²⁶

Just like *Ruiz Zambrano* itself, the first follow-up cases were welcomed as well as criticized. The cases were perceived as an attempt to restore the division of competences in the field of family migration and to honor Member State competence in purely internal situations.²⁷ From this perspective, the

Federalism. The Role of Rights (Cambridge University Press 2017), 443; A. Staver, ‘Free movement and the fragmentation of family reunification rights’, (2013) 15(1) *European Journal of Migration and Law*, 69; L. Block, ‘Regulating membership: explaining restriction and stratification of family migration in Europe’, (2015) 36(11) *Journal of Family Issues*, 1433.

23 Case C-434/09 *McCarthy*, EU:C:2011:277; Case C-256/11 *Dereci*, EU:C:2011:734.

24 Case C-34/09, *Ruiz Zambrano*, *op. cit.*, para 44; Case C-434/09 *McCarthy*, *op. cit.*, para 50; Case C-256/11 *Dereci*, *op. cit.*, para 66. For comments, see e.g. A. Wiesbrock, ‘Disentangling the “Union Citizenship Puzzle”? The *McCarthy* Case’, (2011) 36 *European Law Review*, 873; Van Elsuwege, ‘European Union Citizenship and the Purely Internal Rule Revisited’, *op. cit.*; S. Adam and P. Van Elsuwege, ‘Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*’, (2012) 37 *European Law Review* 176; Nic Shuibhne 2012 ‘(Some of) the Kids are Alright’, *op. cit.*

25 Case C-256/11 *Dereci*, *op. cit.*, para 68.

26 Sarmiento and Sharpston 2017, *op. cit.* 229.

27 Van Elsuwege, ‘European Union Citizenship and the Purely Internal Rule Revisited’, *op. cit.* 313; Nowak 2010, *op. cit.*, 697; C. Taroni, ‘Union Citizenship as a Source of Rights?’,

'restrictive' approach followed by the ECJ in its post-*Ruiz Zambrano* case law is a logical reflection of the horizontal and vertical division of powers in the EU legal order.²⁸ Authors who had hoped that *Ruiz Zambrano* would end reverse discrimination, on the other hand, criticized the Court for curtailing the revolutionary character of its earlier groundbreaking judgment.²⁹ Analysis of the cases demonstrated that the age of the EU citizens involved constituted an important difference: the children of *Ruiz Zambrano* were minors, whereas *McCarthy*, *Dereci*, and *Ymeraga* were adults.³⁰ In *K.A.* the Court indeed stated that 'an adult is, as a general rule, capable of living an independent existence apart from the members of his family'.³¹

For the caretakers of children who are EU citizens, subsequent case-law provided more clarity on the relationship of 'dependency' that is required to derive a residence right from EU law.³² *O.S. and L.* clarified that this relationship may be 'legal, financial, or emotional' in nature.³³ The relevance of legal dependency seems to imply that single-parent custody automatically justifies the conferral of a residence right. This does not imply that a residence right may be automatically refused in cases of shared custody or without custody for the third-country national parent.³⁴ The relationship between the child and his third-country national parent must be assessed independently from the

(2012) 8(1) *Journal of Contemporary European Research*, 145, 146; Hailbronner and Thym 2011, *op. cit.*, 1257.

28 K. Lenaerts and J.A. Guttierrez-Fons, 'Epilogue on EU Citizenship: Hope and Fears', in: D. Kochenov (ed.), *EU Citizenship and Federalism. The Role of Rights* (Cambridge University Press 2017), 779–780.

29 Nic Shuibhne 2012 '(Some of) the Kids are Alright', *op. cit.*; S.A. Mantu, 'European Union Citizenship anno 2011. *Zambrano*, *McCarthy* and *Dereci*', (2012) 26(1) *Tottel's Journal of Immigration, Asylum and Nationality Law*, 40–56; Tryfonidou 2012, *op. cit.*, 521 *et seq.* Tryfonidou is not necessarily in favor of ending reverse discrimination through the *genuine enjoyment* formula, but she does discuss the potential to end reverse discrimination as well as pitfalls in the approach.

30 Case C-434/09 *McCarthy*, *op. cit.*; Case C-256/11 *Dereci*, *op. cit.*; Case C-87/12 *Ymeraga*, EU:C:2013:291.

31 Case C-82/16 *K.A.*, EU:C:2018:308, para 65.

32 Case C-133/15 *Chavez-Vilchez*, EU:C:2017:354, paras 69–71; Case C-82/16 *K.A.*, *op. cit.*, paras 57–58; Case C-836/18 *Ciudad Real v. RH*, EU:C:2020:119, paras 39–40.

33 Cases C-356/11 and C-357/11 *O.S. and L.*, EU:C:2012:776, para 56.

34 H. Kroeze, 'Chavez-Vilchez v. SVB Nederland – The Child's Interest becomes the Central Element in the *Ruiz Zambrano* Genuine Enjoyment Test', in: A. Pahladsingh and R. Grimbergen (eds), *The Charter and the Court of Justice of the European Union. Notable cases from 2016–2018* (Wolf Legal Publishers 2019), 137, 147; H. Kroeze, 'The Substance of Rights: New Pieces of the *Ruiz Zambrano* Puzzle', (2019) 44 *European Law Review*, 238, 244.

existence of a second parent who is an EU citizen.³⁵ In this way, residence rights derived from art. 20 TFEU are instrumental to effectuate children's rights on access to their parents.³⁶

Another question that was raised in the aftermath of *Ruiz Zambrano* was whether residence rights derived from art. 20 TFEU can be limited in the interest of a Member State. Recently, *RH* clarified that lack of finances cannot preclude the conferral of a residence right derived from art. 20 TFEU, provided that a relationship of dependency exists.³⁷ Before that, *Rendón Marín* and *CS* confirmed that residence rights can be restricted on grounds of public policy or public security.³⁸ The Court of Justice set the threshold for expulsion on these grounds on the basis of its earlier case-law on Directive 2004/38 and its predecessors. This approach practically equates protection against expulsion for right-holders of residence rights derived from articles 21 and 20 TFEU respectively.³⁹ Important differences between the two protection regimes include the lack of mentioning public health in the case-law on art. 20 TFEU; and the absence of a gradual protection framework in which protection increases with the number of years of residence of the EU citizen's family member in a Member State, such as provided for by Directive 2004/38.⁴⁰ Lastly, there is no clarity yet on the possibilities for family members who derive a residence right from art. 20 TFEU to retain that residence right when the relationship of dependency comes to an end.⁴¹

35 Case C-133/15 *Chavez-Vilchez*, *op. cit.*, para 71.

36 Art. 24(3) Charter; Art. 9(3) Convention on the Rights of the Child; Kroeze 2019, 'Chavez-Vilchez v. SVB Nederland', *op. cit.* 157; Kroeze 2019, 'The Substance of Rights', *op. cit.*, 245.

37 Case C-836/18 *Ciudad Real v. RH*, EU:C:2020:119, para 49.

38 Case C-165/14 *Alfredo Rendón Marín v Administración del Estado*, EU:C:2016:675, para 81; Case C-304/14 *Secretary of State for the Home Department v CS*, EU:C:2016:674, para. 36.

39 Case C-165/14 *Rendón Marín*, *op. cit.*, para 83; Case C-304/14 *CS*, EU:C:2016:674, para. 37. Advocate-General Szpunar issued a combined opinion for both cases (EU:C:2016:75) in which he also made the comparison. Also see P.J. Neuvonen, 'EU citizenship and its "very specific" essence: Rendón Marín and CS', (2017) 54(4) *Common Market Law Review*, 1201; H. Kroeze, 'Rendón Marín and CS: A Reflection on Proportionality and Fundamental Rights in EU Citizenship Law', in: Pahladsingh and Grimmergen 2019, *op. cit.*, 161.

40 Considerations 23 and 24 of the preamble of Directive 2004/38.

41 In a case of 23 September 2020, NL:RVS:2020:2272 from the Netherlands, the Council of State ruled that when the relationship of dependency ends, the family member's residence right is withdrawn without the possibility to retain this right. From the Court of Justice there are no cases on this question yet.

4 Time for a Stock-Taking Exercise: Organization of This Special Issue

As time passed, the case-law on art. 20 TFEU revealed bits and pieces of the EU citizenship puzzle.⁴² At the same time, the debate about the precise implications of the *Ruiz Zambrano* judgment is far from over. After ten years, it is time to take stock and further explore some of the questions on art. 20 TFEU that have not been exhaustively answered yet. This special issue aims to take on this task, and review the art. 20 TFEU doctrine through the eyes of four different authors. The authors were brought together in a conference on the scope of family reunification under EU law that was held in October 2019 at Ghent University. The contributions, then and now, aim to understand the current standing of EU citizenship law on crucial issues. One of these issues is the relationship between Article 20 TFEU, which contains a non-exhaustive enumeration of EU citizenship rights, and Article 21 TFEU, which is more specific and deals with the right to reside and move freely within the Union.⁴³ Another relevant question concerns the importance of fundamental rights for the application of art. 20 TFEU, such as the right to respect for private and family life,⁴⁴ and the obligation to take account of children's best interests.⁴⁵ Interestingly, the authors in this volume diverge in their answers to these questions, and most notably on the added value of the art. 20 TFEU doctrine in relation to rights derived from art. 21 TFEU.

This special volume aims to contribute to the debate about the long-term consequences of the *Ruiz Zambrano* judgment and the development of EU citizenship law. In the first place, this concerns the understanding of the 'substance of the rights conferred by EU citizenship'. What does this substance of rights entail?⁴⁶ Is it limited to the right not to be expelled from the territory of the Union and, as such, essentially connected to the right to freely move and reside within the Union, or does it have more far-reaching implications?⁴⁷ Somewhat related is the question about the precise relationship between

42 Kroeze 2019, 'The Substance of Rights', *op. cit.*

43 See e.g. Van Elsuwege and Kochenov 2011, *op. cit.*

44 Art. 8 ECHR and 7 EU Charter.

45 Art. 24(2) EU Charter.

46 See also: Kochenov 2013, 'The Right To Have What Rights?', *op. cit.*

47 N. Nic Shuibhne, 'The "Territory of the Union" in EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives', (2019) 38 *Yearbook of European Law*, 267, 291–305; S. Coutts, 'From Union citizens to national subjects: case C-191/16, Romano Piscioti', (2019) 56(2) *Common market law review*, 521; D. Kochenov and B. Pirker, 'Deporting the Citizens within the European Union: A Counter-Intuitive Trend in Case C-348/09, P.I. v. Oberbürgermeisterin der Stadt Remscheid', (2013) 19 *Columbian Journal of European Law*, 369, 376.

citizenship rights derived from Article 20 TFEU and those based on Article 21 TFEU and Directive 2004/38. It has been argued that Article 21 TFEU and Directive 2004/38 only apply in cross-border situations and, therefore, its scope of application is based upon a classical 'cross-border test' whereas Article 20 TFEU has a potentially wider scope of application and is based upon a 'substance of rights test'.⁴⁸ Nevertheless, there is 'an intrinsic connection' between both tests in the sense that they both relate to the freedom of movement and residence of Union citizens.⁴⁹ The question is whether this jurisprudential and doctrinal distinction makes sense in practice or whether it is only an artificial division which could better be abolished?

Martijn Van Den Brink tackles this question in his contribution to this special issue and comes to the conclusion that '[t]en years after *Ruiz Zambrano*, it remains difficult to make sense of the substance of rights test'.⁵⁰ Proceeding from the observation that the *Ruiz Zambrano* line of case law essentially safeguards EU citizens' right to move and reside freely within the territory of the Union, he argues that Article 21 TFEU could be a sufficient legal basis for the protection of this right and that, therefore, the separate 'substance of rights' test is an unnecessary complication which comes at the expense of legal certainty. Stephen Coutts, on the other hand, points out that 'practical and conceptual differences between the rights contained in the two articles should caution against the automatic equivalence between Article 20 and 21 TFEU'.⁵¹ Coutts further argues that Article 20 TFEU reflects the existence of a supranational EU citizenship status involving a fundamental right to be present on the Union's territory. Significantly, this implies new challenges in relation to the Member States' exclusive competence in the field of nationality legislation. Judgments such as *Rottmann*⁵² and *Tjebbes*⁵³ reveal the importance of proportionality as a mechanism ensuring a difficult balance between EU citizenship and Member

48 On the two overlapping jurisdiction tests, see amongst others: Van Elsuwege and Kochenov 2011, *op. cit.* Alternatively, arts. 20 and 21 TFEU may be considered to be mutually exclusive. Where art. 21 TFEU applies in cross-border situations, art. 20 TFEU can only be relied on in one's Member State of nationality. See Case C-86/12, *Aloka et al v Minstre du Travail de l'Emploi et de l'Immigration*, EU:C:2013:645, and Kroeze 2019, 'The Substance of Rights', *op. cit.*, 246 for an analysis.

49 See: Case C-165/14, *Rendón Marín*, *op. cit.*, para 75; Case C-304/14 CS, *op. cit.*, para 30; Case C-133/15, *Chavez-Vilchez*, *op. cit.*, para 66.

50 M. Van den Brink, 'Is it Time to Abolish the Substance of Rights Test?', see further in this special issue.

51 S. Coutts, 'Expulsion and Article 20 TFEU: Some Practical and Conceptual Issues', see further in this special issue.

52 Case C-135/08 *Rottmann*, *op. cit.*

53 Case C-221/17 *Tjebbes*, EU:C:2019:189.

State nationality.⁵⁴ Recently launched Commission infringement cases against the investment citizenship regulations of Malta and Cyprus are reflective of the on-going development and constant (re)interpretation of competences in the field of citizenship.⁵⁵ The procedures initiated by the Commission are based on references to the essence of EU citizenship and therewith resemble the ‘substance of rights’ doctrine which the Court developed in *Ruiz Zambrano* and subsequent case-law.⁵⁶ The infringement cases provide a new opportunity for the Court of Justice to clarify the scope of application of EU law, and may announce another chapter in the *Ruiz Zambrano* era.

The *Ruiz Zambrano* judgment not only launched an ongoing debate about the ‘substance’ of EU citizenship rights and the scope of application of EU law, it also has an important fundamental rights dimension. The *Ruiz Zambrano* judgment did not mention fundamental rights at all, but this neglect stands in stark contrast to the opinion of Advocate General Sharpston, which elaborately discussed the right not to be discriminated in art. 18 TFEU. The referring national court also explicitly enquired about the role of fundamental rights in determining the scope of application of Articles 20 and 21 TFEU.⁵⁷ The Court’s judgment directly affected the right to reside as a family in the EU, which cannot be decoupled from the right to family life in art. 7 Charter and art. 8 ECHR. Family life was in fact translated into the right to care and be cared for.⁵⁸ Subsequent case-law indeed devotes more attention to the role of third country nationals as care takers of EU citizens, and the importance of their fundamental rights for possible limitations to their derived residence rights under Article 20 TFEU received more attention. In *Rendón Marín* and *CS*, for instance, the Court found that the limitation of residence rights derived from art. 20 TFEU should take account of fundamental rights protection in art. 7

54 P. Van Elsuwege and H. Kroeze, ‘Het Arrest Tjebbes: De Evenredigheidstoets Als Complexe Brug Tussen Nationaliteitswetgeving En Unieburgerschap’, (2019) *Nederlands Tijdschrift voor Europees Recht*, 166.

55 See: European Commission, ‘Investor Citizenship Schemes: European Commission opens infringements against Cyprus and Malta for “selling” EU citizenship’, 20 October 2020, available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925>. For a first commentary, see: M. Van den Brink, ‘Investor citizenship and EU law: much to do about nothing?’, 30 October 2020, available at: <<https://globalcit.eu/investor-citizenship-and-eu-law-much-to-do-about-nothing/>> (last access 2 November 2020).

56 Opinion of Advocate-General Szpunar in Cases C-165/14, *Rendón Marín* and C-304/14 *CS*, *op. cit.*; Neuvonen 2017, *op. cit.*; Kroeze 2019, ‘*Rendón Marín* and *CS*’, *op. cit.*

57 See: Opinion AG Sharpston in Case-34/09, *Ruiz Zambrano*, *op. cit.*, para 47.

58 See: N. Cambien, ‘EU Citizenship and the Right to Care’, in: D. Kochenov (ed.), *EU Citizenship and Federalism. The Role of Rights* (Cambridge University Press 2017), 495.

Charter (right to family life) and art. 24(2) Charter (obligation to prioritize the best interest of the child).⁵⁹ For the interpretation of the best interest of the child, the Court also referred to the ECHR.⁶⁰ In *Chavez-Vilchez*, moreover, the Court stated that '[a]s part of that assessment [whether a residence right can be derived from art. 20 TFEU], the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter [...] read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of that charter'.⁶¹

Hanneke van Eijken observes in this present special issue that 'the fundamental right narrative in the cases on Article 20 TFEU became more prominent'.⁶² The Court of Justice, however, only lays down the general guidelines and criteria which the national courts must apply in practice. The role of national judges in applying the art. 20 TFEU line of case law cannot be underestimated. Dutch courts in particular played a relevant role in the development of EU citizenship rules. As a result of *Chavez Vilchez*, the restrictive policy of the Dutch Immigration Service had to be revised in order to take into account the fundamental rights of EU citizens, in particular the right to family life and the right of the child as defined in Articles 7 and 24(2) of the Charter of Fundamental Rights.⁶³ Ellen Nissen further discusses the evolving case law from a children's rights perspective. She points at the importance of an interdisciplinary dialogue between children's rights theory, the judiciary and the decision-making practice for the development of immigration law.⁶⁴

59 Case C-165/14 *Rendón Marín*, *op. cit.*, para 81; Case C-304/14 CS, *op. cit.*, para 36.

60 Case C-304/14 CS, *op. cit.*, para 49, with reference to ECtHR, 3 October 2014, *Jeunesse v. the Netherlands*, CE:ECHR:2014:1003JUD001273810, para 118.

61 Since the Charter only applies within the scope of EU law (art. 51(1) Charter), this paragraph raised the question whether the Charter has become part of the assessment of the question whether a situation falls within EU law in which the Charter shall apply. Kroeze 2019, 'Chavez-Vilchez v. SVB Nederland', *op. cit.*, 159; Kroeze 2019, 'The Substance of Rights', *op. cit.*, 252; H. van Eijken and P.S. Phoa, 'The scope of Article 20 TFEU clarified in Chavez-Vilchez: are the fundamental rights of minor EU citizens coming of age?', (2018) 43 *European Law Review*, 949.

62 H. Van Eijken, 'Connecting the dots backwards: what did *Ruiz Zambrano* mean for EU citizenship and fundamental rights in EU law?', see further in this special issue.

63 Van Eijken and Phoa 2018, *op. cit.*

64 E. Nissen, 'A children's rights perspective to *Ruiz Zambrano* and *Chavez-Vilchez* – an examination in light of theory, practice and child development research', see further in this special issue.

5 Concluding Remarks: What Is the Legacy of Ruiz Zambrano?

Taken together, the contributions in this volume take stock of the ongoing debate about the significance of EU citizenship and the state of play ten years after the *Ruiz Zambrano* judgment. The largely undefined nature of the genuine enjoyment test opened the gates to a wide range of preliminary references. Whereas this may be regarded as a natural and perhaps even unavoidable process, reflecting the complex nature of the EU's constitutional structure, the uncertainties about the precise boundaries of EU citizenship and its implications for family reunification cannot be ignored.

For instance, it has become increasingly clear that the genuine enjoyment test (based on art. 20 TFEU) does not replace but rather complements the traditional cross-border approach (based on art. 21 TFEU and Directive 2004/38) in order to determine whether or not national measures fall within the scope of application of EU law. Conceptually, however, the question *what* distinguishes art. 20 TFEU from art. 21 TFEU continues to be debated, to which the contributions in this special issue attest. Practically, the Court's case-law clarified the most important conditions to obtain a residence right derived from art. 20 TFEU. Particularly the criterion of 'dependency' is of crucial significance for the application of the genuine enjoyment test, which explains why residence rights derived from art. 20 TFEU are strongly connected to the right to care for (minor) EU citizens.⁶⁵ Questions on the limitation of art. 20 TFEU⁶⁶ and the possibility to retain a residence right in changed circumstances,⁶⁷ on the other hand, beg to be dealt with more extensively.

In addition to the stream of preliminary references in cases of family reunification, questions about the relationship between EU citizenship and the Member States' exclusive competence in the field of nationality legislation are still on the agenda. The pending infringement proceedings against the investment citizenship schemes of Malta and Cyprus will provide another opportunity to clarify the status of EU citizenship as defined under article 20 TFEU. After more than a decade, *Ruiz Zambrano* and its progeny continue to leave their marks on the development of EU law.

65 E.g. Cases C-356/11 and C-357/11 *O.S. and L.*, *op. cit.*; Case C-133/15 *Chavez-Vilchez*, *op. cit.*; Case C-82/16 *K.A.*, *op. cit.*; Case C-836/18 *Ciudad Real v. RH*, *op. cit.*, paras 39–40; Cambien 2017, *op. cit.*

66 E.g. there are currently two cases pending that connect to the Court's judgment in Case C-836/18 *Ciudad Real v. RH*, *op. cit.*; Case C-451/19 *Toledo v. XU*; Case C-532/19 *QP v. Toledo*.

67 Most importantly, when dependency ends. See NL:RVS:2020:2272 for a Dutch perspective.