Briefing Paper

Third Country Nationals and European Union Citizenship: An Uneven Balance?

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Introduction

Citizenship of the Union can only be obtained and held by those who have nationality of an EU Member State. The case law on EU citizenship is quite wide ranging and among other aspects of it, EU citizenship does not allow for discrimination on the grounds of nationality. However, as Barnard comments EU citizenship rights have; 'not helped the 18.5 million (and rising) third-country nationals who are legally resident in the EU. Many contribute to the economies of the host country and so indirectly to the EU, but they are excluded from the rights granted to citizens'1.

In this paper we will discuss the above statement and the relationship between Third Country Nationals (TCNs) and EU law with regards to citizenship of the Union in particular the case law which relates to TCNs.

Third Country Nationals; the Current Position

In the past it can be seen that while EU law gave citizens of the Union the right to move and reside freely throughout the Member States of the EU, it is national immigration law which determines the conditions upon which TCNs can enter a Member State.2 The national immigration law also determines how far TCNs can access certain things such as the labour market, be joined by their families and become naturalized in their host state.

As we shall see the EU law is now taking more prominence than national law in this area (although with serious derogations for certain Member States). There are key differences however, between Union citizens and TCNs. This is that unlike EU citizens TCNs do not enjoy free movement rights between Member States, this is subject to some exceptions (those being students, researchers, and in-future blue card holders) this can cause fragmentation within the single market.3 Indeed as Peers has noted; 'The European Union (EU) has long been attacked as an exclusionary organisation concerned solely with the citizens of its Member States at the cost of non-EU citizens residing in the EU, even though many of the latter form part of ethnic or religious minorities and suffer social exclusion'.4

[1] C Barnard, The Substantive Law Of The EU; The Four Freedoms (3rd edn, OUP, 2010) 418
[2] Either directly from a third country or from another Member State
[3] C Barnard, The Substantive Law Of The EU; The Four Freedoms (3rd edn, OUP, 2010) 519
[4] S Peers, 'Implementing equality? The Directive on long term resident third country nationals' (2004) E.L.Rev. 29(4), 437-460, 437

Room 3, Shire Hall, The Sands, Appleby in Westmorland, Cumbria. CA16 6XN.
Telephone: 017683-52165. Mobile: 07502-142658. Fax: 017683 54005.
E-Mail: Adrian.waite@awics.co.uk. Websites: www.awics.co.uk and www.awics.eu. Twitter: @AdrianWaite
Managing Director: Adrian Waite MA CPFA ACIH FIPSM FInstLM
Company Number: 3713554. VAT Registration Number: 721 9669 13

Wiesbrock has commented of the current position of TCNs within the EU that; 'Whereas EU citizens benefit from extensive free-movement rights, the same does not hold true for third-country nationals. Free-movement possibilities of third-country nationals may spring either from their relationship with an EU citizen (so-called "derived rights") or directly from a Union instrument. The first category encompasses family members of EU citizens who have made use of their free-movement rights as well as employees of a firm providing services in another Member State. The second category refers to certain categories of third-country nationals covered by a Union Directive.'5

Third Country Nationals and EU Case Law

The case law with regards to TCNs in the area of citizenship of the Union is limited however there are three highly important cases which will now discuss in depth with display the issues of citizenship of the Union in conjunction with third country nationals.

Ruiz Zambrano ONEM (Office National de l'Emploi)

The case of Ruiz Zambrano v ONEM6 is a leading case in the area of TCNs and involved the parents of a minor who had been morn in an EU Member State and therefore was a Citizen of the Union. The case concerns the proper definition of the scope of EU law in that it asks when are economically inactive citizens within the scope of EU law and how can they derive the rights from it. Commonly as we have seen in the previous chapter there needs to be a cross-border element to trigger EU citizenship law, if this does not happen the orthodox approach is that it is dealt with by national law. However, in this case this came into question.

The case came about where a Columbian national and his wife had applied for asylum in Belgium. Both applications were rejected but under a non-refoulement clause they were permitted to remain because of the continuing civil war in Columbia. While in Belgium the couple had a second and third child, both of whom as per the application of the national legislation of Belgium obtained Belgium citizenship.

Because of this the application of Art. 20(1) TFEU meant that both children obtained also EU citizenship. Throughout this period the Columbian nationals had made a number of failed attempts to regularise their residence in Belgium. Indeed Ruiz Zambrano took up paid employment in Belgium even though he did not possess a work permit as was required under the Belgium law and paid all contributions to the Belgium social security schemes as required also. The case came to the attention of the ECJ when the Columbian's contract of employment was terminated and he claimed benefits from the Belgium state, which were refused. This rejected was justified on the basis that the social security contributions he had made were not legally recognised by Belgian law by virtue of his lack of work permit.

[5] A Wiesbrock, 'Free movement of third-country nationals in the European Union: the illusion of inclusion' (2010) E.L. Rev. 35(4), 455-475, 456-457

[6] Case C – 34/09 Ruiz Zambrano v ONEM (Office National de l'Emploi) [2009] OJ C90/15

Three questions were referred to the ECJ; the first was whether Art. 18, 20 and 21 TFEU gave a Union citizen the right to reside in the Member State of his or her nationality irrespective of whether the Union citizen had previously exercised his or her rights of free movement. The second question was whether the same Treaty articles safeguard citizenship rights of an EU citizen who is an infant regardless of whether the right to move has already been exercised by that child and whether this meant granting a relative upon whom that child is dependent a secondary right of residence when that relative has sufficient resources and sickness insurance. The third question asked whether the relative of a Union citizen as contemplated in the second question was exempted from a requirement to hold a work permit when, were it not for the requirement to possess the permit, he or she would fulfil the condition of sufficient resources and the possession of sickness insurance by virtue of having been in employment.7

On consideration of the case the ECJ decided not to use Art. 18 TFEU nor a combination of Art. 20 and 21TFEU and instead rested solely on Art. 20 TFEU. The ECJ stated that while a Member State has sole jurisdiction to lay down the conditions for the acquisition of nationality of that Member State it is a fact that the children of Ruiz Zambrano had been born in Belgium and therefore had acquired Belgian nationality and in that had become EU citizens. In this the ECJ found that EU law precludes national measurements which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status. The ECJ went onto state with regards to the measures taken by the Belgian authorities that; a refusal to grant a right of residence to a third country national with dependent minor children in a Member State where those children are nationals and reside and also a refusal to grant such a person a work permit, has such an effect.8

Furthermore, the ECJ stated that such a refusal would lead to a situation where those children who were citizens of the Union would have to leave the EU to accompany their parents and that similarly that the refusal of a work permit would mean that those parents would not have sufficient resources to care for themselves or the family and this in turn would leave to the children who whole EU citizenship status having to leave Union territory. The ECJ said of this that; ‘In those circumstances those citizens of the Union would, as a result be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union’.9

[7] R O’Gorman, ‘Ruiz-Zambrano, McCarthy and the purely internal rule’ (2011) Irish Jurist, 46, 221-228, 221
[8] Case C – 34/09 Ruiz Zambrano v ONEM (Office National de l'Emploi) [2009] OJ C90/15 para. 42-43
[9] Case C – 34/09 Ruiz Zambrano v ONEM (Office National de l'Emploi) [2009] OJ C90/15 para. 44

Accordingly the ECJ concluded that the answer to the questions which had been referred is that Art. 20 TFEU is to be interpreted as meaning that it precludes Member States from refusing TCNs upon whom his minor children, who are EU 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 attaching to their status as EU citizens.10

Hinarejos comments that; 'This decision extends the scope of EU law; the only question is how far. The Court had recently come to the conclusion that citizens can rely on Article 20 TFEU whenever they risk losing their status as citizens, and without an intra-EU cross-border element…in Ruiz Zambrano, this seems to have been extended to situations where the effective enjoyment of the substance of this status is in jeopardy; in those cases, it seems that the threat to the status as a citizen or to its core is so great that it is enough to bring the situation within the scope of EU law, without the need for further triggers.'11

Also, Lansbergen and Miller tell us that; 'In Ruiz Zambrano the Court recognised a right of residence of the family member of a European citizen by reason of the very nature of that status, thereby expanding the group of European citizens who may benefit from family reunification rights from those who have 'moved' to, in principle at least, all European citizens irrespective of cross-border movement'12

It would seem from this judgement as Craig and De Burca tell us; 'certain factual situations which might otherwise have been considered as purely internal situations, are now considered to have a sufficient connection with EU Law due to the impact on certain rights enjoyed by virtue of the status of EU citizenship even in the circumstances involving a Member State national who has never exercised rights of movement outside that Member State, that situation will no longer be characterized as a wholly internal situation'13.

This case as we have seen has expanded the scope of EU citizenship law beyond previous levels. The case has proven to be a controversial as it can be seen as a case that challenges Member States policies on migration. The case was followed by the case of McCarthy14 which once again looked at EU citizenship in the light of TCNs.

[10] Case C – 34/09 Ruiz Zambrano v ONEM (Office National de l'Emploi) [2009] OJ C90/15 para. 45
[11] A Hinarejos, 'Extending citizenship and the scope of EU law' (2011) C.L.J. 2011, 70(2), 309-312, 311
[12] S Lansbergen, N Miller, 'European citizenship rights in internal situations: an ambiguous revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)' (2011) E. C. L. Rev 304
[13] P Craig, G De Burca, EU Law; Text, Cases and Materials (5th edn, OUP, 2011) 833
[14] C – 434/09 McCarthy v Secretary of State for the Home Department [2011] All E.R. (EC) 729

McCarthy v Secretary of State for the Home Department

The McCarthy case concerned a woman with dual British and Irish nationality who was living the UK and who had done all her life. She married a Jamaican man who did not have leave to remain in the UK under national law. After marriage they applicant applied along with her husband for residence permits as EU citizen and the spouse of an EC citizen respectively. When these applications were refused by Asylum and Immigration authorities in the UK and her appeal was dismissed she appealed through the UK courts. The UK Supreme Court referred two questions to the ECJ regarding the interpretation of the Citizenship Directive. In the course of their adjudication the court looked not only at the application of the Directive but also considered the impact on the applicant's status with regards to Art. 21 TFEU.15 This case as we will here should be seen in the light of a TCN attempting to retain their residence in an EU Member State and not from merely the EU citizen's point of view. Indeed as Mantu comments; 'at stake is not the 'fundamental' right of an EU citizen to family reunification but the right of a TCN husband to remain in the state of residence and nationality of his spouse'.16

The ECJ in its judgement reaffirmed its position from the Ruiz Zambrano case with regards to the Citizenship Directive by stating that this can only be applied to those who have exercised some form of movement and could not be relied upon without movement17. The ECJ also found that McCarthy was not within the scope of Art. 21 TFEU while she was residing in her own country of nationality and therefore this constituted a wholly internal situation as far as Art. 21 TFEU was concerned. This decision came about because of the ruling in Ruiz Zambrano where (as discussed above) it was said that Art. 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status even when they are nationals of the Member State in question and have never actually exercised their rights of free movement.18

As Craig and De Burca tell us; 'the ECJ distinguished the factual context in McCarthy from that in both Ruiz Zambrano and Garcia Avello, concluding that UK law in McCarthy's case did not (by comparison with Zambran) have the effect of obliging her to leave the territory of the EU, nor (by comparison with Garcia Avello) did it give rise to serious professional inconvenience creating likely obstacles to her exercise of freedom of movement in the future'19. The ultimate ruling was that Art. 21 TFEU does not apply to an EU citizen who has never exercised her right to freedom of movement, who has always resided in a Member State of which she is a national, and who is also a national of another Member State, provided that she is not deprived of the genuine enjoyment of the substance of the rights of EU citizenship, and her right of free movement and residence within the territory of the Member States is not impeded.

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[15] R O'Gorman, 'Ruiz-Zambrano, McCarthy and the purely internal rule' (2011) Irish Jurist, 46, 221-228, 223

[16] S Mantu, 'European Union citizenship anno 2011: Zambrano, McCarthy and Dereci' (2012) J.I.A.N.L. 2012, 26(1), 40-55, 45

[17] Article. 3(1) Directive 2004/38

[18] The fact that McCarthy had recently acquired Irish nationality in addition to her UK one was not enough in this respect to come into the scope of the Treaty provision

[19] P Craig, G De Burca, EU Law; Text, Cases and Materials (5th edn, OUP, 2011) 832

The ECJ in McCarthy reiterated that EU citizens do not derive a right to reside in their own country from Art. 21 TFEU and that this provision will requires a cross-border element, however, as Hinarejos has commented, form the McCarthy case; 'the default will be that, if a citizen has not exercised her freedom of movement, she is outside the scope of EU law for the purposes of this discussion--the label of "wholly internal situation" continues to apply. Because of Article 20 TFEU, that label will be scrapped in those extreme cases where there is a threat to the core of citizenship ("the genuine enjoyment of the substance" of the rights conferred by citizenship). This core is, however, very limited for the time being. Until now, the Court has interpreted it to include protection from losing the status of citizen itself (Rottmann) and from having to leave the territory of the Union (Ruiz Zambrano)'.20

It is notable crucial factor which separated the Ruiz Zambrano and McCarthy cases were the slight factual distinctions, these being the perceived difference in the degree of dependence and vulnerability of the EU citizen family member. As Craig and De Burca go onto say; While this was not explicitly discussed by the ECJ in McCarthy, the fact that the family member for whim the EU citizen was seeing a derivative residence permit in that case was an adult spouse, as compared with the parent of dependent minor children in Ruiz Zambrano, seems to have influenced the Court in reaching a different conclusion in the two cases'21.

Although it is evident in both cases the right to family life of the EU citizen would be significantly affected by the risk of deportation of the non-EU national family member. It is clear that in McCarthy the ECJ was not willing to see the possible deportation of a spouse as a significant depravation of the substance of the rights of the citizen of the Union. This is a significant case with regards to TCNs in relation to EU citizenship law. The McCarthy case shows that the rights of the EU citizen must be dramatically influenced by the presence or indeed lack thereof for the scope of EU citizenship law to come into force and allow the TCN to enjoy protection under Art. 20 or 21 TFEU.

Dereci v Bundesministerium fur Inneres

The final case we will discuss with regards to TCNs and their relationship to EU citizenship is Dereci22. This case concerned five TCNs who were seeking to live with their Austrian family members in Austria. None of the EU family members involved had exercised any rights to free movement. Two of the TCNs involved had entered Austria illegally; one had married an Austrian national before entering Austria but their visa had expired which required her to leave Austria and reapply for from her country of origin and; two involved adult TCNs who wished to live together with their Austrian parents upon whom they claimed dependency. The Austrian authorities had rejected the residence applications of all the TCNs and had issued expulsion orders against them. The grounds for the refusal included the breach of Austrian immigration law, lack of sufficient resources, and breaches of public policy.23

[20] A Hinarejos, 'Citizenship of the EU: clarifying "genuine enjoyment of the substance" of citizenship rights' (2012) C.L.J. 2012, 71(2), 279-282, 282
[21] P Craig, G De Burca, EU Law; Text, Cases and Materials (5th edn, OUP, 2011) 833
[22] Dereci v Bundesministerium fur Inneres (C-256/11) [2012] All E.R. (EC) 373
[23] None of the EU citizens involved were dependent on their TCN family member

The referring Austrian court had based the questions posed to the ECJ on those asked in Ruiz Zambrano in that they asked if the refusal of the Austrian authorities to grant a right of residence to the TCNs involved can be interpreted as leading, for their family members who are union citizens to denial of the genuine involvement of the substance of the rights conferred on them by virtue of their status as citizens of the Union.

In the judgement the ECJ adopted the same position as in McCarthy and clarified further that the Ruiz Zambrano exception 'refers to 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 ECJ stated that whether this would be the case in the particular situation as was in this case is for the national court to determine, however the fact that family reunification may appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union25 is not enough in itself to bring an otherwise internal situation within the scope of Union law.

From this case it can be seen that the exception in the Ruiz Zambrano case is very narrow and that as Hinarejos has explained; 'the citizen needs to prove that he or she will be forced to leave the territory of the Union as a whole. "Being forced" to leave the Union is interpreted so strictly that, for the purposes of family reunification, it seems limited to cases of absolute dependence of the citizen on a third country national, the relationship between child and caregiver being the typical example'.26

The Court went on to argue that a right of residence may still be granted by virtue of the right to protection of family life,27 which is independent of the issue of rights drawn from EU citizenship provisions although it is, of course, relevant to determining the latter and as Mantu tells us; 'The two possible sources of such a right are Article 7 of the EU Charter of Fundamental Rights, and Article 8 ECHR if the Charter is inapplicable (because the situation of the applicants is not covered by EU law)'.28

[24] Dereci v Bundesministerium fur Inneres (C-256/11) [2012] All E.R. (EC) 373 para. 66
[25] Dereci v Bundesministerium fur Inneres (C-256/11) [2012] All E.R. (EC) 373 para. 68
[26] A Hinarejos, 'Citizenship of the EU: clarifying "genuine enjoyment of the substance" of citizenship rights' (2012) C.L.J. 2012, 71(2), 279-282, 281
[27] Dereci v Bundesministerium fur Inneres (C-256/11) [2012] All E.R. (EC) 373 para. 69
[28] S Mantu, 'European Union citizenship anno 2011: Zambrano, McCarthy and Dereci' (2012) J.I.A.N.L. 2012, 26(1), 40-55, 49

Conclusions on Third Country Nationals and European Union Citizenship

Wiesbrock has also observed that the main issues underlying the whole body of case law on EU citizenship are the proper division of competences between the Union and the Member States29 and this is particularly relevant to this area of case law on EU citizenship with regards to TCNs as there is clearly a fine line between what the ECJ will consider within the scope of the EU citizenship provisions and what is not. This as we have seen seems to be an area in which the ECJ is treading carefully and one in which the ECJ are careful not to risk the integrity of Member States' domestic immigration policy with wild wide reaching decisions of TCNs.

Adam M. Waite LL.B LLM R.Inst.PA

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[29] A Wiesbrock, 'Disentangling the 'Union Citizenship Puzzle'? The McCarthy Case' (2011) 36 E.L. Rev. 861-873, 873