

# Extending the scope of application of the EU Charter of Fundamental rights on the basis of the Court of Justice case law on European citizenship<sup>1</sup>

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## Abstract

The paper comes out from Article 51 para 1 of the Charter of Fundamental Rights of the European Union which determines the scope (field) of its application. According to the provision, provisions of the Charter are addressed to the Member States only when they are implementing Union law. In other words, provisions of the Charter are binding on the Member States only when they act within the scope (*ratione materiae*) of Union law. The Court of Justice of the European Union in its recent case law has extended considerably the scope of application (*ratione materiae*) of Article 20 of the Treaty on the Functioning of the European Union (former Article 17 of the Treaty establishing the European Community) relating to the European citizenship. It can be applied nowadays even in such situations which lack before required the cross-border dimension. Article 20 of the TFEU represents nowadays an autonomous source of rights for Union citizens, which can be applied in the purely internal situations (situations in which no actual movement has taken place). Extending the scope of application of the provisions of the Treaties leads to the extending of the scope of application of the Charter. The presentation will examine the scope of application of the Charter on the background of the recent Court of Justice case law on the European citizenship. *Inter alia*, the Court of Justice case law in *Zambrano*, *McCarthy* and *Dereci* will be discussed.

## Key words

scope of application of the Charter of Fundamental Rights, extending the scope of application of EU law on European citizenship by the Court of Justice case law, cross-border dimension of the application of EU law on European citizenship, application of the EU law on European citizenship to purely internal situation, criterion “deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen”.

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<sup>1</sup> This work was supported by the Slovak Research and Development Agency under the contract No. APVV-0823-11.

## 1. SCOPE OF APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF EUROPEAN UNION AS REGARDS THE MEMBER STATES

According to Article 51 para 1 of the Charter of Fundamental Rights of the European Union (later on “Charter”),<sup>2</sup> the provisions of the Charter are addressed to the Member States only when they are implementing Union law. Explanations relating to the Charter of Fundamental Rights,<sup>3</sup> which (according to the Article 6 of the Treaty on European Union (TEU) and Article 52 para 7 of the Charter) provide guidance in the interpretation of the Charter, state that as regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law.<sup>4</sup> The Court of Justice confirmed this case-law in the following terms: ‘In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...’.<sup>5</sup> This rule applies to the central authorities of the Member States as well as to regional or local bodies, and to public organisations, when they are implementing Union law.

Following the rules relating to the application of the Charter, the Charter of Fundamental Rights shall not be applicable as to the “exclusive Member States competences” or belonging to their “reserved domain”. But even in the fields where Member States remain competent to regulate while the Union is not competent to lay down rules, the Member States must exercise their competence with regard to Union law.<sup>6</sup> Such a requirement flows from the *effet utile* of Union law.

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<sup>2</sup> Charter of Fundamental Rights of the European Union. OJ C 303, 14.12.2007, p. 1–16.

<sup>3</sup> Explanations relating to the Charter of Fundamental Rights. OJ C 303, 14.12.2007, p. 17 - 36.

<sup>4</sup> See: Judgment of the Court of Justice of 13 July 1989 in a case 5/88 *Wachauf* [1989] ECR 2609; Judgement of the Court of Justice of 18 June 1991 in a case C-260/89 *ERT* [1991] ECR I-2925; Judgement of 18 December 1997 in a case C-309/96 *Annibaldi* [1997] ECR I-7493.

<sup>5</sup> Judgment of 13 April 2000 in a case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds.

<sup>6</sup> See, for example: Judgment of the Court of Justice of 2 October 2003 in case C-148/02 *Carlos Garcia Avello v Belgian State*, European Court reports 2003 Page I-11613, paragraph 25. Judgment of the Court of Justice of 12 May 2011 in a case C-391/09 *Malgożata Runevič-Vardyn and Lukasz Pawel Wardyn v Vilniaus miesto savivaldybės administracija and Others*, paragraph 63.

According to Article 6 of the TEU, the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Article 51 para 2 of the Charter confirms that the Charter may not have the effect on extending the field of application of Union law beyond the powers of the Union as defined in the Treaties. But extending the scope of application of the Charter by the way of extending the scope of application of EU law is not excluded by these provisions.

It follows that in order the Charter to be applied the link with EU law has to be established. Whenever a link can be established between a national measure and the application of the provisions of EU law (e.g., with respect to EU law on European citizenship, by moving to or visiting another Member State – cross-border link), the protection of fundamental rights at EU level is activated and thus the Charter of Fundamental rights should be applied. If, such a link is not found, the Charter will not apply. Extending the field (scope) of application of the Union law has the effect of extending the scope of application of the Charter.

## 2. EU LAW ON EUROPEAN CITIZENSHIP

According to the Article 20 of the Treaty on the Functioning of the European Union (TFEU) the status of European citizenship is granted to every national of a Member State. The status of European citizenship grants specific rights to the individuals being European citizens. Those rights are listed by the Articles 21 -24 of TFEU, as well as by the Title V. of the Charter.

Article 21 of TFEU grants the right to move and reside freely within the territory of the Member States. The right is subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. The conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members are laid down by the 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.<sup>7</sup>

## 3. EXTENDING THE SCOPE OF EU LAW ON EUROPEAN CITIZENSHIP BY THE CASE LAW OF THE COURT OF JUSTICE

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<sup>7</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. OJ L 158, 30.4.2004, p. 77–123.

Article 21 of TFEU (former Article 18 of the Treaty establishing the European Community) was interpreted by the Court in its initial case law in conjunction with the general prohibition of the discrimination on grounds of nationality.<sup>8</sup> Court of Justice has ruled that the right of free movement and prohibition of discrimination on grounds of nationality preclude the national law to grant social benefits to the nationals of Member States legally resident in another Member States under the conditions which differ to those applied to the national of the Member State. The Court of Justice has extended the scope of application of European citizenship law to such extent that any measures of the Member States that discriminate against citizens of the Union on the basis of their nationality, which may potentially affect individuals daily lives in another Member States were considered to be contrary to the right of free movement in conjunction with the prohibition of discrimination.<sup>9</sup>

In subsequent case law, the Court of Justice extended the scope of application of the right of free movement beyond a mere prohibition of discrimination.<sup>10</sup>

The basic feature of the Court of Justice case law was that the European citizens could rely on the right of free movement only if a supporting cross-border link was established (when they moved from the Member State of their origin and resided in another Member State). Such attitude can be seen, for example, in the Court of Justice decision in a case *Carlos Garcia Avello*<sup>11</sup> or joined cases *Uecker and Jacquet*.<sup>12</sup> The Court of Justice pointed out that citizenship of the Union, established by Article 17 EC, is not intended to extend the scope

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<sup>8</sup> See, for example: Judgement of the Court of Justice in a case C-85/96 *Martinez Sala v. Freistaat Bayern*, European Court reports 1998 Page I-02691; Judgement of the Court of Justice in a case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, European Court reports 2001 Page I-06193.

<sup>9</sup> For a broad interpretation of the right to free movement see, for example: EIJEKN, H.: "A new route into the promised land? Being a European citizen after Ruiz Zambrano". In *European Law Review* 2011, Vol. 36, No. 5, pp. 704 – 721. PRECHAL, S. – VRIES, S. A. EIJEKN, H.: "The principle of Attributed Powers and the "Scope" of EU Law" in BESSELINK, L.F.M. – PENNING, F. – PRECHAL, S. (eds): *The Eclipse of the Legality Principle in the European Union*. Alphen aan den Rijn: Kluwer Law International, 2011, pp.113-249.

<sup>10</sup> See, for example: Judgement of the Court of Justice in a case C-224/02 *Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö*, European Court reports 2004 Page I-05763.

<sup>11</sup> Judgment of the Court of Justice of 2 October 2003 in case C-148/02 *Carlos Garcia Avello v Belgian State*, European Court reports 2003 Page I-11613, paragraph 26.

<sup>12</sup> Judgement of the Court of Justice in joined cases C-64/96 *Land Nordrhein-Westfalen v Kari Uecker* and C-65/96 *Vera Jacquet v Land Nordrhein-Westfalen*. European Court Reports 1997 Page I-03171, paragraph 23.

*ratione materiae* of the Treaty also to internal situations which have no link with Community law. In *Carlos Garcia Avello* case, the Court continued that such a link with Community law does, however, exist in regard to persons in a situation such as that of the children of Mr Garcia Avello, who are nationals of one Member State lawfully resident in the territory of another Member State.

The Court of Justice in its recent case law has broadened the scope of application of Union law on European citizenship. The Court of Justice has ruled that within the ambit of the Article 20 of TFEU belong also the situations where no cross-border link exists. Individuals can therefore rely on the EU law on European citizenship even if they occur in purely internal situations. The Court of Justice set the applicability of the Article 20 of TFEU to the situations which lack cross-border dimension on the criteria “genuine enjoyment of the substance of the rights conferred to individuals by virtue of their status as citizens of the Union” used by the Court in its judgment on *Ruiz Zambrano* case.<sup>13</sup> The Court of Justice introduced the criteria by the reference to the former *Rottmann* case.<sup>14</sup>

The question raised before the Court of Justice in *Rottmann* case was whether the withdrawal of a German national's nationality is contrary to the EU citizenship provisions, if the withdrawal results in statelessness and therefore in losing the status of EU citizenship. Mr. Rottmann was an Austrian national by birth. A case was brought against him before Austrian criminal court because of the suspicion of serious fraud in his profession. After his hearing before the criminal court, he had moved to Germany, where he applied for German nationality. He became a German national, but few months later, the Austrian authorities informed the German authorities of the criminal proceedings pending against Mr. Rottmann. The German authority reacted by withdrawing his naturalization with retroactive effect. Due to his naturalization in Germany he has lost his Austrian nationality in accordance with Austrian law. If not having the nationality of a Member State (Austria or Germany), he was put to risk to lose the status of European citizen, as well. Although the situation of Mr. Rottmann could be interpreted as a cross-border situation since he migrated from Austria to Germany, the Court of Justice pointed out that:

“It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a

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<sup>13</sup> Judgement of the Court of Justice of 8 March 2011 in a case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*. OJ C 130, 30.4.2011, p. 2–2, paragraph 42.

<sup>14</sup> Judgement of the Court of Justice of 2 March 2010 in a case C-135/08 *Janko Rottmann v Freistaat Bayern*. OJ C 113, 1.5.2010, p. 4–4.

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>15</sup>

The Court of Justice has based its decision in the *Rottmann* case on the status of EU citizenship and the consequences of the withdrawal of Member State nationality for that status. The withdrawal of his nationality would constitute an obstacle to his future exercise of rights conferred to him by the virtue of his status as EU citizens. This argumentation seems to be the decisive in the judgment of the Court of Justice in *Rottmann* case. The situation of Mr. Rottmann has fallen within the ambit of EU law because of its nature and its consequences, which would be the loss of the status of EU citizenship and the possibility to exercise the rights attached to the status.<sup>16</sup> The Court of Justice referred to this argumentation in its decision in the *Ruiz Zambrano* case, which facts obviously lack the cross-border dimension.

The case of Ruiz Zambrano began in 1999, when Gerardo Ruiz Zambrano, a Columbian national, came to Belgium with his spouse and their son. They applied for asylum in Belgium, but Belgian authorities refused their request. But because of the ongoing civil war in Colombia and with the view to principle of non-refoulement, they were not deported. While living in Belgium, two additional children, Diego and Jessica, were born to Ruiz Zambranos. The children were granted the Belgium nationality. After the births of Diego and Jessica, their father once again requested a residence permit in Belgium (for the third time). Now, he based his request on the fact of being the family member of EU citizens. He also applied for work permit and social benefits while being unemployed.

Within this context the Belgian Employment Tribunal referred three questions to the Court of Justice for preliminary ruling. The first question was whether Jessica and Diego Ruiz Zambranos can rely on their status as European citizens, even though they had not exercised their right to free movement - did not move from the Member State of their nationality to another Member State. The link with EU law based on cross-border dimension was missing. The question the Court of Justice had to answer was whether the EU citizens can rely upon the EU law without there being a cross-border connection. The Court of

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<sup>15</sup> *Rottmann*, paragraph 42.

<sup>16</sup> For the detailed analysis of the *Rottmann* case, see, for example: CAMBIEN, N.: Case C-135/08, "Janko Rottmann v. Freistaat Bayern". In *Columbia Journal of European Law*, 2011, Vol. 17, No. 2, pp. 375-394.

Justice in its judgment in *Ruiz Zambrano* case has pointed out that the link with EU can be given even if the individuals do not participate on the life in other Member State than the Member State of their origin. The Court of Justice argued that the citizenship of the Union is intended to be the fundamental status of nationals of the Member States<sup>17</sup> and that in those circumstances, Article 20 of 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.<sup>18</sup> A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect. The refusal of a residence permit would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. If a work permit would not be granted to such a person, he would risk not having sufficient resources to provide for himself and his family (children with EU citizenship), what could result in leaving the territory of the Union. Diego and Jessica, citizens of the Union, would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

In *Zambrano case* the Court of Justice has ruled that Article 20 of TFEU is to be interpreted as meaning that it 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 attaching to the status of European Union citizen.*

The criteria “deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen” provides the sufficient link with EU law even if individual who intends to rely on EU law finds him/her-self in a

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<sup>17</sup> See, inter alia: Judgment of the Court of Justice of 20 September 2001 in a case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*. European Court reports 2001 Page I-06193, paragraph 31; Judgment of the Court of Justice of 17 September 2002 in a case C-413/99 *Baumbast and R v Secretary of State for the Home Department*. European Court reports 2002 Page I-07091, paragraph 82; Judgment of the Court of Justice of 19 October 2004 in a case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, European Court reports 2004 Page I-09925, paragraph 25; *Garcia Avello*, paragraph 22 and *Rottmann*, paragraph 43.

<sup>18</sup> *Ruiz Zambrano*, paragraph 42.

purely internal situation.<sup>19</sup> The link with EU law is thus not more established only by the use of free movement (cross-border situation). It can be established simply by the status of European citizenship autonomously. Article 20 of TFEU enshrines an autonomous right. It constitutes a sufficient link with Union law by itself.<sup>20</sup> In that way, the scope of application of EU law on European citizenship is extended. No national measures, even the one falling within the exclusive competences of the Member States, may preclude the genuine enjoyment of the substance of the rights conferred by the status of European citizen.

EU citizens have now two ways of evoking the EU law. First, whenever there is an actual cross-border link, the *Directive 2004/38/EC applies*<sup>21</sup> granting the right to reside in other Member States subject to certain conditions.<sup>22</sup> Secondly, even if there is no cross-border link, but where the fundamental status of European citizenship is endangered, because the EU citizen has been precluded from enjoying this status, *article 20 of TFEU applies*. This new Court of Justice's methodology of application of EU law on European citizenship can be clearly observed for the first time in *McCarthy* case.<sup>23</sup> However, the Court of Justice in *McCarthy* case used the criteria of “deprivation of the

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<sup>19</sup> The concept of internal situation is based on the distinction between the right to move and the right to reside. In answering the question whether Union citizens may rely on their right to move and reside under the article 21 TFEU, irrespective of an actual cross-border link, Advocate General Sharpston in *Zambrano case* has disconnected the right to move from the right to reside. The right to residency when seen as a free-standing right for European citizens allows extending the scope of application of Article 21 TFEU to the situations in which no actual movement has taken place. See: Opinion of the General Advocate Sharpston of 30 September 2010 in a case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*, paragraphs 80 and 81.

<sup>20</sup> Direct applicability of the Article 20 of TFEU by citizens who have not used their free movement right reveals another dimension of EU citizenship – a concept that is developing autonomously and independently from national citizenship. It is argued that the Court has taken a significant step towards the constitutionalisation of EU citizenship. See: EIJEKN, H (2011), p. 721.

<sup>21</sup> The directive expressly limits its scope of application to the existence of the cross-border link. Article 3 of the Directive states that the Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

<sup>22</sup> The Directive in its Article 7 (titled „Right of residence for more than three months“) prescribes, for example these conditions: to have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State.

<sup>23</sup> Judgment of the Court of Justice of 5 May 2011 in a case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department*. OJ C 186, 25.6.2011, p. 5–5, paragraphs 30 *et seq.* and paragraphs 44 *et seq.*



genuine enjoyment of the substance of the rights attaching to the status of European Union citizen” in order to examine the applicability of Article 21 of TFEU and thus not Article 20 of TFEU.<sup>24</sup> In *McCarthy* decision, the Court of Justice has ruled that Article 21 of TFEU is not applicable to a Union citizen who has never exercised his right of free movement ... provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

The most important aspect of the *Ruiz Zambrano* case, within the focus of the paper, is its influence on the application of the Charter of Fundamental Rights. Extending the scope of application of provisions of TFEU on European citizenship (to purely internal situation which lack cross-border link) leads to the extending of the scope of application of Charter since the Charter shall be applied when the factual circumstances of the case fall within the scope of application (*ratione materiae*) of EU law. The criteria “deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen” thus plays important role also with respect to the application of the Charter. The limits of the criteria are the limits of the application of the Treaty provisions on European citizenship as well as of the application of the Charter.

In *McCarthy* case the Court of Justice has observed that the situation of a person such as Mrs McCarthy has no factor linking it with any of the situations governed by European Union law.<sup>25</sup> McCarthy could not rely on the Directive 2004/38/EC because of not moving to or residing in a Member State other than that of her origin and also could not rely on the direct applicability of the Treaty provisions on European citizenship since the national measure applied to her case in the main proceedings does not have the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU.<sup>26</sup>

McCarthy had a dual Irish/UK nationality. She married a Jamaican national and requested, on the basis of her status as a European citizen, a right of residence in the United Kingdom with her husband. The British authorities refused to grant Mr McCarthy a residence document. Mrs McCarthy had always lived in the United Kingdom and had never resided in Ireland.

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<sup>24</sup> See: *McCarthy*, paragraphs 44 *et seq.*

<sup>25</sup> *McCarthy*, paragraph 55.

<sup>26</sup> *McCarthy*, paragraph 49.

But since her mother had Irish nationality, she could successfully apply for the Irish passport. Mrs McCarthy had been in receipt of social benefits and therefore did not fulfil the condition of having sufficient resources. Her situation thus did not fall within the scope of application of the directive on free movement. As to the direct reliance on provisions of TFEU, the fact that Mr McCarthy was refused a residence document as the spouse of Mrs McCarthy did not deprive Mrs McCarthy of genuine enjoyment of the substance of her rights as European citizen. Mrs McCarthy can exercise her rights as Union citizens fully and effectively without the presence of her husband. The scope of application of provisions of TFEU on European citizenship is limited to those situations in which European citizens would be eroded. Because the situation of Mrs McCarthy has no link with any of the situations governed by the EU law, she could also not rely on the respective provisions of Charter if she would like.

The Court of Justice followed the above described methodology of application of EU law on European citizenship with respect to the potential application of the Charter when the link with EU law is (would be) established in *Dereci*<sup>27</sup> and *Yoshikazu Iida*<sup>28</sup> cases. In these cases the Court of Justice has continued in defining the criteria of “deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen” with respect to the facts of the cases.

In *Dereci* case the Court of Justice has pointed out that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status 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. According to the Court, the criterion is specific in character inasmuch as it relates to situations in which a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined. But, the mere fact that it might 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 Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union

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<sup>27</sup> Judgment of the Court of Justice of 15 November 2011 in a case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres*. OJ C 25, 28.1.2012, p. 20–20.

<sup>28</sup> Judgment of the Court of Justice of 8 November 2012 in a case C-40/11 *Yoshikazu Iida v Stadt Ulm*. Not published in the Official Journal of EU yet.

territory if such a right is not granted.<sup>29</sup> Court of Justice left the consideration whether the internal situations fall within the scope of Union law (leads to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status) to the court of the Member State. If the situations in *Dereci* case fall within the scope of EU law, there appears a need to measure the domestic law, falling within the scope of EU law, by the respective provisions of the Charter – respect for private and family life.<sup>30</sup>

In *Yoshikazu Iida* case the Court of Justice states that there are also very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence exceptionally cannot, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status. The common element in the above situations is that, although they are governed by legislation which falls a priori within the competence of the Member States, namely legislation on the right of entry and stay of third-country nationals outside the scope of Directives 2003/109<sup>31</sup> and 2004/38, they none the less have an intrinsic connection with the freedom of movement of a Union citizen which prevents the right of entry and residence from being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom. The Court of Justice observed that the claimant, who is a third-country national, is not seeking a right of residence in the host Member State in which his spouse and his daughter, who are Union citizens, reside, but in Germany, their Member State of origin. The claimant in the main proceedings has a right of residence under national law according to the German Government, and can in principle be granted the status of long-term resident within the meaning of Directive 2003/109. In those circumstances, it cannot validly be argued that the decision at issue in the main proceedings is liable to deny Mr

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<sup>29</sup> *Dereci*, paragraphs 66 – 68.

<sup>30</sup> For the detailed analysis of *Dereci* case, see, for example: ADAM, S. – ELSUWEGE, P.: „Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on *Dereci*“. In *European Law Review* 2012, Vol.37, Issue 2, pp. 176-190.

<sup>31</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23.1.2004, p. 44–53.

Iida's spouse or daughter the genuine enjoyment of the substance of the rights associated with their status of Union citizen or to impede the exercise of their right to move and reside freely within the territory of the Member States. The Court of Justice has recalled that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions. The same applies to purely hypothetical prospects of that right being obstructed.<sup>32</sup> Outside the situations governed by 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 and where there is no other connection with the provisions on citizenship of European Union law, a third-country national cannot claim a right of residence derived from a Union citizen. In those circumstances, the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' does not fall within the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined by reference to the rights established by the Charter.<sup>33</sup>

#### 4. CONSEQUENCES OF EXTENDING THE SCOPE OF APPLICATION OF TFEU ON EUROPEAN CITIZENSHIP ON THE BASE OF CRITERIA "DEPRIVATION OF THE GENUINE ENJOYMENT OF THE SUBSTANCE OF THE RIGHTS ATTACHING TO THE STATUS OF EUROPEAN UNION CITIZEN"

The most important consequence of the extending the scope of application of TFEU on European citizenship on the base of criteria "deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen" – extending the scope of application of the Charter, was already discussed in previous lines. However, few other consequences can be determined.

The application of the criteria "deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen" to the concrete facts of a case might result in *reverse discrimination*, which may occur in internal situations. Mrs McCarthy could not rely on the direct application of the provisions of TFEU on European citizenship because her situation could not deprive her of the genuine enjoyment of the substance of the rights attaching to the status of EU citizen only because she could exercise her rights as

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<sup>32</sup>Yoshikazu Iida, paragraphs 71-77.

<sup>33</sup>Ibid, 82.

Union citizen fully and effectively without the presence of her husband. Diego and Jessica Zambranos could rely on the direct applicability of the provisions of TFEU on European citizenship (their situation could deprive them of the genuine enjoyment of the substance of the rights attaching to the status of EU citizen) only because they could not exercise their rights as Union citizens fully and effectively without the presence and support of their parents. The fact why the Zambranos children could rely on direct applicability of TFEU provisions on EU citizenship and Mrs McCarthy could not seems to be the difference in the age of Diego and Jessica on the one side and Mrs McCarthy on the other side. The presence of Diego and Jessica on the territory of the Member State of the EU, because of being the minors, completely depends on the presence and support of their parents (third country nationals). Contrary, the presence of Mrs McCarthy on the territory of the Member State (and thus her genuine enjoyment of the substance of the rights attaching to the status of European Union citizen), because of being an adult, does not depend on the presence of her spouse (a third country national) with her. In order to be with her husband, McCarthy could not rely on the EU law on European citizenship. Because her situation do not fall within the scope of application of EU law she could not rely on the provisions of the Charter (relating to, for example, the right to respect for private and family life), as well. However, she could claim her right to family life to be protected according to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which shall apply in the internal situations falling outside the scope of application of EU law. For the individuals, like Mrs McCarthy, it can be irrelevant whether to defend the respective fundamental right according to the Charter or ECHR, but only under the condition that the meaning and the scope of application of the rights contained in the ECHR are the same like the corresponding rights contained in the Charter. In the situation when the meaning and the scope of application of the rights contained in the ECHR are narrower than the meaning and the scope of application of the corresponding rights contained in the Charter, the individuals, like Mrs McCarthy, would be subject to worse situation only because of their age. Only because of the age they cannot be deprive of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen and thus do not fall within the scope of application of European Union citizenship law and, as a consequence of that, they cannot rely on the provisions of the Charter.

The other consequence of the extending the scope of application of TFEU on European citizenship on the base of criteria “deprivation of the genuine enjoyment of the substance

of the rights attaching to the status of European Union citizen” resides in the possible resistance of the Member States to such a broad interpretation of EU law by the Court of Justice. The resistance may cause that the Member States limit their rules on the acquisition of nationality to persons born on their territory, since Member States nationality opens the door to the European citizenship. That was the case in Belgium as the reaction on the Court of Justice judgment on *Zambrano* case. The respective Belgian law on the acquisition of Belgian nationality was changed<sup>34</sup>, so that the situations such as that in *Ruiz Zambrano* case would be prevented in the future.<sup>35</sup>

## 5. CONCLUSION

The Charter of EU Fundamental Rights is binding on the Member States when they act within the scope of application of Union law. Member States are binding by the provisions of the Charter whenever the link with EU law is established. In such case, national measures, even the ones falling within the exclusive competences of the Member States, has to respect the provisions of the Charter. The Court of Justice has extended the scope of application of Articles 20 and 21 of TFEU in the way that in order the link with those provisions of the TFEU to be established no cross-border dimension is more required. The link with the Articles 20 and 21 of TFEU can be established also with respect to the purely internal situations. The link is established whenever the national measure may preclude the genuine enjoyment of the substance of the rights conferred by the status of European citizen. The application of the criteria “genuine enjoyment of the substance of the rights conferred by the status of European citizen” may cause some problems. Within the paper, the problems of reverse discrimination and resistance of the Member States to such a broad interpretation of EU law by the Court of Justice were outlined. The vagueness of

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<sup>34</sup> According to the new law, persons born in Belgium who would potentially become stateless do not acquire Belgian nationality if, owing to an administrative procedure or registration, the child would be able to obtain the nationality of his/her parent's country of origin. For the details, see, for example: EIJKEN, H. (2011), p. 720.

<sup>35</sup> To the problems relating to new methodology of application of EU law on European citizenship analysed in the paper, see, for example: KOCHENOV, D. – PLENDER, R.: “EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text” In *European Law Review* 2012, Vol.37, Issue 4, pp. 369-396. PLATON, S.: Le champ d'application des droits de citoyen européen après les arrêts *Zambrano*, *McCarthy* et *Dereci*. De la boîte de Pandore au labyrinthe de Minotaure. In *Revue trimestrielle de droit européen* 2012, Vol.48, No.1, pp. 23-52. PATAUT, E.: Citoyenneté de l'Union européenne 2011 - La citoyenneté et les frontières du droit de l'Union européenne. In *Revue trimestrielle de droit européen* 2011, Vol.47, No.3, pp. 561-576.

the criteria calls for the limitations of its use to be settled by the Court of Justice. By the interpretation of the respective provisions of EU law the Court of Justice has an enormous impact on the scope of application of the Charter to the measures of the Member States.

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