

Connecting the Dots Backwards, What Did *Ruiz Zambrano* Mean for EU Citizenship and Fundamental Rights in EU Law?

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Abstract

What was the added value of the *Ruiz Zambrano* judgment of the Court of Justice of the EU for the development of EU citizenship? And how does that affect the national level? In this contribution the case of *Ruiz Zambrano* and the subsequent case law of the Court of Justice and the Dutch courts is assessed to reveal its impact on EU citizenship and the protection of fundamental rights. The contribution shows that *Ruiz Zambrano* could be called a revolution, in the sense that irrespective of the exercise of free movement, nationals of the Member States can invoke their status of being an EU citizen. That has consequences for family reunification, and the right to reside as a family in the EU. However, the line of case law is still very limited and can be restricted on grounds of public policy and security (and public health; so far there is no case law on restriction on public health and Article 20 TFEU, but in the context of Covid-19 that might be different in the near future). Moreover, the fundamental rights narrative in the cases on Article 20 TFEU became more prominent. However, the implementation of this line of case law lies at the national level and the Dutch case law on Article 20 TFEU is therefore analysed as an example.

Keywords

Art. 20 TFEU – EU citizenship – EU Charter – national implementation – family reunification

1 Introduction

The famous late chairman, chief executive officer of Apple, Steve Jobs, stated in a commencement speech at Stanford University in 2015: “You can’t connect the dots looking forward; you can only connect them looking backwards. So you have to trust that the dots will somehow connect in your future. You have to trust in something – your gut, destiny, life, karma, whatever.”¹ The Court of Justice of the European Union (Court of Justice or Court) is a pioneer, in the sense that it creates dots, in the future, for the development of EU law, which are then reflected upon by scholars, and reacted upon by policy makers and national courts and national legislation. It connects dots backwards as well, by referring back to its previous case law, even though the reasoning of the Court of Justice and its references are not always crystal clear and its reasoning is sometimes difficult to understand.² This contribution will follow the traces back to *Ruiz Zambrano*,³ asking the question whether *Ruiz Zambrano* is a revolution or just a ‘pie in the sky’,⁴ a minor change to the field of European citizenship and fundamental rights, such as family life and the rights of the child. Did *Ruiz Zambrano* mark a real change for the concept of EU citizenship in light of the constitutionalisation of the European Union?⁵

This contribution will discuss the contribution of the *Ruiz Zambrano* judgment to the development of EU citizenship. In the analysis both EU and Dutch case law and legislation will be examined, since the significant impact of *Ruiz Zambrano* is mostly visible at the national level. The trends of case law differ in each Member State, obviously, but two recent cases on Article 20 TFEU came from Dutch courts: *Chavez-Vilchez*⁶ and *Tjebbes*.⁷ These cases also raise new questions, almost naturally, on the scope of Article 20 TFEU.

1 <https://news.stanford.edu/2005/06/14/jobs-061505/>, visited 8 June 2020.

2 *Ruiz Zambrano* is an example, in which the Court of in 7 paragraphs established a new line of case law, referring to *Rottmann*, but without a comprehensive and in-depth legal reasoning.

3 C-34/09 *Ruiz Zambrano*, EU:C:2011:124.

4 H.U. Jessorun d’Oliveira (1995), ‘Union Citizenship: Pie in the Sky?’, in: A. Rosas and E. Antola (Eds.), *A Citizens’ Europe: In Search of a New Order* (London: SAGE Publications).

5 H. van Eijken (2015), *EU citizenship and the constitutionalisation of the European Union* (Groningen: Europa Law Publishing).

6 C-133/15 *Chavez-Vilchez*, EU:C:2017:354.

7 C-221/17 *Tjebbes*, EU:C:2019:189; H. van Eijken (2019), ‘Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights’, *European Constitutional Law Review* 15(4), 714–730; P. van Elsuwege and H. Kroeze (2019), ‘Het arrest Tjebbes: de evenredigheidstoets als complexe brug tussen nationaliteitswetgeving en Unieburgerschap’, *Nederlands Tijdschrift voor Europees recht* 5–6, 166–173; K. Swider (2020), ‘Legitimizing precarity of EU citizenship: Tjebbes’, *Common Market Law Review* 57(4), 1163–1182.

2 The Judgment *Ruiz Zambrano and Its Aftermath: Starting Point of a Walk into the Woods*

In March 2011 the Court of Justice decided on what would become one of the most famous judgments of European law in its seminal *Ruiz Zambrano* judgment. A case concerning a Colombian couple, with two children, Jessica and Diego, who had been given the Belgian nationality, in accordance with the Belgian Nationality Act at that time. According to that Act every person born in Belgium who would otherwise become stateless should be granted the Belgium nationality.⁸ In its decision, the Court notably ruled that EU citizens may invoke their EU citizenship rights despite the fact that they resided in their own Member State and never exercised free movement rights, at least when ‘the genuine enjoyment of the substance of their rights’ is at stake.⁹ Was this judgment a revolution or much ado about nothing?

2.1 *Cross-Border Is No Longer a Precondition for EU Citizenship Rights*

Ruiz Zambrano confirmed and established an extra ‘route’ for EU citizens to claim their EU citizenship rights, even when they did not have a cross-border link to EU law. At that time, such situation, as *Ruiz Zambrano* was in, would by many be qualified as a purely internal situation.¹⁰ It was a very clear step from the internal market foundation to a constitutional meaning of EU citizenship. Actually, the real revolution was the case of *Rottmann*, which paved the way for the judgement in *Ruiz Zambrano*. If we re-read the conclusion of Advocate-General Maduro in *Rottmann*¹¹ it is clear that the EU law dimension of the case was at that time not evident. Maduro was of the Opinion that the case falls within the scope of EU law, and therefore under the jurisdiction of

8 On *Ruiz Zambrano* many case notes were published, amongst others: P. van Elswege (2011), ‘Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law – Case No. C-34/09, Gerardo Ruiz Zambrano v. Office national de l’emploi’, *Legal Issues of Economic Integration* 38(3), 263–276; K. Hailbronner and D. Thym (2011), ‘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’, *Common Market Law Review* 48(4), 1253–1270; H. van Eijken and S.A. de Vries (2011) ‘A New Route into the Promised Land? Being a European Citizen after *Ruiz Zambrano*’, *European Law Review* 36(5), 704–721; R. Morris (2011), ‘European Citizenship and the right to move freely: internal situations, reverse discrimination and fundamental rights’, *Maastricht Journal of European and Comparative Law*, 179–189.

9 C-34/09 *Ruiz Zambrano*, para. 42.

10 Also all intervening Member States and the European Commission argued that the situation was purely internal, see C-135/08, *Rottmann*, EU:C:2010:104, para. 37.

11 Opinion A-G Maduro in C-135/08, *Rottmann*, EU:C:2009:588.

the Court of Justice, because of the previous movement of Mr. Rottmann from Austria to Germany.¹² With regard to the substantive analysis Maduro considered that the situation of Rottmann did not regard an obstacle to one of the EU citizenship rights, since it was not linked to one of the EU citizenship rights. He states that “In this case, deprivation of nationality is not linked to exercise of the rights and freedoms arising from the Treaty and the condition laid down by the Federal Republic of Germany, which resulted in the loss of nationality in this case, does not infringe any Community rule.”¹³ However, the Court held that the situation of Rottmann did fall within the scope of EU law “by reason of its nature and its consequences”;¹⁴ it did not refer to the previous free movement of Rottmann. The Court subsequently ruled on the legitimate aim (bond between individuals and the state) and the proportionality test (interests of the citizen at stake and those of the Member State). Without going into much detail here,¹⁵ the judgment formed the first steppingstone of the new route in case law the Court of Justice took with regard to EU citizenship.¹⁶ Ever since the case of *Martinez Sala*,¹⁷ in May 1998, the Court of Justice ruled extensively on the free movement rights of EU citizens, based on Article 21 TFEU.¹⁸ *Rottmann* is the first case in which Article 20 TFEU is mentioned as an independent source of rights. In paragraph 42 of the judgment the Court of Justice refers specifically to ‘the status conferred by Article 17 EC and the rights attaching.’ The Court of Justice refers therefor not only to the previous

12 Opinion A-G Maduro in *Rottmann*, paras. 10–13.

13 Opinion A-G Maduro in *Rottmann*, para 33.

14 C-135/08, *Rottmann*, para 42.

15 G.R. de Groot and A. Seling (2011), ‘Decision of 2 March 2010, Case C-135/08, Janko Rottman v. Freistaat Bayern – Case Note II – The Consequences of the Rottman Judgment on Member State Autonomy – The European Court of Justice’s Avant-Gardism in Nationality Matters’, *European Constitutional Law Review* 7(1), 150–160; H.U. Jessurun d’Oliveira (2011), ‘Decision of 2 March 2010, Case C-135/08, Janko Rottman v. Freistaat Bayern – Case Note I – Decoupling Nationality and Union Citizenship?’, *European Constitutional Law Review* 7(1), 138–149; A. Seling (2010), ‘Case C-135/08 Janko Rottmann v. Freistaat Bayern, Judgment of the Court of Justice (Grand Chamber) of 2nd March 2010, nyr – Towards a direct “droit de regard”?’, *Maastricht Journal of European and Comparative Law* 17(4), 470–478.

16 K. Lenaerts (2015), ‘EU citizenship and the European Court of Justice’s “stone-by-stone” approach’, *International Comparative Jurisprudence* 1(1), 1–10; J. Langer, ‘EU citizenship: from the cross-border link to the genuine enjoyment-test – understanding the stone-by-stone approach of the Court of Justice’, in: J. van der Harst, G. Hoogers and G. Voerman (eds), *European Citizenship in Perspective* (Edward Elgar Publishing, 2018), 82–102.

17 C-85/96, *Martinez Sala*, EU:C:1998:217.

18 S. O’Leary (1999), ‘Putting Flesh on the Bones of European Union Citizenship’, *European Law Review* 24, 68–79; see also F.G. Jacobs (2007), ‘Citizenship of the European Union – A Legal Analysis’, *European Law Journal* 13(5), 591–610.

free movement of Mr. Rottmann – or his future free movement, but also to the *status of EU citizenship* as such. *Ruiz Zambrano* is the next step of this new line of case law, in which the Court of Justice confirmed that – irrespective of the exercise of free movement rights – EU citizens may invoke their EU citizenship rights, at least regarding ‘the genuine enjoyment of the substance of their rights’.¹⁹ We saw previous to *Ruiz Zambrano* some early traces, like the case of *Schempp*,²⁰ wherein the EU citizen who lost a benefit did not exercise his free movement right, but his former spouse did do so by moving to another Member State. With *Ruiz Zambrano*, the Court of Justice explicitly left, in specific circumstances, the criterion of a cross-border element.²¹ Moreover, in *Delvigne*²² the Court of Justice held that the Charter would provide a direct right for EU citizens to vote for the European Parliament, irrespective of whether the EU citizen exercised her/his free movement rights.²³ As Article 21 TFEU in its application had serious similarities with the other economic free movement of persons, with Article 20 TFEU a more constitutional approach is being chosen.²⁴ Although free movement remains one of the core rights of EU citizens, cases like *Delvigne* show that outside free movement also other rights are attached to Article 20 TFEU. Once within the scope of Article 20 TFEU, the Charter of Fundamental Rights is also applicable.²⁵

19 C-34/09 *Ruiz Zambrano*, para 42.

20 C-403/03 *Schempp*, EU:C:2005:446. Also in *Garcia Avello* there was no actual free movement, but there was a cross-border situation, in the sense that the EU citizens concerned were residing in another Member State than their nationality, C-148/02, *Garcia Avello*, EU:C:2003:539.

21 See also *Garcia-Avello*, in which the connection with free movement was also very limited, since only the parents had moved from one Member State to another Member State, whereas the children did never exercise their right to free movement. However as the children were Spanish nationals legally residing in Belgium, they fitted in the ‘Martinez Sala’-test.

22 C-650/13 *Delvigne*, EU:C:2015:648.

23 H. van Eijken and J.W. van Rossem (2016), ‘Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship?’, *European Constitutional Law Review* 12, 114–132; S. Coutts (2017), ‘Delvigne: A Multi-Levelled Political Citizenship’, *European Law Review* 6, 867–881.

24 F. Wollenschläger (2011), ‘A new fundamental freedom beyond market integration: Union citizenship and its dynamics for shifting the economic paradigm of European integration’, *European Law Journal* 17(1), 1–34.

25 The relationship between Article 20 TFEU and the Charter is complicated and it is well-described in N. Nic Shuibhne, ‘Union citizens and fundamental rights’, in: D. Thym, *Questioning EU citizenship* (Hart Publishing 2020), 209–243.

2.2 *Fundamental Rights as Part of Article 20 TFEU?*

Whether family life was part of the substance of rights where EU citizens may not be deprived of has been much debated after the judgment of *Ruiz Zambrano*,²⁶ which has only 7 substantive paragraphs.²⁷ In *McCarthy*, the Court of Justice held that McCarthy, having dual nationality, could not claim her EU citizenship in order to have her Jamaican partner with her in the UK.²⁸ This was clarified in 2012 in *Dereci*²⁹ where the Court held that the criterion it developed in *Ruiz Zambrano* was meant to cover only the very specific situation in which a EU citizen is actually forced to leave the European Union as a whole,³⁰ family life as such was not specifically included in the substance of the rights of EU citizens.³¹ The Court ruled that the mere fact that it might appear desirable for an EU citizen to keep his family together in the European Union is “is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted”.³² Subsequently, the Court of Justice held that the right to family life is, however, safeguarded in Article 7 of the Charter, and Article 8 of the ECHR. The Court of Justice then adds that it is up to the national court to consider “in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. If it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.”³³ In the case of *Chavez-Vilchez*,³⁴ however, the Court of Justice did connect family life and Article 20 TFEU, in the sense that Article 20 TFEU should be read in the light of family life. In that case, referred by the Dutch Administrative High Court, the Court of Justice actually ruled that to assess whether refusal of a derived right to reside for a third country national parent

26 Van Eijken and De Vries 2011.

27 N. Nic Shuibhne (2011), ‘Seven Questions for Seven Paragraphs’, *European Law Review* 36, 161–162.

28 C-434/09 *Shirley McCarthy*, EU:C:2011:277, paras 49–50; P. van Elsuwege (2011), ‘Court of Justice of the European Union European Union Citizenship and the Purely Internal Rule Revisited Decision of 5 May 2011, Case C-434/09 Shirley McCarthy v. Secretary of State for the Home Department’, *European Constitutional Law Review* 7(2), 308–324.

29 C-256/11 *Dereci*, EU:C:2011:734.

30 C-256/11 *Dereci*, para 66.

31 Van Elsuwege 2011.

32 C-256/11 *Dereci*, para 68.

33 C-256/11 *Dereci*, para 72.

34 C-133/15, *Chavez-Vilchez*, EU:C:2017:354.

would result in forcing the EU citizen to leave the European Union as such, the right to family life and the right of the child (Article 7 and 24 of the Charter) should be considered.³⁵ In *O and others*³⁶ the Court again made a small step forward, arguing that the derived right to reside is not the sole entitlement of the parent who is in blood-line, but that also a non-biological parent could derive a right to reside in order to facilitate residence and therefore use of EU citizenship' rights of the EU minor citizen. In *Chavez-Vilchez*, the Court of Justice explained more precisely how the right to family life and the rights of the child, both included in the Charter of Fundamental Rights of the EU, relate to Article 20 TFEU and the criterion of being forced to leave the territory of the European Union as a whole. Rather than the focus on the relationship between the child and the parent with the EU nationality, which was used by the Dutch Immigration Service, the focus should be on relationship of dependency between the third country national and the dependent EU citizen. In the assessment of that relationship of dependency it is important to take the right of family life and the right of the child into account. The Court of Justice therefore emphasises "it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent".³⁷ As part of the assessment whether an EU citizen is forced to leave the territory of the European Union "the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of that charter".³⁸ *Chavez-Vilchez* clearly builds upon earlier case law, and confirms the ruling in *O. and others*³⁹ that dependency is the core element in assessing a violation of Article 20 TFEU, rather than the blood relationship. Nevertheless, the loss of EU citizenship automatically affects the right to free movement, implying that there is still a certain connection with the traditional criterion of free

35 H. van Eijken and P.S. Phoa (2018), 'The scope of Article 20 TFEU clarified in Chavez-Vilchez: are the fundamental rights of minor EU citizens coming of age?', *European Law Review* 43(6), 949–970; H. Kroeze (2017), 'Belang van het kind staat centraal in de toepassing van Ruiz Zambrano', *SEW Tijdschrift voor Europees en economisch recht* 11, 483–485; F. Staiano (2018), 'Derivative residence rights for parents of Union citizen children under Article 20 TFEU: Chavez-Vilchez', *Common Market Law Review* 55(1), 225–241.

36 C-356/11 and C-357/11, *O. and S.*, EU:C:2012:776, para 55.

37 C-133/15 *Chavez-Vilchez*, para 70.

38 C-133/15 *Chavez-Vilchez*, para 70.

39 C-356/11 and C-357/11, *O. and S.*

movement. As a result of *Chavez-Vilchez*, the Dutch government changed its policy on cases concerning so-called 'Art. 20 TFEU-claims', which was much more restrictive before the case of *Chavez-Vilchez*.⁴⁰

In the case of *Tjebbes*⁴¹ the Court of Justice continued the fundamental rights narrative it included since *Chavez-Vilchez*. That case did not concern residency rights as such, or family life, but concerned a Dutch provision in the Act on Nationality which provided that the Dutch nationality was automatically revoked in case a Dutch person with a second nationality resides for more than ten years outside the Netherlands and the EU.⁴² This automatic withdrawal could be prevented if the person at stake would request a passport in the meanwhile, reside for one year in the European Union or requested a national court to declare for law her or his nationality. According to the Court of Justice that Member States may have a legitimate aim to revoke the nationality, but an individual proportionality test should be possible. The Court of Justice ruled that within that proportionality test the fundamental rights should be taken into account: "As part of that examination of proportionality, it is (...) for the national courts to ensure that the loss of nationality is consistent with the fundamental rights guaranteed by the Charter (...) specifically the right to respect for family life as stated in Article 7 of the Charter, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of the Charter."⁴³ Although *Tjebbes* is not about residency and family life as such, it is striking that the Court of Justice continues its fundamental rights narrative in *Tjebbes*. In *Chavez-Vilchez* the Court of Justice refers to the Charter in the assessment of Article 20 TFEU. It rules that national authorities have to take the fundamental rights into account in their assessment of whether there is a violation of Article 20 TFEU. In *Tjebbes*, the Court of Justice places the fundamental rights within the proportionality test. That seems to be more logical, in line with the case law on the four freedoms, where fundamental rights may serve as a legitimate aim and need to be assessed in justifying a restriction to free movement.⁴⁴ The different role of fundamental rights in the Court's assessment of both cases is not explained yet. Perhaps because in *Chavez-Vilchez* an individual needs protection from being removed from the territory, whereas in

40 Van Eijken and Phoa 2018, 949.

41 H. van Eijken (2019) 'Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights', *European Constitutional Law Review* 15(4), 714.

42 See Article 15 Dutch Act on Nationality.

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

44 C. Barnard (2019), *The Substantive Law of the EU: The Four Freedoms*, Sixth edition, (Oxford: Oxford University Press), 174.

Tjebbes, the individuals want to restore a right that was lost? Do fundamental rights play a more dominant role in the primary assessment (whether there is a violation of Article 20 TFEU) for an individual who faces a risk to lose his or her right to reside in the EU than when an EU citizen loses that same right, while having a permanent residency outside the European Union? That could be the underlying reasoning. Even though both situations fall under Article 20 TFEU, in *Chavez*-situations the residency right is lost, whereas in *Tjebbes*-situations it becomes more difficult to re-establish residency in the EU. As a consequence, fundamental rights play an important role in both a Charter-conform interpretation of Article 20 TFEU and in the examination of the proportionality test.⁴⁵

3 From *Ruiz Zambrano* to *Tjebbes*: Traces Back? What Did It Bring?

In almost ten years of *Ruiz Zambrano*, the case law on EU citizenship brought at least two significant points, that should be mentioned. First and foremost, *Rottmann* and more explicitly *Ruiz Zambrano* established Article 20 TFEU as a self-standing right for EU citizens.⁴⁶ Even though this provision can only be invoked in very specific circumstances, it remains an important deviation from the case law at that time. Whereas there was a huge pile of cases on Article 21 TFEU, the right to free movement, an EU citizen may now also invoke her/his EU citizenship, irrespective of the exercise of free movement rights, *Rottmann* and *Ruiz Zambrano* revealed the protection provided by art. 20 TFEU.

The second achievement of *Ruiz Zambrano* is the fact that due to this new line of case law, the fundamental rights narrative was introduced in Article 20 TFEU in subsequent case law. In *Rottmann* the Court of Justice does not mention human rights as a basis to challenge the withdrawal of nationality, but in *Tjebbes*, following *Chavez-Vilchez*, the Court of Justice includes the Charter explicitly in the proportionality test. It can be argued that the Court of Justice should have included fundamental rights in the proportionality test also in *Rottmann*.⁴⁷ At the same time, *Rottmann* paved the way to subsequent case law that show that the fundamental rights and the Charter provisions on family life and the rights of the child are there to stay in the case law on EU citizenship. In the case of *R.H.* the Court of Justice also states clearly: “In that regard,

45 Van Eijken and Phoa 2018.

46 See again also the contribution of M. Van den Brink who questions the added value of Article 20 TFEU to Article 21 TFEU.

47 D. Kochenov (2010), ‘Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010, not yet reported’, *Common Market Law Review* 47(6), 1831–1846.

it must be pointed out that the assessment of an exception to a derived right of residence flowing from Article 20 TFEU must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter of Fundamental Rights of the European Union.”⁴⁸ In *Rendón Marín, C.S.* and in *K.A.* the Court also explicitly included the fundamental rights (Article 7 and 24 of the Charter) in its’ judgements on Article 20 TFEU.⁴⁹

From a step back in *Dereci* the Court of Justice takes two steps ahead in *Chavez-Vilchez* with regard to the protection of fundamental rights of EU citizens. We had to step from *Dereci* to *Chavez* in order to establish with certainty that family life was included in Article 20 TFEU. In *Carpenter*⁵⁰ the right to family life was considered in the examination of whether there was a restriction of free movement of services. In *B. and O.*⁵¹ the question was on family life and non-economically active free movement. So, although it started in the internal market, we see that EU citizenship created also a line of case law outside the scope of economic free movement, as a more constitutional concept. Hence, from the internal market roots of European citizenship, that leaned much on the existing case law of the four freedoms, two elements are no longer conditional to invoke rights as an EU citizen: the cross-border element and economic link with the internal market.⁵² Fundamental rights, at the same time, are increasingly important.

3.1 *Limitations to the Scope of Article 20 TFEU*

At the same time, one should not overestimate the scope of Article 20 TFEU. Only in very specific circumstances it is possible to rely on Article 20 TFEU, i.e. if an EU citizen would be forced to leave the European Union’s territory. Moreover, even in this situation, Article 20 TFEU does not provide for an absolute derived right to reside: a Member State may restrict also Article 20 TFEU and refuse a derived right of residence if the third country national poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.⁵³ Such decision should be based on the personal conduct

48 C-836/18, *RH*, EU:C:2020:119, para 47.

49 C-304/14 *C.S.*, EU:C:2016:674, paras 48–49; C-165/14 *Rendón Marín*, EU:C:2016:675, para 85; C-82/16 *K.A. and Others* (Family reunification in Belgium), EU:C:2018:308, para 71.

50 C-60/00 *Carpenter*, EU:C:2002:434.

51 C-456/12 *B & O*, EU:C:2014:135.

52 P. De Sousa (2011), ‘Catch Me If You Can – The Market Freedoms’ Ever-Expanding Outer Limits’, *Eur. J. Legal Stud.* 4, 149.

53 C-165/14 *Rendón Marín*; C-82/16 *K.A. and Others*, para 92; C-304/14, *C.S.*, para 36; P.J. Neuvonen (2017), ‘EU citizenship and its “very specific” essence: Rendón Marín and CS’, *Common Market Law Review* 54(4), 1201–1220.

of the EU citizen at stake and may not be based purely on a criminal conviction. Neither may this be used as a preventive measure for Member States to refuse certain third country nationals. The Court held in *Rendón Marín, C.S.* and in *K.A.* that third country nationals may be refused a residency right, even if they have such a derived right based on Article 20 TFEU. In *Rendón Marín* the Court of Justice interpreted Article 20 TFEU by analogy to Article 21 TFEU and Article 27 of Directive 2004/38, which is, in principle, not applicable to Article 20 TFEU.⁵⁴ As the Court of Justice held on several occasions and as the Directive defines itself, the Directive, including Article 27, applies only to EU citizens and their family members who used their free movement rights (see Article 3 of Directive 2004/38).⁵⁵ It is interesting to see how the Court of Justice seeks analogy with Directive 2004/38, which might also be relevant for other provisions of Directive 2004/38, such as Article 35, which prohibits “abuse of rights or fraud, such as marriages of convenience”.

The Court puts also limitations on the analogy between Article 20 TFEU and Directive 2004/38. In the Spanish case of *RH*⁵⁶ the Court ruled that having sufficient means should not be a precondition to Article 20 TFEU. The case concerned a Moroccan national, R.H., who was married with a Spanish national, both adults, who had never exercised the freedom of movement within the European Union. The couple lived with the father of the Spanish national. The Spanish authorities refused a residency right to R.H., since his Spanish partner did not have sufficient means. The question rose whether the obligation of Article 7 of Directive 2004/38, to have sufficient resources in order to be allowed to reside for more than three months in another Member State can be imposed in similar vein to an Article 20 TFEU-situation. The Court of Justice held this obligation inapplicable in this situation, since it would render against the essence of Article 20 TFEU to refuse a derived right to reside in a Member State, because a dependent EU citizen consequently would have to leave the territory of the European Union as a whole.⁵⁷ Hence, the stricter condition for a residency right that follows from Article 7 of the Directive cannot be imposed analogically to Article 20 TFEU.

However, at the same time the Court of Justice in *R.H.* confirmed, as it ruled in *K.A.* previously that Article 20 TFEU applies basically only to a relationship between minors and adults, and is not, in principle, applicable to two adults.

54 C-165/14 *Rendón Marín*, para 82. In para. 82 the Court refers to para 58 in the same judgment. In paragraph 58 the Court assesses the situation under Article 21 TFEU and the derogations of Directive 2004/38.

55 See e.g. C-127/08 *Metock and others*, EU:C:2008:449; C-94/18 *Chenchoolia*, EU:C:2019:693.

56 C-836/18, *RH*.

57 C-836/18 *RH*, para 50.

The Court held that “unlike minors, particularly if they are infants, an adult is, in principle, able to lead a life independent of the members of his or her family”. Therefore Article 20 TFEU only applies in such situation in “exceptional cases, where, having regard to all the relevant circumstances, there could be no form of separation of the individual concerned from the member of his or her family on whom he or she is dependent”.⁵⁸ Hence, Article 20 TFEU provides extra protection for those who would otherwise not be able to rely on EU law, including the rights from the Charter of Fundamental Rights. Nevertheless, there are limitations, in analogy with Article 21 TFEU and Directive 2004/38. The limitations to Article 20 TFEU do not include all conditions that are laid down by Directive 2004/38, as applicants do not need to show they have sufficient means, as *R.H.* shows.⁵⁹ All in all, we see that Article 20 TFEU extended the scope of protection, but there is also a fragmented new area created, in which it is unclear how Article 20 and Article 21 TFEU merge.

4 Connecting the Dots Back to the National Level: What Did *Ruiz Zambrano* Bring for Dutch Case Law?

Cases on EU citizenship and residency are day-to-day practice for national courts. Although most literature focusses on the Court of Justice, it is important and relevant to assess national case law, resulting from *Ruiz Zambrano*. Almost every case on EU citizenship is a preliminary reference, meaning that it is usually an EU citizen who brought up an EU citizenship argument in national proceedings and a national court that doubted on the interpretation and referred therefore to Luxemburg. Some cases and issues that arose in the Dutch national judicial context are highlighted in this contribution.⁶⁰

Almost immediately after the ruling of the Court of Justice in *Ruiz Zambrano* the first case in which a third country national invoked Article 20 TFEU was decided by a Dutch District Court.⁶¹ In many cases before Dutch courts there was an issue of broken families, with one Dutch and one third country national parent. Frequently, the Dutch parent was not or not closely involved in taking care of the Dutch child, whereas the third country national was living alone with the minor Dutch national. In the many subsequent cases, the Dutch

⁵⁸ C-82/16 *K.A.*, para 65; C-836/18 *RH*, para 56.

⁵⁹ C.A. Groenendijk (2020), ‘HvJEU 27 februari 2020, C-836/18 (RH) EU:C:2020:119’, *JV* 2020/61, 441.

⁶⁰ The author made a selection of cases from the public website rechtspraak.nl.

⁶¹ District Court The Hague, 28 March 2011, NL:RBSGR:2011:BQ0062.

policy with regard to Article 20 TFEU was challenged. The policy of the Dutch Immigration Service, accepted by the Supreme Court and the Council of State, held that in a situation in which a Dutch parent was able to take care of the minor EU citizen, the third country national parent was not entitled to reside based on Article 20 TFEU. Even in extreme cases in which the EU minors had to reside in a foster home, for a limited period of time, the third country parent was not granted a derived residency right. According to the policy guidelines the two situations in which it would be assumed that the Dutch parent was unable to take care of the child was 'in detention or shows that custody of the child cannot be awarded to him/her.' This line of case law eventually led to a preliminary reference to the Court of Justice, which was the case of *Chavez-Vilchez*.⁶² After *Chavez-Vilchez* it was clear that an examination of the relation between the third country national and the minor EU citizen was required rather than assessing whether the Dutch parent was *de facto* able to care for the minor EU citizen.

4.1 *The Relationship of Dependency*

The Dutch District courts apply *Chavez-Vilchez* in many cases, in which different circumstances are tested before the courts. A crucial issue is the assessment of dependency, i.e. whether the care is marginal or whether there is a real relationship of dependency. Another point raised in Dutch courts is the question of whether a relationship of dependency can be present when the EU citizen is an adult, but might still be dependent on her/his third country national parent. The District Court in The Hague⁶³ ruled that *Chavez-Vilchez* only applies for minor children-parent relations, so Article 20 TFEU is not applicable for other relations, even if there is a dependency to a certain extent.⁶⁴ In another case the District court held that there is not sufficiently proved that a relation of dependency exist for an adult EU citizen, who still reside with his third country national parent and who held to be dependent because of a diagnosis of autism. In that specific case the District Court held that the EU citizen concerned did not submit sufficient proof of his dependency since the reports submitted were out-dated.⁶⁵ In the light of *K.A.* and *H.R.* this seems in line with EU law, but it is important to keep in mind that the Court of Justice left

62 On the line of case law in the Netherlands after *Ruiz Zambrano*: see FIDE report 2013.

63 In the Netherlands migration cases are dealt with formally by the District Court The Hague, although the District court that handled the case may be seated elsewhere in the Netherlands. Therefore, formally all the cases are from the same District court, but in practice the cases are from one of the 11 District courts in the Netherlands.

64 District Court The Hague, 16 April 2019, NL:RBDHA:2019:3850, para 8.

65 District Court The Hague, 12 July 2019, NL:RBDHA:2019:7037.

the possibility open, in extreme circumstances, that two adults could have a relation of dependency. One might think of an elderly EU citizen and a third country national who is the primary carer in a specific situation.

Another interesting question in Dutch case law relates to chain-dependency. In two other cases it was claimed that the sibling of a Dutch (and therefore EU) citizen should also have a derived right to reside in the EU, just like their third country national mother. In one case it concerned a mother with the Thai nationality, who resided in the Netherlands, because she had a Dutch minor child residing in the Netherlands. Her other children, all with the Thai nationality, requested also for such a visa, because they would be dependent on their Thai mother. They argued that if they would not be allowed to reside in the Netherlands, their mother would be forced to return to Thailand, with their Dutch sister. The second case concerned a family with a Serbian mother and a child, with the Serbian nationality, with a Dutch father and two Dutch children – the two children got the Dutch nationality because they were born after their father naturalized. The mother with the Serbian nationality had a derived right to reside in the Netherlands based on *Chavez-Vilchez*/Article 20 TFEU, the Serbian minor child did not have the right to reside on the basis of Directive 2004/38, because she (or her parents) did not exercise their free movement rights. Therefore, she claimed a right to reside in the Netherlands based on the fact that if she had no residency right her mother would be forced to leave the European Union, to Serbia, and the Dutch children would consequently follow their mother. In both cases the District court held that *Chavez-Vilchez* should not be extended to siblings, in this context.⁶⁶ The relation of dependency has to be a direct relation, and not as in these cases a chain-dependency. According to the District Court *Chavez-Vilchez* is not applicable to this situation, because chain-dependency was not at stake in that case. Moreover, according to the District Court, the applicant is not a minor EU citizen. As a minor third country national she is unable to invoke Article 20 TFEU, since only EU minor nationals may do so. That reasoning is quite blunt in the sense that there could still be a derived right to reside, as long as the relationship of dependency is proved. The Court of Justice did not rule on such chain-dependency situation, but that does not mean that it cannot fall under Article 20 TFEU.

In the context of the relation of dependency it is not necessary that the third country national parent proves he is the biological parent of the minor EU citizen. In a specific Dutch case concerning this situation, the Nigerian father acknowledged the Dutch child one month before the application for a derived

66 District Court The Hague, 25 February 2020, NL:RBDHA:2020:2352; see also District Court The Hague, 31 October 2018, NL:RBDHA:2018:13277.

right to reside. His main residency was not at the same place as the mother and the child and he was not the biological father. According to the immigration service those facts were decisive to refuse a residency rights. However, statements of the school showed that the father was involved in almost any contact with the school (birthday parties, conversations with the teachers and so on). Therefore, the court ruled that the immigration service had to decide again, taking all elements into account.⁶⁷ Another case concerned a Moroccan mother, who lived with her four children in Morocco, while her Dutch husband resided in the Netherlands. When she was in the Netherlands (on a visa) with her children she requested residency based on *Chavez-Vilchez*. For two of her children the District Court did not accept a relationship of dependency, since one child was an adult and the other was her grandchild. For her other two children the District Court held that she was indeed their primary carer in Morocco, in also in the Netherlands, while living there with the two Dutch children. Moreover, there were personal testimonies that both parents brought their child to school, and both were thus involved in taking care of the child. Consequently, the District Court held that a more comprehensive examination was required to assess the relation of dependency and that the claim on the basis of Article 20 TFEU could not be refused because of the potential role of the Dutch father in the family.⁶⁸ In another case, the District Court confirmed that a derived right to reside could be rejected by the Dutch Immigration Service. That case concerned a mother with the Surinam nationality, who lived with her 11-year old son with the Dutch father in the Netherlands. The District court held in that case the preference of the son that his mother resides in the Netherlands is not sufficient to argue that he will be forced to leave the territory of the European Union as a whole. According to the District Court both parents take care of the son, but there is no relation of dependency, since the father is able and willing to take care of their Dutch son.⁶⁹ The District Court seems to refer to *Dereci* by ruling that the fact that it is desirable for the minor EU citizens to live with his mother is not sufficient to grant a right to reside to the mother. According to the District Court the third country national did not prove sufficiently that the relationship between her and her son is a dependency relation. One may doubt whether the District Court was not too strict in his judgment, in the light of *Chavez-Vilchez*. The fact that the father is able and willing to take care is not enough, at least, to come to the conclusion that the mother should not be granted a derived right to reside.

67 District Court The Hague, 19 September 2019, NL:RBDHA:2019:11870.

68 District Court The Hague, 9 September 2019, NL:RBDHA:2019:10085.

69 District Court The Hague, 9 April 2020, NL:RBDHA:2020:3362.

4.2 *Detention and the Relationship of Dependency and Public Policy*

To assess the relationship of dependency certain circumstances might be important factors to take into account. When the parent at stake is in detention, it is more difficult to prove that there is indeed a relationship of dependency. This issue led to a number of cases concerning a third country national parent in detention and the question whether *Chavez-Vilchez* can be invoked, against, mostly, an entry ban of the third country national. The national courts assess whether the third country national parent performs substantive care, and not marginal care tasks. In one case an appeal on Article 20 TFEU was rejected because the third country national father was only very little time present in the lives of his young children, because he was in detention and in a drugs clinic for long periods and several times.⁷⁰ Even more clear, the District Court held that in the situation wherein the third country national father is in detention, and is convicted for 19 years imprisonment, and his children reside with other persons who take care of them (respectively their grandparents, his ex-spouse and his twin of 14 years old live in an institution), no relation of dependency is present.⁷¹ Another case concerned a third country national father who was sentenced for 12 years imprisonment in Germany, while his Dutch son was at that time 1 year old. According to the District Court the fact that his son was very young at the moment the father was in detention is ground to believe that there is no relation of dependency between the father and the Dutch child, in the sense of Article 20 TFEU. The fact that the third country national father was sentenced for 12 years in prison in Germany for being active in an international drugs organisation was taken into account in the ruling. Moreover, the District Court assessed whether the fact that both the Dutch mother as well as the minor EU citizen are traumatized would lead to the conclusion that they would both be forced to leave the European Union, when the father would go back to Morocco. In that context the District Court also considered Article 8 ECHR, but believed the mother and son could also live in Morocco.⁷²

Another case, not concerned with detention but with public policy, is a case of a third country national, who is refused a refugee status, because he was considered to have committed crimes against humanity (the so-called 1F status). Article 1F of the Geneva Convention excludes persons from a refugee status if there are serious reasons to consider that they have committed serious crimes, such as a crime against peace, a war crime, or a crime against humanity. He was,

⁷⁰ District Court The Hague, 20 April 2020, NL:RBDHA:2020:3686.

⁷¹ District Court The Hague, 28 June 2019, NL:RBDHA:2019:6651.

⁷² District Court The Hague, 11 June 2019, NL:RBDHA:2019:6187.

however, allowed to stay in the Netherlands because of Article 3 ECHR and the principle of non-refoulement. The District Court held in that case that he cannot rely on *Chavez-Vilchez*, since he still is allowed to reside in the Netherlands. Other than in the case *Rendón Marin*, the third country national father did not have the sole care and exclusive custody over his child.⁷³ Moreover, even if he in the future has to leave the Netherlands, it is not obvious that his minor daughter would be forced to leave the European Union, since she could also reside with her mother.⁷⁴ The other children (three Dutch sons) are adults living on themselves, and do therefore not fall, at least so it seems, implicitly from the judgment, in the scope of *Chavez-Vilchez* as their situation is not considered. If the father could rely on Article 20 TFEU again, the limitation of public policy and security could limit his possibility to have a derived right to reside. It would be not very logical if Article 20 TFEU would grant a right to reside, which is denied by Article 1F of the Geneva Convention, since that would undermine the system of the Geneva Convention. The mere fact, however, that someone is qualified under 1F status, would not automatically mean that the right to reside as an EU citizen or family member can be restricted.⁷⁵

4.3 *Residency Right in Another Member State*

There are also a couple of cases on third country nationals with a Dutch child, who have a right to reside in another Member State, but seek to obtain residence in the Netherlands. A remarkable case is the case in which the third country mother had a residency permit/entitlement to reside in Germany, while her Dutch husband (naturalized after residing as an Iraqi refugee in the Netherlands) and her Dutch children were living in the Netherlands. It is unclear why the mother based on the Dublin Regulation was granted a residency right in Germany and not in the Netherlands, but she only had the right to reside in Germany.⁷⁶ In another case, a third country national had a residency right in Spain, while her children were residing in the Netherlands. In both situations the District courts held that the Dutch child was not forced to leave the EU territory as a whole, since the children at stake could reside with their third country national parent in another Member State of the EU, and therefore a derived right to reside in the Netherlands was not granted to the

73 On this point: “exclusive custody thus equals dependency”: H. Kroeze (2019), ‘The Substance of Rights: New Pieces of the Ruiz Zambrano Puzzle’, 44 *European Law Review*, 238, 244.

74 District Court The Hague, 21 May 2019, NL:RBDHA:2019:5278, para 14.

75 See also C-331/16 and C-366/16 *K. and H.F.*, EU:C:2018:296.

76 District Court The Hague, 6 February 2020, NL:RBDHA:2020:1203.

third country national parent.⁷⁷ These cases are remarkable, because it creates a legal limbo in which the minor EU citizen is indeed not forced to leave the European Union as a whole, but at the same time residing in another Member State under Article 21 TFEU would require to have sufficient means. What if those means are not present? Would than Article 20 TFEU be relevant again?

4.4 *Withdrawal of the Dutch Nationality*

An important case in the Netherlands is the case of *Tjebbes*, a reference of the Dutch Council of State, concerning the automatic withdrawal of nationality after not being resident in the Netherlands, or another Member State of the EU, for a period of ten years. It remained possible to stop the continuation of that period, by, amongst other possibilities, requesting a Dutch passport. The final decision of the Dutch Council of State in *Tjebbes* took a while, but it was not surprising that the Council of State ruled that automatic withdrawal should be accompanied with a personal proportionality test.⁷⁸ According to the Council of State Article 20 TFEU is directly applicable by (former) EU nationals who lost their Dutch nationality and it is also the legal basis for the authorities to perform a proportionality test. It has been debated whether *Tjebbes* and the proportionality test would also apply to the loss of the Dutch nationality, for the reason that the citizen at stake acquired voluntarily a foreign nationality. On 20 May 2020 the Council of State ruled that it indeed considered that also in such a situation a personal proportionality test should be possible.⁷⁹ The argument of the Dutch government that by voluntarily acquiring a foreign nationality, an active decision is made by the citizen, which would, according to the government, fall outside the scope of Article 20 TFEU, was rejected by the Council of State. The wording of the Court of Justice in *Rottmann* and in *Tjebbes* are more generally formulated. The argument that both *Rottmann* and *Tjebbes* would only apply in a very specific situation is therefore not sound. *Tjebbes*, building upon *Rottmann* and *Ruiz Zambrano*, created a legal path for Dutch nationals to challenge the Dutch Act on Nationality, which was until then not an option. *Tjebbes* is also applied in cases concerning terrorism and the withdrawal of nationality.⁸⁰ Because of the nature and consequences of such withdrawal the situations fall under Article 20 TFEU and, therefore, also the Charter is applicable. In that specific judgement, the Council of State held that the withdrawal of the Dutch nationality was unlawful because it violated

77 District Court The Hague, 5 September 2019, NL:RBDHA:2019:10224.

78 Council of State, 12 February 2020, ECLIL:RVS:2020:423, para 11.1.

79 Council of State, 20 May 2020, NL:RVS:2020:1270.

80 Council of State, 17 April 2019, Case 201806107/1/V6, NL:RVS:2019:990, para 8.1.

Article 47 of the Charter.⁸¹ As a consequence of *Tjebbes*, the Council of State examined the compatibility of the decision to revoke the Dutch nationality with the Charter.⁸²

5 Conclusion: Is *Ruiz Zambrano* a Revolution or Much to Do about Nothing?

Almost ten years after *Ruiz Zambrano* it is fair to define this judgment as a revolution. It opened the door to a whole new line of case law, which broadened the scope of EU law. Consequently, the scope of application of the Charter of Fundamental Rights was extended to apply to more situations too. Even though, the scope of application of Article 20 TFEU is limited to very specific circumstances, Article 20 TFEU also includes now the right to family life and the rights of the child. At least, national authorities have to take these fundamental rights into account when assessing Article 20 TFEU. As a consequence, parents who did not have a right to reside under the Article 21 TFEU could actually have a derived right on ground of Article 20 TFEU and EU law. The debate is far from over, as case law at the national level shows that there are many cases, all with their own specific circumstances and lots of new questions that remain yet unanswered. To quote Sharpston: “when citizens move, they do so as human beings, not as robots. They fall in love, marry and have families.”⁸³ Even if they never moved, families live like human beings, and that means that this line of case law will be dynamic, as the relations of citizens are. National case law shows that the questions on the relationship of dependency and the right of the child and family life are in each case different and the outcome of each case depends on factual and emotional arguments. To assess whether there is a relation of dependency between the third country national parent and the EU (minor) citizen is therefore not an easy task for authorities and national judges.

All in all, *Ruiz Zambrano*, or perhaps actually *Rottmann*, paved the way for EU citizens to rely on their rights as EU citizens, also outside the scope of free movement. It meant that a new path of case law was made possible, which is very lively in the Member States, at the national courts and the National Immigration Services. It released the link between the internal market and EU citizenship, since both the economic link and the cross-border element were

81 Council of State, 17 April 2019, Case 201806107/1/V6, NL:RVS:2019:990, para 8.1.

82 Van Eijken (2019).

83 Opinion A-G Sharpston in C-34/09, *Ruiz Zambrano*, EU:C:2010:560.

untied. It gave also a boost to fundamental rights, especially the right to family life and the rights of the child, which can also be relied on in an Article 20 TFEU situation. Of course, the impact could have been broader or more significant, since the scope of Article 20 TFEU is still limited to those situations in which an EU citizen is so dependent of the third country national that she/he will be forced to leave the European Union as a whole. As Dutch case law shows, this is a precarious line of reasoning and is difficult to assess. Each case is very particular with very specific circumstances, and that is why it is important not only to connect the dots backwards in EU case law, but also follow closely what national courts decide on Article 20 TFEU. This contribution argued that *Ruiz Zambrano* is a revolution, but it is still a nuanced one, it left and still leaves questions unanswered, and therefore the national case law is important to follow. It is a revolution, because it widened the scope of EU law and therewith the scope of protection of fundamental rights on account of EU law. It fuelled national case law on residency rights, in which the real fine-tuning takes place. At the same time, one should keep in mind that Article 20 TFEU is still limited to relationships of dependency and that even in such situation restriction on ground of public order (and security and public health) can be imposed.

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