

# The scope of EU Law in recent ECJ case law: reversing ‘reverse discrimination’ or aggravating inequalities?\*

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**Summary:** I. Introduction: reverse discrimination, inherent in EU law? 1. Link with EU law. 2. Reverse discrimination.—II. Recent ECJ case law: attempts at curing the disease? 1. Overview. 1.1. *Ruiz Zambrano*: new approach towards reverse discrimination. 1.2. *McCarthy*: not reaping the consequences? 1.3. *Dereci and Others*: consolidating the narrow approach. 2. Limited evolution only.—III. Assessment: recent ECJ case law provides no solution. 1. Perverse incentives for the Member States. 2. Illustration: 2011 restriction of Belgian immigration laws. 3. Counter-productive consequences.—IV. Solutions. 1. EU legislator. 2. National constitutional norms.—V. Conclusion.

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**Abstract:** ‘Reverse discrimination’ is one of the most blatant and persistent forms of discrimination in the EU. In recent cases, the European Court of Justice (ECJ) seems minded to combat the gravest instances of reverse discrimination, by interpreting EU law more broadly than it has traditionally done. My paper shows that the ECJ’s innovative interpretation, while driven by noble motives, is not a step in the right direction because it entails new incentives for the Member States to introduce or consolidate instances of reverse discrimination. The paper explores alternative avenues for curing reverse discrimination, namely amending EU legislation, or using national constitutional provisions to solve the problem. The paper concludes that the responsibility for solving the problem of reverse discrimination lies first and foremost with the EU legislator and the authorities of the Member States, and not with the ECJ.

**Keywords:** EU citizenship, Reverse discrimination, European Court of Justice.

**Resumen:** La «discriminación inversa» representa una de las formas de discriminación más flagrante y persistente en la Unión Europea. En recientes sentencias, el Tribunal de Justicia de la Unión Europea (TJUE) parece decidido a combatir los ejemplos más graves de discriminación inversa aplicando una interpretación más extensiva del Derecho de la Unión Europea que su línea de razonamiento tradicional. Mi contribución muestra que la interpretación innovadora del TJUE, pese a los nobles motivos que la animan, no constituye un avance en la dirección

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*correcta porque proporciona nuevos incentivos a los Estados Miembros para introducir o consolidar casos adicionales de discriminación inversa. El artículo explora líneas alternativas para corregir la discriminación inversa, a saber, la enmienda legislativa o el recurso a disposiciones de rango constitucional. La conclusión es que la responsabilidad de resolver el problema de la discriminación inversa corresponde, ante todo, al legislador europeo y a las autoridades de los Estados Miembros, no al TJUE.*

**Palabras clave:** *Ciudadanía de la Unión Europea, discriminación en sentido inverso, Tribunal Europeo de Justicia.*

## I. Introduction: reverse discrimination, inherent in EU law?

### 1. Link with EU law

According to settled case law the provisions on EU citizenship<sup>1</sup> “cannot be applied to activities which have no factor linking them with any of the situations governed by [EU] law and which are confined in all relevant respects within a single Member State”.<sup>2</sup> It follows that, according to the traditional approach, these provisions can only apply to situations presenting a link with EU law and this link is interpreted, moreover, as a link with two or more specific Member States. The EU citizenship provisions are not applicable, by contrast, to situations of which all relevant elements are linked to one Member State only.

A link with two or more specific Member States is most commonly provided by the fact that an EU citizen has exercised his right to free movement by moving from his home Member State to another Member State and has taken up residence in the latter Member State. Accordingly, the EU citizen concerned is entitled to claim in that Member State the rights conferred by EU law on EU citizens and their family members. Once the right to free movement is exercised, an EU citizen may also rely on EU free movement law against his home Member State.<sup>3</sup> Exceptionally, the Court has even ac-

<sup>1</sup> See Part Two of the TFEU on “Non-discrimination and Citizenship of the Union” (Articles 18-25 TFEU).

<sup>2</sup> See e.g. ECJ, Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, para. 33.

<sup>3</sup> See e.g. ECJ, Case C-192/05 *Tas-Hagen and Tas* [2006] E.C.R. I-10451; ECJ, Case C-370/90 *Singh* [1992] E.C.R. I-4265. For a critical discussion of this case law, see TRYFO-NIDOU, A., “Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach”, *European Law Journal*, 15, 2009, pp. 634-653.

cepted that EU citizens fell within the scope of EU law, despite the fact that they had never left their Member State of residence. In *Zhu and Chen*, the fact that the EU citizen concerned possessed the nationality of a Member State other than her Member State of residence provided a sufficient link with EU law.<sup>4</sup> In one case, the Court even considered that EU law was applicable because the spouse of an EU citizen had exercised her free movement rights, unlike that EU citizen himself.<sup>5</sup> All the same, it should be clear that in the cases just mentioned a clear link with two different Member States was present. Precisely this link was relied on by the Court in order to consider the situation as falling within the scope of EU law.

## 2. Reverse discrimination

The main consequence of this traditional case law is that only EU citizens whose situation is characterized by a sufficient inter-State element enjoy the rights conferred by EU law on EU citizens and their family members. Conversely, EU citizens who find themselves in a purely internal situation, because their situation does not present a link with two or more specific Member States, cannot rely on these rights.<sup>6</sup> This is clearly illustrated by the *Morson and Jhanjan* case,<sup>7</sup> in which the ECJ held that two Dutch nationals working in the Netherlands had no right under EU law to bring their parents, of Surinamese nationality, into the country to reside with them. As nationals working in their own Member State “who had never exercised the freedom of movement within the EU”,<sup>8</sup> their situation was to be regarded as purely internal.<sup>9</sup> This case was obviously decided before the introduction of EU citizenship, but its *rationale* remained valid afterwards.

Consequently, the traditional approach followed in the case law can give rise to instances of “reverse discrimination”, *i.e.* EU citizens who find

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<sup>4</sup> ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925, para. 19.

<sup>5</sup> ECJ, Case C-403/03 *Schempp* [2005] E.C.R. I-6421, paras 22-25.

<sup>6</sup> See CRAIG, P. and DE BÚRCA, G., *EU law. Text, Cases, and Materials*, Oxford University Press, Oxford, 2007, 4th ed., pp. 782-783.

<sup>7</sup> ECJ, Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] E.C.R. 3723.

<sup>8</sup> *Ibid.*, para. 17.

<sup>9</sup> The situation in these cases should be contrasted with the one at hand in ECJ, Case C-370/90 *Singh* [1992] E.C.R. I-4265. In that case, an Indian national had married a British national and travelled with her to Germany, where they had both worked for some years before returning to the UK. It was decided that Mr. Singh could claim the right under EU law to join his spouse in the UK because, through the period of working activity in another Member State, the EU legislation on the free movement of persons had become applicable.

themselves in a purely internal situation being treated less favourably than EU citizens who can demonstrate a sufficient link with EU law.<sup>10</sup> The reason is that EU citizens in a purely internal situation cannot rely on the rights conferred by EU free movement law, but only on the possibly less favourable rights conferred by the national law of their Member State of residence. For instance, static EU citizens, who have never moved between Member States, cannot normally rely on the family reunification rights conferred by EU law, but only on possibly less favourable national provisions concerning family reunification. Instances of reverse discrimination do not infringe the EU principle of non-discrimination because the latter is not applicable to purely internal situations.

Accordingly, reverse discrimination appears to be embedded in the EU legal framework. It seems to be an inevitable consequence of the limited scope of application of the EU law provisions, and the provisions on EU citizenship in particular. Consequently, EU law suffers from a blatant and persistent form of discrimination, which cannot, it would seem, be “cured” by EU law. However, in recent case law, the European Court of Justice (“ECJ”) seems willing to combat, at least the gravest instances of reverse discrimination, by applying EU law in circumstances hitherto considered as falling outside the scope of EU law.

In the following, I will first analyse in some detail this recent tendency in the case law and the underlying justifications for the ECJ’s departure of the traditional approach (II). The main questions that are answered in this connection are: 1) what is the extent of the Court’s new approach towards the scope of EU law and 2) are the Court’s justifications for its expansive justification convincing? In this connection, it is examined how the principles announced by the Court could be fruitfully applied in other cases with different sets of circumstances. My paper shows that the ECJ’s innovative interpretation, while driven by noble motives, has major shortcomings (III). Therefore, I explore what possible alternative solutions exist for curing the problem of reverse discrimination (IV).

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<sup>10</sup> There is abundant literature on the subject. See, *inter alia*, TRYFONIDOU, A., *Reverse Discrimination in EC Law*, Alphen aan den Rijn, Kluwer Law International, 2009, 271 pp.; POIARES MADURO, M., “The Scope of European Remedies: The Case of Reverse Discrimination and Purely Internal Situations”, in KILPATRICK, C., NOVITZ, T. and SKIDMORE, P. (eds.), *The Future of Remedies in Europe*, Oxford and Portland, Hart Publishing, 2000, pp. 117-140; CANNIZZARO, E., “Producing ‘Reverse Discrimination’ through the Exercise of EC Competences”, *YbEL*, 1997, pp. 29-46. See the helpful overview of literature on the subject in HANF, D., ‘Reverse Discrimination in EU Law’: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?”, *Maastricht Journal of European and Comparative Law*, 2011, pp. 58-61.

## II. Recent ECJ case law: attempts at curing the disease?

### 1. Overview

#### 1.1. *RUIZ ZAMBRANO*: NEW APPROACH TOWARDS REVERSE DISCRIMINATION

Mr. Ruiz Zambrano was a Colombian national who came to Belgium together with his Colombian spouse and their first child. Although his request for asylum was rejected by the Belgian authorities, he nevertheless remained in the country and even managed to become gainfully employed. He did not, however, satisfy the conditions under Belgian law for obtaining a residence permit or a work permit. The question to be answered by the ECJ was whether Mr. Ruiz Zambrano could derive a right of residence in Belgium from EU law and whether EU law would exempt him from the obligation to hold a work permit. The crucial element in this regard was that, during his stay in Belgium, Mr. Ruiz Zambrano's spouse gave birth to a second and third child, who acquired the Belgian nationality on grounds of their birth in Belgium.<sup>11</sup> Since these children are EU citizens, it was argued that Mr. Ruiz Zambrano was entitled to reside with them in Belgium. To support this point, Mr. Ruiz Zambrano heavily relied on the *Zhu and Chen* case, in which the Court held that a young minor EU citizen was entitled to be accompanied in the host Member State by the parent who is his or her primary carer.<sup>12</sup>

The problematic aspect of his argument was, however, that in contrast with baby Chen, the children of Mr. Ruiz Zambrano had never resided in a Member State other than that of their nationality. For that reason, the situation of Mr. Ruiz Zambrano seemed to be a purely internal one, in which no reliance on EU law was possible. The logical consequence of this would be that Belgium was allowed under EU law not to extend the more favourable “Zhu and Chen” treatment to persons like Ruiz Zambrano. In other words, the case appeared to revolve around a classic instance of reverse discrimination, which could not be cured under EU law. This point of view was defended before the ECJ by no less than eight Member States and by the Commission.

The ECJ disagreed and held that EU law was applicable to the circumstances of the case. In a remarkably short judgment, the Court pointed out

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<sup>11</sup> Pursuant to Article 10(1) of the Belgian Nationality Code, in the version applicable at that time, children born in Belgium acquired the Belgian nationality if they would otherwise be stateless.

<sup>12</sup> ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925. For a detailed analysis, see the case notes by TRYFONIDOU, A., in *E.P.L.*, 2005, pp. 527-541, and VANVOORDEN, K., in *Colum. J. Eur. L.*, 2005, pp. 305-321.

that the children of Mr. Ruiz Zambrano were undeniably EU citizens and that EU citizenship was the fundamental status of nationals of the Member States.<sup>13</sup> Referring to the *Rottmann* judgment,<sup>14</sup> the Court stated that Article 20 TFEU precludes national measures which have the effect of depriving EU citizens of the “genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the EU”.<sup>15</sup> The Court held that the refusal of a residence permit and of a work permit to a person in a situation like Mr. Ruiz Zambrano had precisely this effect. The reason was that a refusal of a residence permit would require his children to accompany their parents to a third country. Similarly, the refusal of a work permit would entail the risk that he would not have sufficient resources to provide for himself and his family, which would also result in his children having to leave the territory of the EU. In both circumstances, the children would, as a result, be unable to exercise the substance of their citizenship rights.<sup>16</sup>

Although the *Ruiz Zambrano* judgment was remarkably short and lacking in elaborate reasoning,<sup>17</sup> it did appear to mark a landslide in the Court’s case law. Indeed, the Court found EU law to be applicable despite the fact that the traditional requirement of an inter-State element was not satisfied. Moreover, the open-ended reasoning of the Court could seemingly apply to a rather broad spectre of cases. Consequently, it seemed to be the case that EU law, under the Court’s new interpretation, would henceforth prohibit reverse discrimination of EU citizens. However, in a subsequent case, the Court dealt a fatal blow to these hopes and clarified that EU law could only in exceptional circumstances apply to static EU citizens.

## 1.2. *MCCARTHY*: NOT REAPING THE CONSEQUENCES?

The applicant in the case, Mrs. McCarthy, held both the Irish and the UK nationality, but had lived her whole life in the UK. In 2002, she married a Jamaican national, who was not, however, entitled to reside in the UK in accordance with the British immigration rules. Relying on her Irish nationality, Mrs. McCarthy and her husband argued that they were entitled to residence on the basis of EU law, namely in their capacity of EU citizen

<sup>13</sup> ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr., paras 40-41.

<sup>14</sup> ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449, para. 42.

<sup>15</sup> ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr., para. 42. Throughout this article I will use the expression “citizenship rights”.

<sup>16</sup> ECJ, Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr., paras 43-44.

<sup>17</sup> The Court’s succinct reasoning was rightly criticised in the editorial of a major EU law journal. See NIC SHUIBHNE, N., “Seven questions for seven paragraphs”, *E.L. Rev.*, 36, 2011, p. 162 (“How can the Court possibly think that such a brief and opaque articulation of its reasoning is remotely adequate or acceptable?”).

and husband of an EU citizen, respectively.<sup>18</sup> The question to be answered by the Court was, again, whether the applicant could in the circumstances of the case rely on the provisions of EU law. Mrs. McCarthy had never exercised her right to free movement and, consequently, her situation, *prima facie*, seemed to amount to a purely internal situation. Yet, such was far from certain after the Court's judgment in *Ruiz Zambrano*. Moreover, the question arose whether the fact that Mrs. McCarthy possessed the nationality of another Member State than the Member State in which she resided could provide a sufficient link with EU law. Some earlier cases, *Garcia Avello*<sup>19</sup> in particular, appeared to indicate that the possession of the nationality of two Member States was sufficient in order to enable a EU citizen to invoke EU law.

Contrary to what some commentators had expected in view of the recent *Ruiz Zambrano* judgment, the Court ruled that EU law was not applicable in the circumstances of the case. According to the Court, Mrs. McCarthy could not invoke Article 21 TFEU because the contested national measure did not have the effect of depriving her of the genuine enjoyment of the substance of her citizenship rights or of impeding the exercise of her right of free movement and residence.<sup>20</sup> The Court explicitly distinguished the circumstances of the *McCarthy* case from those at stake in *Ruiz Zambrano*. It held that, in contrast to the case of *Ruiz Zambrano*, the contested national measure did not have the effect of obliging Mrs McCarthy to leave the territory of the EU. The fact that Mrs. McCarthy possessed the nationality of two Member States could not change anything in this regard, as it did not trigger the application of national measures depriving her of the genuine enjoyment of the substance of her citizenship rights or impeding the exercise of her right of free movement and residence.<sup>21</sup>

The bottom-line was that, in the circumstances of the case, the UK was entitled to deny to Mrs McCarthy the rights regarding family reunification pertaining to EU citizens from other Member States. As such, the Court

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<sup>18</sup> Their application was rejected, however, by the British authorities on the ground that the conditions for a right of residence on the basis of EU law were not satisfied. It is not fully clear whether this refusal was based on the fact that Mrs. McCarthy fell outside the scope of EU law or on the fact that she did not satisfy the conditions for a right of residence under EU law. Given that she was completely dependent on State benefits for her subsistence, she did in any event not satisfy these conditions. The Court did not consider this element at all in its judgment, in contrast to AG KOKOTT (see Opinion of AG KOKOTT in Case C-434/09 *McCarthy* [2011] E.C.R. nyr., para. 44).

<sup>19</sup> ECJ, Case C-148/02 *Garcia Avello* [2003] ECR I-11613.

<sup>20</sup> ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., paras 44-56.

<sup>21</sup> ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., para. 54.

endorsed the continued existence of reverse discrimination with regard to family reunification. The Court confirmed this stance in the more recent *Dereci and others* judgment.

### 1.3. *DERECI AND OTHERS*: CONSOLIDATING THE NARROW APPROACH

The *Dereci and Others* case provided the ECJ with an ideal opportunity to further clarify the scope of its holdings in *Ruiz Zambrano* and *McCarthy*.<sup>22</sup> The reference of the Austrian *Verwaltungsgerichtshof* in fact concerned five cases in which a third country family member<sup>23</sup> of a static adult Austrian national were refused a right of residence in Austria. The referring court wanted to know, essentially, whether these refusal decisions were precluded under Article 20 TFEU. This required the ECJ to clarify whether such decisions were to be considered as having the effect of depriving the EU citizens concerned of the genuine enjoyment of the substance of their citizenship rights. The ECJ firmly stated that this criterion is only satisfied in situations in which the EU 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 EU as a whole”.<sup>24</sup> It emphasised that this criterion would only under exceptional circumstances preclude a refusal of a right of residence. In this connection, the Court explained that the mere fact that it might appear desirable to an EU citizen, for economic reasons or in order to keep his family together, for his third country family members to be able to reside with him in the territory of the EU, is not sufficient in itself to support the view that the EU citizen will be forced to leave EU territory if such a right is not granted.<sup>25</sup>

The bottom-line is that the Court confirmed the narrow interpretation of the *Ruiz Zambrano* judgment it had adopted in *McCarthy*. Somewhat curiously the Court in *Dereci and Others* did not make a final assessment of compliance with Article 20 TFEU, explicitly leaving this to the referring court.<sup>26</sup> Yet the Court’s emphasis on the limited applicability of Article 20

<sup>22</sup> ECJ, Case C-256/11 *Dereci and Others*, nyr. The case was decided under the accelerated procedure (see the Order of the President of the Court (9 September 2011) in Case C-256/11 *Dereci and Others*, nyr.).

<sup>23</sup> Namely the spouse of an EU citizen in three cases and the adult children of an EU citizen in the two other cases.

<sup>24</sup> ECJ, Case C-256/11 *Dereci and Others*, nyr., para. 66.

<sup>25</sup> ECJ, Case C-256/11 *Dereci and Others*, nyr., paras 67-68.

<sup>26</sup> *Ibid.*, para. 74. It is, of course, common practice for the ECJ in the framework of proceedings for a preliminary ruling to leave the final assessment to the referring court. Yet it is striking that the ECJ made a final assessment in *Ruiz Zambrano* and *McCarthy*, but not in *Dereci and Others*.



TFEU vis-à-vis static EU citizens and on the fact that *Ruiz Zambrano* concerned the right of residence of a third country national with dependent minor children<sup>27</sup> clearly indicate that it was of the opinion that the applicants' argument under EU law would not succeed. Indeed, given the fact that the EU citizens in all cases were adults, they should presumably be considered to be able to continue to reside in the territory of the EU independently of their third country family member, as was explicitly stated by AG Mengozzi.<sup>28</sup> Admittedly, the ECJ tempered its strict holding somewhat by pointing out that a right of residence could possibly be claimed on the basis of the fundamental right to protection of family life, even in situations falling outside the scope of EU law.<sup>29</sup> Still this holding *prima facie* does not change anything regarding the limited applicability of EU law to static EU citizens and their family members.

## 2. Limited evolution only

The picture resulting from the judgments just discussed is rather nuanced. In *Ruiz Zambrano* the Court departed from its traditional EU citizenship case law, which was centred on the presence or absence of an inter-State element. As a consequence, a large number of situations could seem to fall henceforth within the scope of EU law which would previously have fallen outside that scope. In all these circumstances, reverse discrimination would have become contrary to EU law. On a closer look, however, it seems that the judgment does not entail such wide consequences. As the Court clarified in *McCarthy* and *Dereci and Others*, it is willing to apply EU law only where a measure threatens to take away the genuine enjoyment of the substance of a person's citizenship rights. In such circumstances an inter-State element will no longer be required. In essence, the Court is merely drawing the consequences from its *Rottmann* judgment<sup>30</sup>: if a measure taking away one's EU citizenship status falls within the scope of EU law in the absence of a cross-border dimension, the same should be the case for a national measure completely rendering it impossible for someone to exercise the rights attached to that status. Put differently, national measures which *de iure* or *de facto* annihilate one's EU citizenship should be treated

<sup>27</sup> ECJ, Case C-256/11 *Dereci and Others*, nyr., para. 65.

<sup>28</sup> View of AG MENGOZZI in Case C-256/11 *Dereci and Others*, nyr., paras 33-36.

<sup>29</sup> In a way reminiscent to the *Metock and Others* judgment (ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 79), the ECJ pointed out that all Member States are parties to the ECHR (ECJ, Case C-256/11 *Dereci and Others*, nyr., para. 73).

<sup>30</sup> ECJ, Case C-135/08 *Rottmann* [2010] E.C.R. I-1449.

equally and be held to fall within the scope of EU law even in the absence of a cross-border dimension.<sup>31</sup>

One could agree with the Court that the fundamental importance of EU citizenship warrants a wider interpretation of the scope of EU law in such exceptional circumstances. However, it appears from the cases discussed higher that the Court is interpreting the “genuine enjoyment” criterion narrowly. The Court accepts that a refusal of a right of residence to the parent of a minor EU citizen makes it impossible for that citizen to genuinely enjoy the substance of his citizenship rights. The impossibility for an adult EU citizen to be joined by a third country family member, by contrast, does not seem to have this consequence because it does not, strictly speaking, oblige her to leave the territory of the EU.<sup>32</sup> Consequently, the Court appears to limit its extensive interpretation of Article 20 TFEU to children who face the impossibility to be joined by their parent-primary carer.

It could be objected that the Court, in taking this position, is focussing too much on what is possible in theory. Adult EU citizens who are refused the right to live with their family member will in many circumstances *de facto* be forced to join that family member in a third country and, as a consequence, be put in the same situation as far as the enjoyment of their citizenship rights is concerned. This could be the case, in particular, where the adult EU citizen would be financially or emotionally dependent on his third country relative.<sup>33</sup> In the near future,<sup>34</sup> the Court will have the opportunity to further fine-tune its case law and clarify under what circumstances precisely a measure should be considered as taking away the genuine enjoyment of EU citizenship rights in a way contrary to Article 20 TFEU. Perhaps the Court will accept that the genuine enjoyment criterion is satisfied in the case of certain adult EU citizens. Still then it can be expected that the criterion will remain one that is satisfied in exceptional circumstances only. As a consequence, most instances of reverse discrimination will continue to be valid under EU law. Below I will argue that the Court’s expansive case law might actually even lead to an increased number of instances of reverse discrimination.

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<sup>31</sup> CAMBIEN, N., “Case Note: Case C-34/09 *Ruiz Zambrano*”, *Sociaal-economische Wetgeving*, 2011, pp. 410-413.

<sup>32</sup> ECJ, Case C-434/09 *McCarthy* [2011] E.C.R. nyr., para. 50.

<sup>33</sup> See View of AG MENGOZZI in Case C-256/11 *Dereci and Others*, nyr., para. 48.

<sup>34</sup> A substantial number of references have already been made to the Court, asking for further clarification of the *Ruiz Zambrano* judgment. See, for instance, pending cases C-356/11 *O and S* and C-357/11 *L*, lodged on 7 July 2011.

### III. Assessment: recent ECJ case law provides no solution

#### 1. *Perverse incentives for the Member States*

Even if the evolution in the Court's case law just discussed is limited in scope, it is clear that it will have significant consequences for the immigration laws and policies of the Member States. Indeed, it obliges the Member States to grant a residence permit to the parent of a child which acquired their nationality, even in situations formerly considered to be purely internal situations. The consequences of this development should not be underestimated, in particular since many young children of third country nationals will have acquired the nationality of the Member State of residence of their parent without having a link to any other Member State. While these children and their parents could not traditionally claim a residence right under EU law, such will henceforth be the case. This can lead to a significant increase in immigration in a number of Member States. Furthermore, once a right of residence is recognised for the EU citizen and his parents, they can presumably rely on the EU principle of equal treatment, something which may entail significant financial burdens for their Member State of residence.<sup>35</sup>

Moreover, the Member States have only limited scope to rely on their immigration laws in order to refuse third country nationals in the circumstances described a right of residence. Indeed, the violation of the provisions of national immigration law in itself does not seem to be a ground for such a refusal. The ECJ in *Ruiz Zambrano* did not seem to consider it relevant that Mr. Ruiz Zambrano had overstayed his visa and had been residing illegally in Belgium as far as the Belgian immigration law provisions were concerned.<sup>36</sup> Presumably, Member States could refuse a right of residence in the circumstances described where such is justified by legitimate reasons of an overriding public interest such as reasons of public policy, public security or public health or in case of abuse of rights. However, these grounds are very narrowly defined and could be relied on therefore in exceptional circumstances only.<sup>37</sup>

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<sup>35</sup> See the discussion in ROSS, M. "The Struggle for EU Citizenship: Why Solidarity Matters", in ARNULL, A., BARNARD, C.; DOUGAN, M. AND SPAVENTA, E. (eds.), *A Constitutional Order of States: Essays in European Law in Honour of Alan Dashwood*, Hart Publishing, Oxford and Portland, 2011, pp. 283-300.

<sup>36</sup> In this respect, the Court's judgment resembles its judgment in the *Carpenter* case (ECJ, Case C-60/00 *Carpenter* [2002] E.C.R. I-6279).

<sup>37</sup> LENAERTS, K. and VAN NUFFEL, P. (BRAY, R. and CAMBIEN, N. (eds.)), *European Union Law*, Sweet & Maxwell, London, 3rd ed., 2011, pp. 251-253.

The bottom-line is that, because of the ECJ's expansive recent case law, the Member States are faced with an unwanted increase in immigration. Naturally, Member States will look for devices to limit this increase. However, the Member States' hands are tied as far as persons coming within the scope of EU law are concerned. Indeed, given the primacy of EU law over national law, the Member States cannot limit the residence rights enjoyed under EU law by EU citizens and their family members, except under the very limited conditions allowed by EU law just mentioned. The obvious solution for Member States is to restrict the residence and family reunification rights of persons not falling within the scope of EU law, i.e. primarily their own (static) nationals. This phenomenon is perfectly illustrated by a recent change in the Belgian immigration rules.

## 2. *Illustration: 2011 restriction of Belgian immigration laws*

Until recently, the Belgian Aliens Act<sup>38</sup> provided for complete equality in treatment between Belgian nationals and other EU citizens as far as the possibility to be joined in Belgium by family members was concerned. The only exception was the category of ascendants of Belgian nationals, who were subject to additional conditions.<sup>39</sup> Some other Member States, by contrast, have chosen to subject their own (static) nationals to less beneficial conditions than EU citizens from other Member States as far as family reunification rights are concerned.<sup>40</sup> As was explained above, such differential treatment, effectively amounting to reverse discrimination, is not contrary to EU law as traditionally interpreted. In Belgium too, proposals for such differential treatment had been circulating for some time in political circles. The restriction of the conditions relating to family reunification for Belgian nationals was defended on account of the need to restrict immigration in Belgium and to counter abuses of the immigration rules. In this connection, it was pointed out that family reunification is the most important form of immigration in Belgium by far.<sup>41</sup>

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<sup>38</sup> Law of 15 December 1980 on entry, stay, settlement and removal of foreign nationals.

<sup>39</sup> With regard to ascendants, Belgian nationals had to prove that they had stable, regular and sufficient resources and comprehensive sickness insurance (Article 40ter of the Aliens Act).

<sup>40</sup> This is the case, *inter alia*, in Denmark and the Netherlands. For an overview of the legal regime surrounding family reunification of static EU citizens, mobile EU citizens and third country nationals in different Member States, see WALTER, A., *Reverse Discrimination and Family Reunification*, Wolf Legal Publishers, Nijmegen, 2008, 78 pp.

<sup>41</sup> This appears to be the case in most European States (see GROENENDIJK, K., "Family Reunification as a Right under Community Law", *Eur. J. Migration & L.*, 8, 2006, 215).

On 22 September 2011 a legislative amendment entered into force which effectively restricts the conditions regarding family reunification for Belgian nationals, EU citizens and third country nationals.<sup>42</sup> The newly introduced conditions are, however, more stringent for Belgian nationals than for other EU citizens. During the debates it was even proposed to align the conditions for family reunification for Belgian nationals with those applicable in Belgium to third country nationals.<sup>43</sup> That proposal did not make it into law after the Council of State rendered a negative opinion.<sup>44</sup> The Council of State estimated, *inter alia*, that the full exclusion of Belgian nationals from the family reunification rules applicable to EU citizens would be incompatible with the *Ruiz Zambrano* judgment.

The amendment introduces three important new conditions or restrictions for family reunification by Belgian nationals. First, only the parents of minor Belgian nationals have the right to join their child in Belgium. Other ascendants of Belgian nationals<sup>45</sup> do no longer have this right. EU citizens and their spouse or partner, by contrast, have the right to be joined in Belgium by parents and ascendants in a further degree. Second, Belgian nationals can only be joined by a spouse or partner if both spouses or partners are older than 21. In the case of EU citizens, this condition only applies as far as registered partners are concerned who have contracted a partnership which is not treated as equivalent to marriage under Belgian law. Third, new conditions are imposed for reunification with a spouse or partner or with descendants. For such reunification, it is required that the Belgian national demonstrates the possession of stable, sufficient and regular resources, adequate housing and comprehensive sickness insurance. The condition regarding revenue will be deemed satisfied if the person concerned possesses at least 120% of the minimum subsistence income, without taking into account possible social security benefits.<sup>46</sup> EU citizens are not made subject to

<sup>42</sup> Legislative proposal of 26 May 2011 amending the Law of 15 December 1980 on entry, stay, settlement and removal of foreign nationals regarding the conditions for family reunification (*Parl.St.* Kamer 2010-2011, nr. 530443/021). For a detailed discussion, see CAMBIEN, N., "Mogen statische Unieburgers worden gediscrimineerd op het vlak van gezinshereniging? Enkele beschouwingen bij de arresten *Ruiz Zambrano* en *McCarthy* van het Hof van Justitie", *Tijdschrift voor Vreemdelingenrecht*, 2011, pp. 242-253.

<sup>43</sup> See the amendment introduced by FRANCKEN and others (*Parl.St.* Kamer 2010-2011, nr. 530443/014).

<sup>44</sup> Belgian Council of State, Opinion 49.356/4 of 4 April 2011.

<sup>45</sup> *I.e.* ascendants of adult Belgian nationals and ascendants of minor Belgian nationals other than their parents.

<sup>46</sup> This rule is inspired by, although not wholly similar to, the rules applicable in the Netherlands, which were challenged before the ECJ in *Chakroun* (ECJ, Case C-578/08 *Chakroun* [2010] E.C.R. I-1839.). For a discussion, see the case note by WIESBROCK, A. in *EuConst*, 2010, 462-480.

the condition regarding adequate housing and the limit of 120% of the minimum subsistence income does not apply to them.

Two categories of Belgian nationals are not, however, made subject to more stringent conditions as far as family reunification is concerned than other EU citizens. In the first place, it should be clear that the newly introduced restrictions cannot apply to Belgians who have exercised their right to free movement, even though this is not explicitly stated. The reason is that EU law requires Belgians who move or have moved to another Member State to be treated in exactly the same way as EU citizens from other Member States.<sup>47</sup> In the second place, no conditions are imposed as far as reunification of minor Belgian nationals and their parents is concerned. This can be explained by the Belgian legislator's desire to comply with the *Ruiz Zambrano* judgment.<sup>48</sup> It should be clear that the two exceptions just mentioned do not stem from a deliberate wish of the Belgian legislator. Rather they were both mandated by EU law. Accordingly, it seems the Belgian legislator, by introducing the recent amendments, has maximised its scope for reverse discrimination.

### 3. Counter-productive consequences

As the Belgian example perfectly illustrates, a wide interpretation of the rights of EU citizens and their family members in ECJ case law may well lead the Member States to restrict their legislation. It appears from the interventions of a large number of Member States in high-profile cases before the Court that most Member States resist such wide interpretation because they fear that the Court thereby opens the "floodgates" and renders it impossible for them to control immigration, resulting in significant and uncontrollable financial burdens.<sup>49</sup> The Court, however, is often perceived as not being sufficiently responsive to these concerns and putting too much emphasis instead on the effectiveness of EU citizenship.<sup>50</sup> *Ruiz Zambrano* can be seen as another example of the Court brushing away the Member States' concerns, although the narrow interpretation in *McCarthy* and *Dereci and Others* goes a long way towards alleviating them.

<sup>47</sup> See e.g. ECJ, Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] E.C.R. I-1683, para. 34.

<sup>48</sup> The need to comply with *Ruiz Zambrano* is explicitly put forward in the preparatory documents to the legislative proposal (*Parl.St.* Kamer 2010-2011, nr. 530443/017).

<sup>49</sup> See e.g. ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, paras 71-72.

<sup>50</sup> See, for instance, the discussion of the reactions by some Member State governments to the *Metock and Others* judgments, discussed in COSTELLO, C., "Metock: Free movement and 'Normal Family Life' in the Union", *CML Rev.*, 46, 2009, 587-622.

Where the Court adopts a wide interpretation of the scope of EU provisions, Member States basically have three devices at their disposal to counter to some extent the unwanted effects deriving from this. First, they can give a narrow interpretation to the Court's judgment, by focussing on the actual circumstances of the case in which the judgment was rendered rather than on the underlying justifications of the Court. One example is provided by a circular<sup>51</sup> and a memo<sup>52</sup> issued by the UK Department for Work and Pensions to clarify the consequences of the recent *Ibrahim* and *Teixeira* judgments. These documents take a surprisingly literal interpretation of these judgments and thereby seem to overlook their underlying reasoning.<sup>53</sup>

The second device is the restriction of nationality legislation.<sup>54</sup> Where it is felt that an avalanche of claims based on EU citizenship undermines the national immigration policies, Member States may react by making it harder to become EU citizen, thereby reducing the number of persons that could make such claims.<sup>55</sup> Such restriction reduces the pressure of immigration not just for the Member State concerned, but also potentially for all other Member States. The reason is obvious: EU citizens can claim residence rights throughout the EU. If the possibilities for acquiring EU citizenship are restricted in one Member State, this will be felt in other Member States. It should be no surprise therefore, that restrictions of nationality legislation can come about after informal pressure by other Member States.<sup>56</sup>

Third, Member States may limit the more extensive rights recognised in the case law to EU citizens presenting a link with EU law, while denying

<sup>51</sup> Housing Benefit and Council Tax Benefit Circular HB/CTB A10/2010 of May 2010, available at [www.dwp.gov.uk/docs/a10-2010.pdf](http://www.dwp.gov.uk/docs/a10-2010.pdf).

<sup>52</sup> Memo DMG 30/10 revised of December 2010 "Right to Reside: Parent and Primary Carer of a Child in Education", available at <http://dwp.gov.uk/docs/m-30-10.pdf>.

<sup>53</sup> See the discussion in CAMBIEN, N., "Citizenship of the Union as a cornerstone of European integration: a study of its impact on policies and competences of the Member States", *PhD Thesis* (Leuven University, 2011), pp. 387-391.

<sup>54</sup> See HAILBRONNER, K. and THYM, D., "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", *CML Rev.*, 48, 2011, p. 1265 and WIESBROCK, A. "The Zambrano case: Relying on Union citizenship rights in 'internal situations'", *EUDO Citizenship Observatory*, available at <http://eudo-citizenship.eu/citizenship-news/449-the-zambrano-case-relying-on-union-citizenship-rights-in-internal-situations>.

<sup>55</sup> AG SHARPSTON openly admitted that the solution to the expected unwanted impact of the *Ruiz Zambrano* judgment (and the related fear for opening the "floodgates") would be to amend the rules on the acquisition of nationality, although she added that it would be wrong to turn the EU into "Fortress Europe" (see Opinion of AG SHARPSTON in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr., 114-115).

<sup>56</sup> See the discussion in ROSTEK, K. and DAVIES, G., "The Impact of Union Citizenship on National Citizenship Policies", *Tul. Eur. & Civ. L.F.*, 2007, pp. 89-156.

them to their own static EU citizens. The amendment of the Belgian Aliens Act introduces precisely this distinction, following the lead from a number of other Member States. Given that family reunification is the most important form of immigration and given that the majority of EU citizens cannot demonstrate a sufficient link with EU law,<sup>57</sup> this is an effective device to reduce unwanted immigration. In other words, Member States may opt to enact a regime of reverse discrimination in order to limit immigration. Admittedly, after *Ruiz Zambrano* reverse discrimination is no longer tolerated by EU law under certain circumstances. However, as was discussed above, these circumstances are narrowly defined.

All devices have in common that Member States choose to allow as few persons as possible to enjoy the rights pertaining to EU citizens and their family members. Consequently, the wide interpretation in the case law of the rights attached to EU citizenship may well have the somewhat paradoxical consequence that in the near future fewer persons will enjoy these rights rather than more. Accordingly, rather than solving the problem of reverse discrimination, an expansive interpretation of the scope of EU law by the Court in fact worsens the problem of reverse discrimination. This is a problematic situation, for a number of reasons. First, a narrow implementation of the rights attached to EU citizenship reduces the added value of that status, which is purported to be the fundamental status of Member State nationals. Second, the increasing occurrence of systematic forms of reverse discrimination does not side well with the aims of a Citizens' Europe because it leads to inequalities between different categories of EU citizens.<sup>58</sup> This distinction is moreover based on the rather vague criterion of having established a cross-border element, which creates perverse incentives to artificially create a link with EU law.<sup>59</sup>

Consequently, the question arises how this problematic situation can be cured, if not by the case law described above. This will be dealt with under the following point.

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<sup>57</sup> See KOCHENOV, D., "Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights", *Colum. J. Eur. L.*, 15, 2009, p. 214. Much depends, of course, on how restrictive the required link with EU law is interpreted. The case law is not always consistent on this point. See the discussion in VAN ELSUWEGE, P. and ADAM, S., "The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination" *EuConst*, 5, 2009, p. 334.

<sup>58</sup> See, *inter alia*, TRYFONIDOU, A., "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe", *LIEI*, 35, 2008, pp. 43-67; JACOBS, F., "Citizenship of the European Union - A Legal Analysis", *European Law Journal*, 13, 2007, pp. 591-610.

<sup>59</sup> For instance, by briefly moving to another Member State with the sole purpose of "activating" one's EU citizenship.



## IV. Solutions

### 1. *EU legislator*

To remedy the problem of reverse discrimination, one obvious solution would be to interpret the provisions on EU citizenship as applying regardless of whether a cross-border element is present. In this connection it is sometimes suggested that EU citizenship in itself could constitute a sufficient link with EU law.<sup>60</sup> As a result, all EU citizens would be entitled to invoke EU citizenship rights, such as the ones relating to family reunification. While the Court in *Rottmann* and *Ruiz Zambrano* appears to have embraced this position, it at the same time limited it to fairly exceptional circumstances.

The Court was probably right in doing so. Accepting EU citizenship as a sufficient link with EU law in general would be a particularly intrusive step, given the significant impact it would have on the competences of the Member States. Such would certainly be good for realising the full potential of EU citizenship, but it can be doubted whether the Court could legitimately take such a revolutionary step without overstepping its constitutional role. Indeed, the Court is bound by the regulatory framework surrounding EU citizenship as it results from the Treaties and from secondary EU law, Directive 2004/38 in particular. Precisely because that Directive is limited in scope, the Court was not prepared to accept AG Sharpston's far-reaching suggestion to read Article 21 TFEU as embodying a right of residence even in the absence of prior movement.<sup>61</sup>

If the EU citizenship provisions are to be extended to static EU citizens, this step should, perhaps, preferably be taken by the EU legislator rather than by the EU Court.<sup>62</sup> Given that Article 21 TFEU is explicitly made subject to the limitations and conditions laid down in secondary EU law, the EU legislator was arguably given an explicit authorisation by the Treaties to

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<sup>60</sup> See, *inter alia*, DAUTRICOURT, C. and THOMAS, S., "Reverse Discrimination and Free Movement of Persons under Community Law: All For Ulysses, Nothing For Penelope?", *E.L. Rev.*, 34, 2009, pp. 447-450; SPAVENTA, E., "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects", *CML Rev.*, 45, 2008, pp. 30 *et seq*; TONER, H., "Judicial Interpretation of European Union Citizenship - Consolidation or Transformation", *Maastricht Journal of European and Comparative Law*, 7, 2000, pp. 168-170.

<sup>61</sup> Opinion of AG SHARPSTON in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. nyr., paras 80 *et seq*.

<sup>62</sup> See WALTER, A. (*op. cit.*, n. 40), p. 60; BESSON, S. and UTZINGER, A., "Future Challenges of European Citizenship: Facing a Wide-Open Pandora's Box", *European Law Journal*, 13, 2007, p. 584.

determine the scope of the right to free movement and residence and could on that ground arguably extend the right of residence enjoyed by EU citizens to static EU citizens. Accordingly, it could amend Article 3(1) of Directive 2004/38 to the effect that it would apply to all EU citizens “who move to or reside in a Member State”. As a consequence, the Directive, including the principle of equal treatment laid down in its Article 24, would also apply to static EU citizens.<sup>63</sup> It is unlikely that the Member States, represented in the EU legislative organs, would agree to that, at least in the foreseeable future.

Another, more limited option would be to merely extend the rights relating to family reunification to static EU citizens. In a not so distant past, the Commission did in fact adopt a proposal to this effect.<sup>64</sup> An early Commission proposal for a family reunification directive stated in its Article 4:

“By way of derogation from this Directive, the family reunification of third-country nationals who are family members of a citizen of the EU residing in the Member State of which he is a national and who has not exercised his right to free movement of persons, is governed *mutatis mutandis* by Articles 10, 11 and 12 of Council Regulation (EEC) No 1612/68 and by the other provisions of Community law listed in the Annex.”

The Commission deleted this provision in later versions of the proposal, stating that the alignment of the rights of all EU citizens to family reunification would be dealt with later, after the work on the Citizens’ Directive (the eventual Directive 2004/38) would be finished.<sup>65</sup> Such has not happened so far.<sup>66</sup> Perhaps the recent developments relating to EU citizenship and the recent case law of the ECJ could give a new impetus to the EU legislator to adopt new rules relating to family reunification.<sup>67</sup> To this purpose, the pro-

<sup>63</sup> See DAUTRICOURT, C. and THOMAS, S. (*op. cit.*, n. 60), p. 450.

<sup>64</sup> See Commission proposal on the right to family reunification, COM (1999) 638 final (published in [2000] O.J. C116E/66). The proposal is discussed in WALTER, A. (*op. cit.*, n. 40), pp. 41-43.

<sup>65</sup> Amended proposal for a Council Directive on the right to family reunification, COM(2002) 225 final: see the explanatory memorandum under 2.4.

<sup>66</sup> This was confirmed by the Commission in its 2008 Report on the application of Directive 2003/86 (Report from the Commission to the European Parliament and the Council on the Application of Directive 2003/86 on the Right to Family Reunification, COM(2008) 610 final). The Report states, under point 4, that “family reunification of Union citizens residing in the Member State of their nationality is not subject to [Union] law”.

<sup>67</sup> Some additional support for the desirability of this could be found in the fact that Directive 2003/86 grants third country nationals a right to family reunification irrespective of whether they have moved between Member States. The limited parallelism between Direc-

visions of Directive 2004/38 relating to family members of EU citizens could be extended so as to cover also static EU citizens. The legal basis for this could presumably be Articles 20 and 21 TFEU, which would thereby be given a wider interpretation than is currently the case.<sup>68</sup> Accordingly, the EU legislator could solve the problem of reverse discrimination with regard to family reunification — which is perhaps the most controversial and topical field of reverse discrimination —. Again, such a step could only be taken if sufficient Member States would agree to adopt it in the EU legislative organs. However, it can be expected that the Member States would more readily accept clearly defined legislative amendments than Court-led evolutions, in particular if the legislator would surround these amendments with a number of financial safeguards.<sup>69</sup>

## 2. *National constitutional norms*

An alternative avenue for curing the problem of reverse discrimination focuses on the national level rather than the EU level. According to some authors, reverse discrimination is not caused by EU law but by national law.<sup>70</sup> As I explained above, reverse discrimination arises when national law in purely internal situations applies more stringent conditions than those applying in comparable situations falling within the scope of EU law. Put differently, it arises from the fact that a Member State accords its own (static) nationals a less favourable treatment than EU citizens enjoy under EU law. Consequently, a logical way to address this problem would be to amend national law and bring it “up to the level” of EU law. Taking this reasoning to its logical conclusion means that reverse discrimination is the responsibility of the Member States and not of EU law. Some authors have

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tives 2003/86 and 2004/38, accepted by the Court in *Metock and Others* (ECJ, Case C-127/08 *Metock and Others* [2008] E.C.R. I-6241, para. 69) could be seen as an additional argument for extending the right to family reunification to static EU citizens.

<sup>68</sup> The Treaty provisions on EU citizenship would provide a more convincing legal basis than the provisions formerly contained in Title IV of the EC Treaty (see now Title V of the TFEU), as was remarked by NIC SHUIBHNE (NIC SHUIBHNE, N., “Free movement of persons and the wholly internal rule: time to move on?”, *CML Rev.*, 39, 2002, p. 762).

<sup>69</sup> In particular, the present financial conditions (see, in particular, Article 7 of Directive 2004/38) applicable to family reunification of mobile EU citizens could be made applicable to family reunification by static EU citizens.

<sup>70</sup> See, in particular, RITTER, C., “Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234”, *E.L. Rev.*, 31, 2006, p. 706; HANF, D. (*op. cit.*, n. 10), pp. 57-58. See also the discussion in VAN DER MEI, A.P., “Combating Reverse Discrimination: Who should do the Job? (Editorial)”, *Maastricht Journal of European and Comparative Law*, 2009, pp. 379-382.

added, moreover, that the suggested amendment of national law will come about naturally, since it is not in the interest of Member States to treat their own nationals less favourably than nationals from other Member States.<sup>71</sup> However, it would be naive to assume that Member States will always remedy instances of reverse discrimination. As was explained above, Member States may well have a strong interest in preserving or even introducing a system of reverse discrimination, such as the desire to limit immigration.

One could wonder, however, whether reverse discrimination is in accordance with national constitutional norms. The principle of equality is a norm of high constitutional importance in most Member States. The question arises whether the difference in treatment between nationals who can only invoke the less favourable national rules and EU citizens who can invoke the more favourable EU rules does not infringe the constitutional principle of equal treatment. This question arises in particular with regard to nationals of the same Member State, who will be treated differently depending on whether they can establish a link with EU law or not. Take the hypothetical example of two nationals of Member State A, named Mister X and Mister Y. Mister Y has worked for five years in Member State B, whereas Mister X has never left Member State A. Consequently, only Mister Y can invoke the family reunification rights laid down in EU secondary law, whereas Mister X can only invoke the less favourable family reunification rights laid down in the national laws of Member State A. It can be readily understood why such a situation might be problematic in the light of a national constitutional norm mandating equal treatment of all (national) citizens.

In a number of Member States, including Spain<sup>72</sup>, instances of reverse discrimination have already been held to violate the national principle of equality. However, in other Member States, courts have adopted a different approach. The Austrian Constitutional Court, for instance, has accepted that a different treatment of moving nationals (and EU citizens) and static nationals was objectively justified.<sup>73</sup> It would also appear to be the case that the case law on this issue in some Member States has not yet been fully developed. The Belgian constitutional equality provisions, for instance, would appear to provide a strong ground to tackle reverse discrimination. How-

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<sup>71</sup> E.g. HANF, D. (*op. cit.*, n. 10), p. 56.

<sup>72</sup> See Judgement no 96/2002 of 25 April 2002 of the Spanish Constitutional Court and Judgment in Case 114/2007 of 1 June 2010 (cited in HANF, D. (*op. cit.*, n. 10), p. 50). See also the discussion in SARMIENTO, D., "Discriminaciones inversas comunitarias y Constitución Española", 15 *Revista Española de Derecho Europeo*, 2005, pp. 375-411.

<sup>73</sup> See Judgment of the Austrian Constitutional Court in Case 18269 of 23 September 2010 (cited in HANF, D. (*op. cit.*, n. 10), p. 50).

ever, the Belgian Constitutional Court so far has never taken a firm position on this issue. Interestingly, the recent amendments of the Belgian immigration rules, described higher, were challenged before the Constitutional Court in a number of cases which are currently pending.<sup>74</sup> This will provide the Constitutional Court with an ideal opportunity to clarify the validity of reverse discrimination under Belgian constitutional law.

The bottom-line is that national constitutional provisions potentially provide a promising ground for tackling instances of reverse discrimination, although their precise scope and effect remains largely to be tested. One can expect that the opportunities for such testing will increase in parallel with the increase in instances of reverse discrimination.

## V. Conclusion

“Reverse discrimination” is one of the most blatant and persistent forms of discrimination in the EU. It is a symptomatic consequence of the limited scope of application of the provisions on EU citizenship. In recent case law, however, the ECJ has started to interpret the scope of these provisions more broadly than it has traditionally done, thereby outlawing some forms of reverse discrimination. Be that as it may, this paper has demonstrated that the recent expansive ECJ case law far from “cures” the problem of reverse discrimination. In fact, it may well have the effect of consolidating or even worsening the problem, in particular because it provides new incentives for the Member States to enact systems of reverse discrimination.

This paper has argued that the ECJ is not well placed to cure the problem of reverse discrimination, in view of the significant limitations that surround its competence. Other, more promising avenues exist to tackle the problem. On the one hand, if the scope of EU law is extended to static EU citizens, currently falling outside the scope of EU law, this step could more effectively and more legitimately be taken by the EU legislator. On the other hand, the problem could also be approached from the viewpoint of national law instead of EU law. Reverse discrimination essentially arises from the fact that a Member State accords its own (static) nationals less favourable treatment than EU citizens enjoy under EU law. This leads to a difference in treatment under national law between “static” nationals and nationals having a connection with EU law. Such a situation may well run counter to national constitutional norm mandating equal treatment of all (national)

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<sup>74</sup> See the overview of pending cases on the website of the Constitutional Court: <http://www.const-court.be/>.

citizens, as is illustrated by recent case law from the Spanish Constitutional Court. It would also appear to be the case that the case law on this issue in a number of Member States has not yet been fully developed. As a result, national constitutional norms, embodying the fundamental principle of equality, would seem to provide strong potential grounds for challenging instances of reverse discrimination.