



# The RESEARCHER

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## Disclaimer

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THANK YOU TO ALL OUR CONTRIBUTORS

## The Evolution and Elusiveness of EU Citizenship: The Court of Justice Decision in *McCarthy*<sup>1</sup>



By John Stanley BL

### Introduction

The rights to live and work anywhere in the Member States, introduced in the Treaty of Paris in 1951, in a little over forty years had developed into Union citizenship, inserted under Article 8 of the EC Treaty by the Maastricht Treaty in 1992. The relevant Treaty provisions are now in Articles 20 to 25 of the Treaty on the Functioning of the European Union (hereafter: TFEU)<sup>2</sup>. While the words in the Treaty were not initially used to any discernable legal effect, the Court of Justice soon developed the idea of Union citizenship by interpreting these provisions, in light of the right to equal treatment and the prohibition of discrimination, and clarified that a Union citizen’s right to move and reside in another Member State was independent from the traditional economically grounded protection of free movement rights (e.g., *Martinez Sala*<sup>3</sup>).

<sup>1</sup> This article is based on a talk given to the Refugee and Immigration Practitioners’ Network at the Law Society, Dublin on 18<sup>th</sup> May 2011. Many thanks to Bríd Moriarty BL, Jonathan Tomkin BL, and Anja Wiesbrock for their invaluable comments.

<sup>2</sup> These provisions are complemented by the non-discrimination provisions in Articles 18 and 19. All eight articles come under the heading ‘Non Discrimination and Citizenship of the Union’ and constitute part two of the TFEU.

<sup>3</sup> Case C-85/96 *Martinez-Sala* [1998] ECR I-2691

The Court went on to develop this interpretation, benefiting economically inactive Member State nationals, in light of the Treaty's citizenship provisions (e.g., *Grzelczyk*<sup>4</sup> on free movement rights, and *Spain v UK*<sup>5</sup> on electoral rights). These judicial and progressive interpretations of citizenship rights were reflected in the legislative consolidation of citizenship rights in Directive 2004/38<sup>6</sup>. The Court of Justice subsequently clarified that the exercise of free movement rights brought Union citizens within the material scope of the Treaty, and that any measure with a restrictive or deterrent effect, unless justified by an overriding objective in the general interest, and proportionate to the aim sought to be achieved, was prohibited (e.g., *Metock*<sup>7</sup>)

Union citizenship has again evolved with the Court of Justice's interpretation of Article 20 TFEU in *Zambrano*<sup>8</sup>, and Union citizens may now invoke rights essential to the concept of citizenship without exercising free movement. Moreover, the ruling effectively clarified that the right to reside can be distinct from the right to move. Union citizens who have not exercised free movement rights can now invoke EU law against their own Member States, when there is a linking EU matter. This amounts to a fundamental change in our understanding of the nature of the relationship between Member States and their nationals.<sup>9</sup> The consequences of the *Zambrano* decision have now been the subject of a delimiting exercise in the recent Court of Justice

<sup>4</sup> Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

<sup>5</sup> Case C-145/04 *Spain v UK* [2006] ECR I-7917

<sup>6</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance).

<sup>7</sup> Case C-127/08 *Metock* [2008] ECR I-6241.

<sup>8</sup> Case C-34/09 *Zambrano* (unreported), 9<sup>th</sup> March 2011. See McMahon, Aoife; "Citizenship: The Court of Justice Decision in *Zambrano*" in *The Bar Review*, Vol 16, No 2, pp 43 & ff for a concise summary of the Advocate General's opinion and the Grand Chamber's decision in *Zambrano*, and an interesting discussion of some the implications of the judgment.

<sup>9</sup> See Tomkin, Jonathan; "Citizenship in Motion: The Development of the Freedom of Movement for Citizens in the Case-law of the Court of Justice of the European Union" (not yet published) for a summary of the history of EU citizenship.

decision in *McCarthy*<sup>10</sup>. This article addresses that latter case, and some of its implications.

### The Facts in *McCarthy*

Shirley McCarthy is a British citizen who was born, and always lived, in the UK. She does not claim to be a worker or self employed, or financially self-sufficient. Indeed, she was in receipt of State benefits. Her husband, George McCarthy, is a Jamaican national living in the UK without leave to remain. The couple married in 2002. After her marriage to George, Mrs McCarthy applied for, and was granted, an Irish passport (Mrs McCarthy's mother was born in Ireland).

In 2004 Mrs McCarthy applied to the Home Secretary for residency under EU law for both herself and her husband. The Secretary of State refused these applications, evidently because he found that Mrs McCarthy was not a 'qualified person' under the legislation (she was not, after all, a worker, or self employed or self-sufficient). Mrs McCarthy appealed the Secretary of State's decision to the then Immigration Appeal Tribunal (IAT), while her husband put in a new application, which was again refused, and then the subject too of an appeal to the IAT. George McCarthy's appeal was adjourned pending the outcome of his wife's appeal, which was, in turn, refused by the Asylum and Immigration Tribunal (AIT).

On appeal, the High Court ordered the AIT to reconsider the matter, and, in 2007, the AIT carried out its reconsideration and upheld its original decision. In 2008 the AIT refused George's appeal too. Sheila McCarthy appealed the AIT's new decision in respect of her claim, and, in dealing with that matter, the UK's Supreme Court decided it had to refer two questions to the Court of Justice of the European Union for preliminary rulings:

- 1 Is a person of dual Irish and UK nationality who has resided in the UK for her entire life a "beneficiary" within the meaning of Article 3 of Directive 2004/38/EC?
- 2 Has such a person 'resided legally' within the host Member State for the purpose of Article 16 of Directive 2004/38 in circumstances where she was unable to satisfy the requirements of Article 7 of that directive?

<sup>10</sup> Case C-434/09 *McCarthy* (unreported), 5<sup>th</sup> May 2011.

## The Opinion of Advocate General Kokott

The Advocate General made some interesting preliminary remarks in her assessment of the case:<sup>11</sup>

- I It might at first sight seem strange that an EU citizen seeks to rely on EU law against her Member State's authorities in order to get a right of residence in her own country, where her right of residence cannot be restricted, but that on closer examination what is really at stake is the right of residence of her non EU citizen husband (for the Advocate General, this indicated that the case was ultimately about family unification.)
- II It was open to question whether the case was really an EU law matter as "[t]he only possible connecting factor with EU law here is Mrs McCarthy's status as a person with dual nationality".

### "Beneficiary"

Advocate General Kokott essentially recommended the first question be answered in the negative for literal, contextual, and teleological reasons. She wrote that it can be inferred from the wording of Article 3(1)<sup>12</sup> of the Directive that the Directive does not apply to the relationship of EU citizens with the Member State of which they are a national and in which they have always resided. The Advocate General wrote that this interpretation is confirmed by the legislative context of Article 3(1) as the Directive contained numerous provisions<sup>13</sup> that, she said, showed that the Directive governed the legal position of a Union citizen in a Member State in which he resides in exercise of his right of free movement and of which he is not a national.

<sup>11</sup> Case C 434-09 McCarthy, Opinion delivered on 25<sup>th</sup> November 2010.

<sup>12</sup> "This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members ... who accompany or join them."

<sup>13</sup> Provisions referring to a Union citizen's entry or arrival: Recitals 6 & 22, and Articles 3(2); 5; 8(2); 15(2); 27(3); 29(2)&(3); 31(4). Provisions relating to residence "on the territory of another Member State": Recital 11 and Article 6(1) and 7(1) of Directive 2004/38. Provisions relating to the "host member State": Recitals 5, 6, 9, 10, 15, 16, 17, 18, 19, 21, 23, and 24, and Articles 2, 3(2), 5(3), 7, 8, 14 to 18, 22, 24, 28, 29, and 30 of the Directive. That Article 2(3) provides that the host Member for the purposes of the Directive is "the Member State to which a Union Citizen moves in order to exercise his/her right to free movement and residence". The AG noted that the Directive is not prevented from applying to a Union citizen who exercises a right of free movement and wants to return to his home Member State (e.g., *Singh; Eind; Carpenter*), or where a Union citizen wants to leave his home Member State in order to move to another Member State in exercise of his right to free movement (e.g., *Jipa*).

With regard to the aim of the Directive, the Advocate General stated it was to facilitate free movement within the territory of the Member States for Union citizens, and that '[a]ccordingly the directive often refers to free movement and residence in the same breath". Following from this analysis, the Advocate General concluded that Mrs McCarthy, who had always resided in a Member State of which she is a national, and who has not exercised her right to free movement, did not fall within the Directive's scope.

Advocate General Kokott asserted that Article 21(1) TFEU did not alter this, and that Union citizens could not derive from Article 21(1) a right of residence in a Member State where there is no cross border element. She then posed the question whether these views were impacted by Mrs McCarthy's dual nationality. The Advocate General said that the existence of dual nationality can in principle be relevant when assessing the legal position of Union citizens vis-à-vis their Member States of origin (e.g., *Garcia Avello*<sup>14</sup>), but that no particular relevant factors arose from the dual nationality of a Union citizen in Mrs McCarthy's position.

Finally, Advocate General Kokott considered the phenomenon of reverse discrimination (what she here construed as arising where the EU right of free movement yields more generous rules on the right of entry and residence than are provided to nationals of Member States). Advocate General Kokott said that EU law provides no means of dealing with this problem which, she said, does not fall within the scope of EU law. The Advocate General, (and it should be noted that her opinion post dated that of Advocate General Sharpston in *Zambrano*, but pre dated the Court's judgment in that case), noted Advocate General Sharpston's proposals on the matter, but stated that "citizenship of the Union is not intended to extend the scope *rationae materiae* of EU law to internal situations which have no link to EU law".

Noting (as has been noted in the Court's jurisprudence on many occasions) that citizenship of the Union is 'destined to be the fundamental status of nationals of the Member States' and that it could not be ruled out that the Court will review its case law 'when the occasion arises', the Advocate General set out reasons why Mrs McCarthy's case did not 'provide the right context for detailed examination of the issue of discrimination against one's own nationals. First, the Advocate General asserted that a 'static' Union citizen such as Mrs McCarthy was not discriminated against

<sup>14</sup> Case C-148/02 *Garcia Avello* [2003] ECR I-11613.

compared with 'mobile' Union citizens as (a) she had not exercised free movement, and (b) did not fulfill the conditions under EU law for longer term rights of residence. Intriguingly, the Advocate General urged the Court of Justice to reopen the oral procedure in the case to deal with the matter of reverse discrimination in greater depth, if the Court was to consider 'further developing' the status of EU citizenship in its decision.

### *Legal Residence*

The Advocate General opined that this question was logically dependent on the first, and as such if her answer to the first question stood, then the Union citizen did not come under the scope of the Directive, and the answer to the second question must also be in the negative. The Advocate General, nonetheless, set out her views in the alternative.

The Advocate General was of the view that the Court had not determined the matter in its *Lassal*<sup>15</sup> judgment as the decision there that periods of residence 'completed ... in accordance with ... earlier EU law instruments ... must be taken into account' did not preclude other periods of residence under national law from being taken into account. For Advocate General Kokott, it is consistent with the Directive's aims of 'promoting social cohesion' and creating a 'genuine vehicle for integration into the society of the host Member State' for the entitlement to permanent residence to be extended to those whose residence entitlement in the host Member State result only from that State's domestic law on foreign nationals, as it is of secondary importance where the right of residence originates from. Indeed, the AG stated that there were clearly instances where residence of Union citizens in a host Member State could not be based on EU law, but on domestic law of foreign nationals (e.g., *Trojani*<sup>16</sup>).

The Advocate General opined, nonetheless, that 'legal residence' under Article 16(1) can only mean residence for foreign nationals, as opposed to a state's nationals. The Advocate General asserted that the Directive is not intended to 'promote for example integration into the society of the host Member State of nationals of that State who have never exercised their right of free movement. Moreover, Advocate General Kokott opined, there are 'fundamental qualitative differences' between a right of residence resulting from law on foreign nationals and a right of residence resulting from nationality. Specifically, she

distinguished between the impermissibility under international law of states restricting the right of residence of their own nationals, and the conditional nature of foreign nationals' residence, and this, she opined, 'also applies to residence of Union citizens from other Member States, although the limits of EU law are to be observed.' The Advocate General was of the view that to allow Mrs McCarthy to rely on the Directive, would be to allow her to 'cherry pick' in a manner against the spirit and purpose of the directive, i.e., to get the benefit of family unification under the Directive, without meeting the directive's objectives, or being subject to its conditions.

### *The ECHR*

In a possible harbinger, the Advocate General concluded by noting that the UK might be obliged, as a party to the ECHR, to grant Mr McCarthy a right of residence as the spouse of a British national living in the UK, but was quick to state that this is not a question of EU law.

### **The Judgment of the Court of Justice**

Although the referring court limited its questions to the interpretation of Articles 3(1) and 16 of Directive 2004/38, the Third Chamber of the European Court, noting that it was not prevented from providing the national court with all the elements of interpretation of EU law that might assist in adjudication, reformulated the first question, essentially, in the following way:

Is Article 3(1) of Directive 2004/38 or Article 21 TFEU applicable to the situation of a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also the national of another Member State?

### *Directive 2004/38*

The Court, in line with the Advocate General's opinion, stated that literal, contextual and teleological interpretations of Article 3(1) of the Directive led to a negative reply to the first question. Firstly, the Court emphasized that according to Article 3(1), all Union citizens who move to or reside in a Member State 'other' than that of which they are a national, are beneficiaries of the Directive.

In terms of legal context, the Court stated that it is apparent that the residence to which the Directive refers is linked to the exercise of the freedom of movement of persons (e.g., Article 1(a) defines its subject by reference to 'the' right of 'free movement and residence'), and that the Directive's rights of

<sup>15</sup> Case C-162/09 *Lassal* [2010] ECR I-0000.

<sup>16</sup> Case C-456/02 *Trojani* [2004] ECR I-7573.



residence govern the legal situation in a Member State of which a Union citizen is not a national (e.g., Articles 6, 7 and 16 refer to the residence of a Union citizen either 'in another Member State' or in 'the host Member State').

And in terms of a teleological interpretation, the Court stated that the subject of the Directive concerns the *conditions governing the exercise* of the right to move and reside freely within the Member States (e.g., Article 1(a)), notwithstanding that the Directive aims to facilitate and strengthen the exercise of that right. The Court went on to say that as the residence of a national in his own Member State cannot be made subject to conditions, the Directive cannot apply to a Union citizen who enjoys an unconditional right of residence due to the fact that he resides in the Member State of which he is a national.

Accordingly, the Court held, in circumstances as pertained in this case, a citizen like Mrs McCarthy, is not covered by the concept of 'beneficiary' for the purposes of Article 3(1), so that the Directive is not applicable to such a person. The Court stated that this finding cannot be influenced by dual nationality.

#### *Article 21 TFEU*

The second part of the question, as reformulated, concerned whether Article 21 TFEU was applicable. The Third Chamber noted that the Treaty rules governing freedom of movement cannot be applied to situations with no linking factor to EU law and which are confined in all relevant respects within a single Member State (e.g., *Metock*, para 77), but also that the situation of a Union citizen like Mrs McCarthy cannot be dismissed as a purely internal situation merely because she had not made use of the right of free movement (e.g., *Schempp*,<sup>17</sup> para 42).

The Court also noted that citizenship of the Union is 'intended to be the fundamental status of nationals of the Member States' (e.g., *Zambrano*, para 41), and that Article 20 TFEU precludes national measures that have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (e.g., *ibid*, para 42).

The Court held, however, that 'no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue ... has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within

the territory of the Member States in accordance with Article 21 TFEU.'

The Third Chamber distinguished Mrs McCarthy's case from the *Zambrano* case on the basis that, in contrast with *Zambrano*, the national measure at issue does not have the effect of obliging Mrs McCarthy to leave the EU. And the Court distinguished Mrs McCarthy's case from the *Garcia Avello* case on the basis that what mattered in the latter case was not whether the discrepancy in surnames was the result of dual nationality, but the fact that the discrepancy was liable to cause serious inconvenience constituting an obstacle to freedom of movement justifiable only if based on objective considerations and proportionate to the aim pursued.

For the Court, it followed that in *Zambrano* and *Garcia Avello*, the national measure at issue had the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status or of impeding the exercise of their right of free movement and residence within the EU, while in *McCarthy* the dual nationality factor was not enough, on its own, for a finding that the situation was covered by Article 21 TFEU.

That being the case, the Court held that Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

#### *The Court's Answer*

In light of the foregoing, the Third Chamber answered the reformulated first question as follows:

1. Article 3(1) of Directive 2004/38 must be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.
2. Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member

<sup>17</sup> Case C-403/03 *Schempp* [2005] ECR I-6421.

State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

And, in light of this answer, the Court found there was no need to answer the second question.

### Some Implications of the Judgment

#### *Union Citizenship as a linking factor to EU law*

Advocate General Mazák, in *Förster*, wrote that “Union citizenship, as developed by the case-law of the Court, marks a process of emancipation of Community rights from their economic paradigm”.<sup>18</sup> *Zambrano*’s reimagining of free movement rights as derived from fundamental citizenship rights, rather than as the economic rights from which they emerged, marks a pivotal juncture in this process, and a paradigm shift in the legal order. Member State nationals’ fundamental rights can now be seen as deriving from their fundamental status as Union citizens, rather than from their economic value.

*McCarthy*’s delimitation of the effects of *Zambrano* is set out in terms more typical of the pre-*Zambrano* legal order. For example, the Third Chamber’s teleological considerations focused on the aim of the Directive, not the aim of the citizenship Treaty provisions. Similarly, the Third Chamber in *McCarthy* found that there was no EU law linking factor in the case, notwithstanding that *Zambrano* turned this concept on its head by decoupling citizenship rights from free movement or economic ends.<sup>19</sup> And yet it appears that *McCarthy* does not detract from the core development of *Zambrano*. Indeed, the Court in *McCarthy* confirmed that the situation of a Union citizen who has not made use of the right to freedom

of movement cannot, for that reason alone, be assimilated to a purely internal situation.<sup>20</sup> And the Court also stated that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status.<sup>21</sup> It would appear then that the requisite EU law link can be provided by a cross border movement, whether actual or prospective, or by a measure resulting in the deprivation of EU citizenship rights, and the latter approach appears to be reliant on the status of citizenship as such, rather than on any prospective movement to another Member State.

Alternatively, it may be that a measure resulting in the deprivation of Union citizenship rights itself requires at least a prospective cross border element. As already noted, the Court in *McCarthy* commented that the fact that Mrs McCarthy had not made use of her free movement rights could not, for that reason alone, be assimilated to a purely internal situation. This allows for the interpretation that the need for a future cross border element would be necessary to provide an EU law link. On this reading, it would appear that the facts in *Zambrano* (e.g., the children’s age and dependence on non national parents) disclosed a situation wherein any future exercise of free movement was fundamentally jeopardized by the national measures at issue (refusal to provide residency and permission to work to the non national parents), such that the children’s genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens was undermined, while the facts as canvassed in *McCarthy*, inversely, did not so fundamentally affect Mrs McCarthy’s citizenship rights such that any future exercise of free movement was undermined.

#### *Delimitation of the categories of people benefiting from Zambrano*

While *McCarthy* appears to clarify the core development in *Zambrano*, it also delimits the categories of people who might benefit from the latter judgment. Applicants whose situation is comparable to that in *McCarthy* (e.g., cases where there is (a) continuous residence in the Member State of birth uninterrupted by residence in another Member State; (b) dual nationality, but with no history of residence in a second state; (c) no economic activity in the Member State of choice; (d) no evidence of self sufficiency; and (e) no minor child of a

<sup>18</sup> Opinion of Advocate General Mazák, *Förster v IB-Groep*, Case C-158/07 [2008], para. 54.

<sup>19</sup> Similarly, it is jarring to read Advocate General Kokott opine that EU law provides no means of dealing with reverse discrimination, notwithstanding the suggestions from Advocate General Sharpston in *Zambrano*, and Advocate General Maduro’s cogent argument in *Heinz Huber v Bundesrepublik Deutschland*, Case C-524/06 [2008] ECR I-09705 (see, e.g., para 18). See Wiesbrock, Anja; *Disentangling the ‘Union Citizenship Puzzle’? The McCarthy Case* (not yet published) for a discussion of reverse discrimination in light of *McCarthy*.

<sup>20</sup> *McCarthy*, para. 46.

<sup>21</sup> *Ibid.*, para. 47.

third country national<sup>22</sup>) may well be unable to effectively assert reliance on *Zambrano*<sup>23</sup>. Such people can either rely on domestic law, or, in order to invoke EU law, exercise their rights in another Member State, and then return to the Member State in which they seek residency with their family members. Applicants could also seek to distinguish their case from *McCarthy*, by emphasizing factual issues not emphasized, or present, in *McCarthy*, or develop legal arguments not fully canvassed in *McCarthy*, particularly in light of the judgment's lack of consideration of fundamental rights. Indeed, the Court's conclusion that Article 21 TFEU is not applicable to the facts of *McCarthy* might be construed as a negative view of the admissibility of the case in this regard, leaving it to the Court's decisions in future cases, with more compelling facts, to provide guidance on what rights are implied in Articles 20 and 21 TFEU, and how any such rights might be justifiably breached.

#### *The ECHR & The Charter*

The *McCarthy* case relates to decisions taken in the UK predating the entry into force of the Lisbon Treaty and the Charter of Fundamental Rights. Nonetheless, it is notable that Advocate General Kokott referred to the ECHR in her opinion, while the Court's decision was silent on the matter (similarly, Advocate General Sharpston referred to the ECHR extensively in her opinion, while the Court in *Zambrano* was, again, silent). The Advocate General's concluding remark that a Member State might be obliged, as a party to the ECHR, to grant a right of residence to the spouse of a Union citizen in a situation like that in *McCarthy*, but that this was not a question of EU law is problematic in that it fails to address Article 6(2) TEU, which stipulates that the Union shall accede to the ECHR, and Article 6(3) TEU which stipulates that the fundamental rights guaranteed and protected by the ECHR constitute general principles of EU law. It would be interesting to learn the view of the European Court of Human Rights (ECtHR) on such matters. While the ECtHR has accepted that there is generally adequate protection of human rights in the EU, it has been clear

<sup>22</sup> Anja Wiesbrock has argued that a reintroduction of "a categorical distinction between different types of Union citizens (such as children and adults) in respect of the derivative right of residence and employment of family members in one's Member State of nationality would defeat the objective of inclusiveness" (Wiesbrock, Anja; *Disentangling the 'Union Citizenship Puzzle'? The McCarthy Case*, not yet published).

<sup>23</sup> This outline is indebted to a cogent summary of the impact of *McCarthy* by Professor Elspeth Guild.

that if the level of protection becomes manifestly deficient, it remains open to the Court to find Member States liable (e.g., *Bosphorus*<sup>24</sup>).

It is also notable that neither the opinion nor the judgment in *McCarthy* mentions the Charter of Fundamental Rights of the European Union (the Charter). Following the entry into force of the Lisbon Treaty in 2009 the charter has the same legal value as the Treaties. Article 51 of the Charter provides:

1. *The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.*
2. *This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.*

Article 7 (respect for private and family life), Article 9 (right to marry and found a family), Article 19 (protection in the event of removal), Article 20 (equality before the law), Article 21 (non discrimination), Article 34 (social security and social assistance), and Articles 39 to 46 (citizens' rights) would all have potentially significant impact on a case like *McCarthy*. Articles 14 (right to education), Article 24 (the rights of the child), Article 25 (the rights of the elderly), and Article 26 (integration of persons with disabilities) are also particularly noteworthy as provisions of potential importance depending on the facts of a case.<sup>25</sup>

Questions in relation to the ECHR and the Charter are open, particularly in respect of post-Lisbon cases. The Court of Justice will soon have an opportunity to consider Articles 7 and 24 of the Charter, and Article 8 of the ECHR, as well as Article 20 TFEU in the *Lida*<sup>26</sup> case. Accordingly, it remains to be seen whether applicants may yet distinguish *McCarthy*-type situations from the already temporally specific reasoning in *McCarthy* itself.

<sup>24</sup> *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, ECHR (2005) No 45036/98.

<sup>25</sup> The Irish Supreme Court will have an opportunity to consider Article 24 of the Charter in the appeal in the *Lofinmakin*<sup>25</sup> case, a challenge to the Minister's pre Lisbon Treaty decision to deport a third country national parent of a minor Irish citizen

<sup>26</sup> Case C 40/11 *Lida*, pending.

### *Entitlement to permanent residence under EU law*

In her Opinion, Advocate General Kokott effectively conceded that entitlement to permanent residence under EU Treaty rights should be extended to third country nationals whose residency resulted from domestic law on foreign nationals. It is disappointing that this matter went unaddressed by the Court. Accordingly, we are left with the inconclusiveness of *Lassal*,<sup>27</sup> which, as the Advocate General noted, does not preclude periods of residence under national law from being taken into account, but which, inversely, does not require that they be taken into account.

### *Acquisition of Citizenship*

In light of *Zambrano*, Member States may well toughen up their naturalization laws. The right to confer citizenship is, of course, within the competence of each Member State. In applying national rules, however, a Member State may be required to give due regard to the principles of EU law. In *Rottmann*<sup>28</sup>, the Court of Justice ruled that it was for that Court to rule on questions referred to it by a Member State which concerned the conditions under which a Union citizen may, because he loses his nationality, lose his status of citizen of the Union, and thereby be deprived of the rights attaching to that status. It is an open question whether third country nationals, particularly those whose acquisition of the nationality of a Member State has been possible as a result of making use of EU free movement rights, bear a connection to EU law such that the application of EU law principles to their acquisition of Member State citizenship would disallow national laws contrary to EU fundamental principles.<sup>29</sup>

### *The Framing of the Questions in Zambrano and McCarthy*

The distinct approaches taken by the Court in *Zambrano* (a decision of the Grand Chamber (i.e., thirteen judges)) and *McCarthy* (a judgment of the Third Chamber (four judges)) are perhaps understandable in light of the differences between the questions referred. For example, *Zambrano*'s questions were set out in terms of the Treaty

provisions, while those in *McCarthy* were initially in terms of the Directive's provisions. While the Third Chamber in *McCarthy*, indicated it would provide the national court with 'all the elements of interpretation of European Union law which may be of assistance...', and indeed reformulated the first question to include Article 21 TFEU, it is clear that the applicant in *McCarthy* approached the case in terms of the provisions of secondary legislation, rather than in terms of fundamental citizenship Treaty rights. It is also evident that the plenary session was far from exhaustive: Advocate General Kokott remarked in her opinion that if the Court was going to consider 'further developing' the status of EU citizenship in its decision, the Court should reopen the oral procedure in the case as the "parties involved in the present proceedings have hitherto been given occasion to set out their arguments on this issue in passing only..." Accordingly, it is to be hoped that the implications for what is 'destined to be the fundamental status of nationals of the Member States' will be canvassed more comprehensively in written and oral submissions in future cases.

### *Substance of the rights of Citizenship*

Neither *Zambrano* nor *McCarthy* provide much by way of guidance about what 'genuine enjoyment of the substance of the rights conferred by virtue of the status as a Union citizen' means. Evidently, the facts in *Zambrano* disclosed to the Grand Chamber that the Belgian measures at issue in that case were in breach of the *Zambrano* citizen children's rights. And it was equally evident to the Third Chamber in *McCarthy* that the UK measures in that case were not in breach of Mrs McCarthy's rights as a citizen. But the particular rights either constellation of the Court had in mind remain unknown.

*Zambrano* appears to imply that there are some matters so fundamental to the genuine enjoyment of the substance of rights conferred on Union citizens that Member States are precluded from applying measures that have the effect of depriving citizens of such rights, or that so fundamentally impact such rights that future free movement is seriously jeopardized. This is, essentially, an EU doctrine of unenumerated fundamental rights. And it also appears that among these rights is the free standing right to reside in a Member State of nationality, the right of a minor child citizen to the company and care in a Member State of nationality, of his parent upon whom she is dependent, and the right of such a parent to reside and work in the child's Member State of nationality. Beyond that, the doctrine is silent.

<sup>27</sup> Case C-162/09 *Lassal* [2010] ECR I-0000.

<sup>28</sup> Case C-135/08 *Rottmann* (unreported), 2 March 2010, para. 41.

<sup>29</sup> For more on this theme, see: Wiesbrock, Anja; "Granting citizenship-related rights to third-country nationals: an alternative to the full extension of European Union citizenship?" (not yet published).<sup>29</sup> Case C 40/11 *Lida*, pending.

<sup>29</sup> Case C-162/09 *Lassal* [2010] ECR I-0000.

<sup>29</sup> Case C-135/08 *Rottmann* (unreported), 2 March 2010, para. 41.

<sup>29</sup> For more on this theme, see: Wiesbrock, Anja; "Granting citizenship-related rights to third-country nationals: an alternative to the full extension of European Union citizenship?" (not yet published).



There is useful judicial guidance for a possible way ahead in the Australian decisions of *Vaitaiki*<sup>30</sup>, and *Wan*<sup>31</sup>, and in the UK Supreme Court's judgment in *ZH (Tanzania)*<sup>32</sup>, in which Baroness Hale referred to those Australian cases, and opined that "although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8)."<sup>33</sup>

Some literature on citizenship in general has been thoughtfully set out recently by Michael Lynn BL who noted the importance of an understanding of citizenship as including a strong participatory right in one's community.<sup>34</sup> Judicial opinions in Irish law have both broadly concurred with this view (e.g., Fennelly J in his dissenting judgment in *A.O. & D.L.*<sup>35</sup>), and have proffered a more restrictive view (e.g., Clarke J in *Alli*<sup>36</sup>). And these differing views have somewhat analogous counterparts in the opinions of Advocates General Sharpston in *Zambrano* and Kokott in *McCarthy*.

It is interesting to consider how the interpretation of Union citizenship will develop in light of the Lisbon Treaty. While the basic provisions on citizenship from the EC Treaty were retained in the Lisbon Treaty, and are now in Part II TFEU, the Treaty also contains new, potentially far-reaching, mandatory provisions relevant to Union citizenship. Article 10(3) TEU, for example, provides that every citizen has the right to

<sup>30</sup> *Vaitaiki v Minister for Immigration and Ethnic Affairs* [1998] FCA 5, (1998) 150 ALR 608.

<sup>31</sup> *Wan v Minister for Immigration and Multi-cultural Affairs* [2001] FCA 568.

<sup>32</sup> *ZH (Tanzania) v Secretary of State for the Home Department* (unreported), 1<sup>st</sup> February 2011.

<sup>33</sup> Baroness Hale also cited (at para. 30) with approval the following list of matters which the Court in *Wan* regarded as important:

*"(a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle'....;*

*(b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;*

*(c) the loss of educational opportunities available to the children in Australia; and*

*(d) their resultant isolation from the normal contacts of children with their mother and their mother's family."*

<sup>34</sup> Lynn, Michael; *Citizenship, Residence Rights and Zambrano*, paper presented 4<sup>th</sup> April 2011.

<sup>35</sup> *A.O. & D.L v Minister for Justice* [2003] 1 IR 1

<sup>36</sup> *Alli v Minister for Justice, Equality and Law Reform* (unreported), High Court, 2<sup>nd</sup> December 2009.

participate in the democratic life of the Union. Article 11 TEU stipulates that the institutions shall give citizens the opportunity to make known and publicly exchange their views in all areas of Union action. Paul Craig has argued that a restrictive interpretation of Article 11 would send a very negative message about the nature of participatory democracy in the EU, and risk turning a provision designed to convey a positive feeling about the inclusive nature of the Union and its citizenry into one that carried the opposite connotation.<sup>37</sup> It is also noteworthy that provisions set out in the Charter of Fundamental Rights (e.g., Article 25 (the rights of the elderly), and Article 26 (integration of persons with disabilities) refer to a right to participate in the community's social and cultural life.

It is sobering to consider what the putative founders of the Irish State thought the State should be. The Democratic Programme adopted by the first Dail in January 1919 set out a republic based on a community of people with a governing ideal oriented to public right and welfare. It declares it "the duty of the Nation to assure that every citizen shall have opportunity to spend his or her strength and faculties in the service of the people. In return for willing service, we, in the name of the Republic, declare the right of every citizen to an adequate share of the produce of the Nation's labour." The Democratic Programme went on to state that it "shall be the first duty of the Government of the Republic to make provision for the physical, mental and spiritual well-being of the children, to secure that no child shall suffer hunger or cold from lack of food, clothing, or shelter, but that all shall be provided with the means and facilities requisite for their proper education and training as Citizens of a Free and Gaelic Ireland."

It should be of concern that it required a decision of the Court of Justice to remind Ireland that the constructive deportation of its children is anathema to a participatory democracy. Now that we have been disabused of the notion that children's citizenship can be postponed for reasons of immigration control, and that the residency and company and care of a child's parents are necessary for meaningful citizenship, it remains to be seen what else constitutes 'the substance of the rights' of Union citizenship.

<sup>37</sup> Craig, Paul; *The Lisbon Treaty* (OUP, 2011).

## European Asylum Curriculum – Researching Country of Origin Information



By Elisabeth Ahmed, Refugee Documentation Centre

The European Asylum Curriculum - Country of Origin Information Module is available through the Refugee Documentation Centre, and is facilitated by EAC Authorised Trainers. The RDC offers the course both on a national and international level to employees of the Immigration and Asylum Services and also to NGOs. Two of the Authorised EAC trainers are members of the COI Network. The COI Training Network is a group of COI trainers from governmental and non-governmental organisations in different European countries.

The Module, Researching Country of Origin Information is based on the *Common EU Guidelines for processing Country of Origin Information (COI)* and is a blended learning course consisting of 4 weeks online-learning and one day face-to-face training. Taking into account the obligation to use COI in RSD cases the module aims to impart knowledge and skills about the role of COI, standards of COI, scope of COI and limits of COI research. Areas such as COI sources, research skills and presentation of research results are also covered.

The training is designed to provide flexibility for the trainee and allows participants work according to their own timetable. E-learning can be done anywhere, at work, at home (wherever you have access to the internet). The E-learning phase allows the participant to be available at their workplace while on the course. The only set time is the one day face-to-face training which requires participants to be on site. During the face-to-face training participants come together and have the opportunity to review the module and work together on a case study. Face-to-face training takes place in week 5 after completion of the online phase.

A number of national authorities including Ireland have invested resources in the development of the European Asylum Curriculum which is co-funded by the European Commission. The idea of the European Asylum Curriculum provides a common European vocational training for officials working within the area of asylum, leading to a more harmonized approach in working with asylum cases. This should guarantee a

fairer and more uniform procedure throughout Europe. It is envisaged that this training can be offered to all those throughout Europe working in the field of asylum with the RDC fulfilling this role in Ireland.

During July 2010 the *EU Commissioner for Home Affairs Cecilia Malmström* attended one of the EAC's training sessions in Brussels and stated:

*"It was very interesting and useful to attend one of EAC's training sessions. Today, discrepancies between Member States are too big; it is not acceptable that asylum seekers get different decisions depending on in which EU country they submit their asylum application. One of my main priorities during the years to come is to work towards getting a common European asylum and migration policy in place, and in that I think this initiative is a very useful tool in order to harmonise the national asylum systems within the EU."<sup>38</sup>*

Training in the European Asylum Curriculum - Researching Country of Origin Information Module has been delivered by the RDC to a number of staff of asylum agencies and non governmental agencies. The most recent training delivered in March and April of this year proved very successful. On this occasion the training was open to international participants and included staff from asylum agencies in Ireland, non governmental agency staff and a participant working in the EU Commission. All the participants were very engaged and committed during the online phase and there was full attendance at the face-to-face day providing the opportunity for lively discussions. The view of one participant is outlined below.

*"I found the European Asylum Curriculum COI Module to be an essential training tool for me as a Legal Officer in my organisation. Very often I would consider complex legal and COI issues in my role and to learn a rigorous standard of practice in respect of research production is essential for me.*

*The interactive course continually focuses one's attention on the various subjects of the course through illustrations, practical online guidance and exercises. The subjects within the course ranged from quality analysis of research sources, to guidance on how to present one's research. The month long training course culminates in a face-to-face training session which was facilitated by the Refugee Documentation Centre. Together with other students we revised the course content, engaged in group exercises and carried out practical COI research exercises all the while benefiting from the enthusiasm and interests of the facilitators."* Ronan O'Brien, Legal Support Officer.

<sup>38</sup> [http://ec.europa.eu/commission\\_2010-2014/malmstrom/news/archives\\_2010\\_de.htm](http://ec.europa.eu/commission_2010-2014/malmstrom/news/archives_2010_de.htm)

The Refugee Documentation Centre remain committed to play their role in ensuring training is available to those who need it and to date we have provided a number of EAC trainings, with a further training planned for September of this year. It is our intention that all those requiring training have the opportunity to avail of participating in the EAC COI Module, taking advantage of this excellent training which has been specifically developed to enhance the capacity and quality of the European asylum process and to strengthen practical cooperation among European asylum/immigration systems.

If you are interested in registering for the September Training please contact the Refugee Documentation Centre at [eactraining@legallaidboard.ie](mailto:eactraining@legallaidboard.ie) or telephone +353-1-4776250.

#### September 2011 Course Details

*E-learning phase:* 26 September 2011 – 21 October 2011.

*Face-to-face training:* 25 October 2011.

*Closing date for application:* 16 September 2011

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## UNHCR marks World Refugee Day

*By Sophie Magennis, Head of Office, UNHCR Ireland*

World Refugee Day took place on 20 June and around the world organizations involved in protecting and supporting refugees, asylum seekers, stateless people and internally displaced people organized hundreds of events and actions to mark this important day. World Refugee Day this year had an extra special resonance as it also marked the 60th anniversary of the UN Convention Relating to the Status of Refugees.

Some sixty years ago, Europe's most destructive war left millions of traumatized people homeless and displaced. Realizing these vulnerable people needed special protection world leaders took action. Thousands were resettled to new countries and the 1951 Refugee Convention was created. Today this Convention is still protecting millions of people forced to flee war or persecution.

Currently, more than 43 million people are displaced by violence around the world. Europe is no longer home to most of them. The vast majority - about 80 percent - are hosted and cared for in developing countries, not industrialized ones. This generosity has been seen most recently in the response of Tunisians and Egyptians to people escaping the violence in

Libya. These two countries have received the majority of the almost 1 million people who have fled the violence - offering safety before they could be evacuated home or refuge if returning home was not possible. It's estimated that less than 2 percent of those leaving Libya are actually coming to Europe.

UNHCR Ireland decided to mark the anniversary of the UN Convention Relating to the Status of Refugees and World Refugee Day through a photographic project to capture the images and stories of some of the thousands of refugees who have found protection and safe haven in Ireland over the last sixty years. The project culminated in a photographic exhibition and booklet entitled *60 Years - Stories of Survival and Safe Haven* which brings to life Ireland's little known tradition in past decades of providing a safe haven to those in need of international protection from persecution, terror, fear and conflict. The exhibition documents the experiences of Hungarian refugees who came to Ireland in 1956 to escape the Soviet tanks, Chilean refugees forced to flee in the 1970's after the Pinochet coup, the Vietnamese 'boat people' who were resettled in Ireland in the late 1970's following the fall of Saigon and stories from refugees of a contemporary nature from Iraq, Myanmar, Somalia, Sudan and the Democratic Republic of Congo. *60 Years - Stories of Survival and Safe Haven* tells the story of people who came to Ireland looking for refuge and how they found a home.

In Ireland, there is a long history of solidarity with refugees and an archive trawl UNHCR undertook through back issues of the Irish Times records this spirit. An editorial from 1974 entitled "Let them in" which was displayed in the exhibition, called on the Government of the day to admit a greater number of Chilean refugees than originally planned. The editor wrote, "If individuals were to guarantee homes and, where possible, jobs to those who need urgently them, the Government's problems would diminish". Another article from 1956 carries a photograph of Dublin Dockers marching through the streets of Dublin to protest at the treatment of Hungarians who had refused to unload Russian timber at Dublin port.

This spirit of hospitality and understanding was expressed in tougher financial times than Ireland is experiencing at present. Ireland in the 1950's and 1970's was far less well equipped to meet the needs of people arriving from places of conflict.

There were however, then as now, cautionary voices in relation to the welcome that should be extended to those in need of international protection. A few years

ago, Government papers released under the 30 year rule indicated that the Irish Justice Ministry had concerns about the potential future Marxist activities of Chilean refugees who might be admitted to Ireland. The concerns were addressed successfully by the late Garrett Fitzgerald, then Minister for Foreign Affairs, and the refugees were admitted.

The exhibition and accompanying booklet is a contribution to addressing the concerns that some may have about what protection may entail. The exhibition documents the enormous contributions those offered protection here have made to Irish life. Many of those featured in the exhibition work in the medical profession as surgical doctors, homeopaths, bio medical researchers and pharmacists while others are studying social studies, completing doctorates and working as chefs and in travel. Of course, there have been challenges along the way and pursuing integration in the Ireland of the 1950's or 1970's was surely no mean feat, but the stories documented in the booklet are nothing short of inspirational.

The refugees' stories tell us a lot about the strength, determination and spirit of those whose portraits feature in the exhibition. They also tell us a lot about the capacity of Irish society to nurture and benefit from the contributions of refugees determined to build a better future for themselves and their children. Even in the context of the current financial crisis, given this rich history of providing protection since the 1950's and before, the Irish authorities and society can be confident about their capacity to continue to provide this protection into the future. In recent weeks, UNHCR has warmly welcomed the decision of the Irish Government to admit 34 people from North Africa and Malta who have fled the crisis in the region.

The generosity documented in the exhibition *60 Years - Stories of Survival and Safe Haven* is rooted in a shared humanity - and a shared belief that there are no tolerable levels of suffering. It is a recognition that even one person forced to flee war or persecution, is one too many.

Today's chronic conflicts are a cause for special concern. What we see is that as new conflicts flare, old ones are left unresolved. This leads to new displacement on the one hand and millions of people being prevented from returning home on the other. Fewer than 200,000 refugees went home in 2010, the lowest number in 20 years. With few options these uprooted people will languish in camps or in urban shantytowns. Today more than seven million refugees live in so-called protracted situations - living their lives in a virtual limbo.

It's a situation that can lead to desperation and a search for an escape, even if it means risking life for those undertaking desperate journeys. It is necessary for the international community to step forward and act. Whether it be to keep borders open to those seeking safety from violence or persecution, or to provide solutions to long-term refugees.

The recent tragedies involving refugees fleeing Libya and the longer standing ones such as the mistreatment and drowning of Somali refugees across the Gulf of Aden also argue powerfully for more resettlement places in the developed world. Through resettlement, the most vulnerable refugees are able to start new lives in new countries. It allows people in need of protection to move in an orderly and predictable way, removing the temptation to life-imperiling means and routes. At the same time, it is palpable proof to those countries which host large numbers of refugees, that other nations and peoples are willing to share the responsibility to protect.

On World Refugee Day, the Office of the United Nations High Commissioner for Refugees is asking States everywhere to reflect on the solidarity expressed 60 years ago - to help the most vulnerable - and to do one thing: - to ensure that those fleeing danger - no matter what part of the world they are in - can still find refuge under the 1951 Convention. Because even one refugee without hope, is one too many.

The exhibition *60 Years - Stories of Survival and Safe Haven*, following a four day run in The chq Building, IFSC, will be featured in the Photolreland Festival in the Complex, Smithfield from 8 - 21 July. Entry is free and all are welcome to visit. UNHCR also plans to take the exhibition to Cork, Kilkenny, Limerick, Dun Laoghaire Co. Dublin (for Social Inclusion Week) and other venues around the country in the coming months. For enquiries please contact Yolanda Kennedy at [kennedy@unhcr.org](mailto:kennedy@unhcr.org)

The booklet accompanying the exhibition is available to download from the UNHCR Ireland website: [www.unhcr.ie](http://www.unhcr.ie).

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## ***Case C -34/09 Gerardo Ruiz Zambrano v Office national de l'emploi; Court of Justice of the European Union, 8<sup>th</sup> of March 2011***

*By Mary Fagan, Refugee Documentation Centre*

ARTICLE 234 EC - PRELIMINARY RULING – ARTICLES 12, 17 & 18 EC TREATY - ARTICLE 20 TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION – CITIZENSHIP OF THE EUROPEAN UNION – GRANT OF A RIGHT OF RESIDENCE UNDER EC TREATY TO A UNION CITIZEN IN THE MEMBER STATE OF WHICH HE IS A NATIONAL - WHETHER A MEMBER STATE IS OBLIGED TO GRANT A THIRD COUNTRY NATIONAL ASCENDANT RELATIVE OF AN INFANT NATIONAL OF THAT MEMBER STATE WHO IS DEPENDANT ON SUCH RELATIVE A RIGHT TO RESIDE AND WORK THERE- ARTICLES 21 24 & 34 CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

### **Facts**

The plaintiff and his wife who were both Colombian nationals applied for asylum in Belgium. Their applications were refused. While waiting to have their residence situation in Belgium regularised, the wife gave birth twice. By virtue of Article 10(1) of the Belgian Nationality Code any child born in Belgium who would otherwise be stateless acquires Belgian nationality. Colombian law did not recognise Colombian nationality for children born outside Colombia in the absence of specific steps by the parents to have them so recognised. The parents having omitted to take the requisite steps, both children acquired Belgian nationality.

The couple applied for Belgian residency pursuant to Article 40 of the Law of 15 December 1980 in their capacity as ascendants of a Belgian national. These applications were refused on the grounds that the couple had deliberately failed to take the necessary steps to have their children recognised as Colombian nationals in an attempt to legalise their own residency in Belgium.

Although the plaintiff did not have a work permit, in October 2001 he signed an employment contract to work full time for an unlimited period. His work was paid according to the applicable scales with statutory deductions made for social security and the payment of employer contributions. When he became unemployed, he applied for unemployment benefit in respect of periods of unemployment. His application was refused on the grounds that the working days on which he relied for the purpose of completing the qualifying period for unemployment benefit were not completed as required by the legislation

governing foreigners' residence and employment of foreign workers in Belgium.

The plaintiff's proceedings challenging the decision to refuse him unemployment benefit came before the Tribunal du Travail de Bruxelles where he argued that he enjoyed a right of residence by virtue of the EC Treaty or at the very least a derived right of residence recognised in Case C – 200/02 *Zhu and Chen* [2004] ECR I – 9925 for the ascendants of a minor child who is a national of a Member State and was thus exempt from the requirement to hold a work permit. The Tribunal referred the following questions for a preliminary ruling: -

1. Do Articles 12,17 and 18 EC or one or more of them either separately or together confer a right of residence upon a Union citizen in the territory of the Member State of which he is a national irrespective of whether he has previously exercised his right to move within the territory of the Member States?
2. Must the aforementioned Articles in conjunction with the provisions of Articles 21, 24 & 34 of the Charter of Fundamental Rights which recognise the right of a Union Citizen to move and reside freely in the territory of Member States, be interpreted as meaning that in the case of an EU citizen who is an infant dependant on a parent who is a national of a Non-Member State, the infant's enjoyment of the right of residence in the Member State in which he resides and of which he is a national must be safeguarded even if he hasn't exercised the right to free movement within the territory of the Member States, by coupling that right of residence with the useful effect whose necessity is recognised by case law [*Zhu & Chen*] and granting such parent who has sufficient resources and sickness insurance, the secondary right of residence which the said parent would have had, had the dependent child been a Union citizen but not a national of the Member State in which he resides?
3. Must the aforementioned Articles of the EC Treaty and the Charter of Fundamental Rights be interpreted as meaning that the right of an infant national of a Member State to reside in the territory of the State in which he resides confer an exemption from the requirement to hold a work permit on the infant's parent where the parent is a national of a Non-Member State upon whom the child is dependant and who, were it not for the requirement to hold a work permit

under the national law of the Member State in which he resides, fulfils the condition for making him subject to the social security system of that State, so that the infant's right of residence is coupled with the useful effect recognised by case law [Zhu and Chen] in favour of an infant who is a Union citizen who is not a national of the Member State in which he resides and is dependent on a third country national parent?

### Findings

It was appropriate to consider the referred questions together. In essence the referring court had asked whether the provisions of the TFEU on European Union citizenship were to be interpreted as meaning that they confer on a third country national who is a parent of minor children who are EU citizens and upon whom such children are dependent, a right of residence in the Member State of which such children are nationals and in which they reside and whether they exempt such parent from the requirement to obtain a work permit in that Member State.

Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State. The Member State has exclusive jurisdiction to set the conditions for acquisition of the nationality. The plaintiff's children who were born in Belgium had according to Belgian law acquired Belgian nationality. Accordingly as Belgian nationals they were conferred with the status of EU citizens. As the Court had already stated on previous occasions, EU citizenship is intended to be the fundamental status of nationals of the Member States. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights stemming from their status as EU citizens. A refusal to grant a right of residence and a work permit to third country nationals with dependent minor children in the Member State where those children are nationals and reside has such an effect. As a result of a refusal of residence, it must be assumed that the children who are citizens of the Union would be obliged to leave the territory of the EU with their parents. Likewise, if the work permit wasn't granted, the third country national parent would risk not having sufficient resources to provide for the family which would also result in the children who are citizens of the Union having to leave the Union territory. Consequently, the children would be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his infant children who are EU citizens are dependent a right of residence in the Member State of residence and nationality of those children and from refusing the grant of a work permit to such parent in so far as such refusals deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of EU citizen.

### Cases Cited

Case C – 200/02 *Zhu and Chen* [2004] ECR I – 9925, Case C – 224/98 *D'Hoop* [2002] ECR I -6191, Case C - 148/02 *Garcia Avello* [2003] ECR I –11613, Case C - 135/08 *Rottmann* [2010] ECR I - 0000, Case C – 184/99 *Grzelczyk* [2001] ECR I – 6193, Case C – 413/99 *Baumbast and R* [2002] ECR I – 7091.

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## The Persuasiveness of UNHCR's Eligibility Guidelines

*By Peter Fitzmaurice*

Eligibility guidelines are issued by the Office of the United Nations High Commissioner for Refugees to assist decision-makers, including UNHCR staff, Governments and private practitioners, in assessing the international protection needs of asylum-seekers. There are seven sets of eligibility guidelines, currently in force, as of April 2011. They are Eritrea (April 2011), Afghanistan (December 2010), Iraq (April 2009 and declared to be of continued applicability in July 2010), Somalia (May 2010), Kosovo (November 2009), Sri Lanka (July 2010) and Colombia (May 2010).

The Eligibility guidelines are legal interpretations of the refugee criteria in respect of specific profiles on the basis of assessed social, political, economic, security, human rights and humanitarian conditions in the country/territory of origin concerned. The pertinent international protection needs are analysed in detail and recommendations made as to how protection applications relate to the relevant principles and criteria of international refugee law as per, notably, the 1950 UNHCR Statute, the 1951 Refugee Convention and its 1967 Protocol, and relevant regional instruments such as the 1984 Cartagena Declaration, the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa and the European Union Qualification Directive. The recommendations may also touch upon, as relevant, complementary or subsidiary protection regimes.

UNHCR issues eligibility guidelines to promote the accurate interpretation and application of the above-mentioned refugee criteria in line with its supervisory responsibility as contained in paragraph 8 of its Statute in conjunction with Article 35 of the 1951 Convention and Article II of the 1967 Protocol. They are issued based on the expertise it has developed over the years in matters related to eligibility and refugee status determination, including as a result of its involvement in State and UNHCR refugee status determination procedures.

The Guidelines are the result of in-depth research, information provided by UNHCR's global network of field offices and material from independent country specialists, researchers and other sources, which is rigorously reviewed for reliability and impartiality. The authority of UNHCR country guidelines flows from UNHCR's supervisory function with respect to implementation of the 1951 Convention and 1967 Protocol.

There are four types of UNHCR country related papers:

1. *Eligibility Guidelines* – UNHCR positions that contain guidance on the eligibility for international protection of specific groups and profiles at risk in particular country or territory – “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum seekers from [country]”
2. *Safe Third Country Papers* – UNHCR positions that assess the availability of sufficient protection for asylum seekers and refugees in a particular “safe third country” of asylum. They are entitled “UNHCR Position on the situation of asylum seekers and refugees in [country]”
3. *Return Advisories* – UNHCR position that contain guidance for States and others with regard to reasonableness and feasibility of return based on the conditions in a particular country of origin. They are entitled “UNHCR Position on return to [country];”
4. *Country of Origin papers* - UNHCR (commissioned) papers that summarise and analyse background country of origin information (COI) relevant to the production of Eligibility Guidelines and/or Return advisories. Country of Origin papers are primarily factual in nature. They are entitled “[country]: Country of Origin Background Note.”

The latter category may be externally commissioned by UNHCR from country experts, while the former three are all produced by UNHCR.

It is expected that the positions and guidance contained in eligibility guidelines be given substantial weight by the relevant decision-making authorities, whether they are UNHCR staff or State authorities. The information contained within the eligibility guidelines comes from UNHCR's global network of field offices, country specialists and researchers, information from public sources and other information included is deemed to be relevant for assessing the issues at hand and to be sufficiently reliable to be used in a refugee/asylum context as either primary evidence or corroborative evidence.

All UNHCR eligibility guidelines undergo a thorough internal review prior to publication. A Headquarters review, both by the UNHCR Division of International Protection (DIP) and the relevant UNHCR Regional Bureau, with inputs from concerned UNHCR field offices, ensures balanced and objective positions. The review process addresses, *inter alia*, the selection and assessment of relevant country of origin information, legal analysis and policy conclusions and neutrality of language.

However, it is important to understand that UNHCR Eligibility Guidelines are not a substitute for decision making. They are simply broad guidance based on the prevailing situation in the country of origin with respect to certain groups. Nevertheless, given the requirement that UNHCR remain neutral and impartial in carrying out its remit, significant weight can be afforded to UNHCR guidance by decision makers. This is due to a number of factors:

1. Competence – UNHCR is a Treaty Organ of the 1951 Convention which has been vested with a specific mandate by the UN General Assembly to provide international protection to refugees and asylum seekers as well as stateless persons, internally displaced persons (IDPs), and other persons of concern.
2. Veracity - UNHCR does not try to misrepresent facts or knowingly engage in purveying falsehoods.
3. Objectivity - UNHCR does not have a vested interest in asylum adjudication from the point of view of supporting either side, it simply wants to encourage fair and efficient asylum procedures and decisions. UNHCR employs a rigorous methodology for the production of the papers.

4. Reputation - As a UN organization mandated to protect persons of concern, UNHCR has gained a considerable reputation for neutrality and impartiality over the past 60 years.
5. Observational capacity and proximity - With a field presence in most refugee producing as well as asylum states, UNHCR is one of the few international organisations with a first hand view and perspective of country conditions.

Clearly events continue to evolve following issuance of guidance and decision makers are expected to exercise due diligence in ensuring they have the latest relevant COI, but this does not always mean UNHCR guidance should be ignored as it is most often based on a holistic assessment of a country situation. With the exception of very quickly changing country situations, UNHCR guidance can be relevant for some time following release.

The importance of information obtained from UNHCR in the Common European Asylum System is borne out by Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ("The Procedures directive") which refers to the duty to obtain information from UNHCR in several articles.

The Directive states at Article 8 - "Requirements for the examination of applications" paragraph (2) (b):

"2. Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that:

(b) precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;"

And at Article 29 – "Minimum common list of third countries regarded as safe countries of origin," at paragraph 3;

"3. When making its proposal under paragraphs 1 or 2, the Commission shall make use of information from the Member States, its own information and, where necessary, information from UNHCR, the Council of Europe and other relevant international organisations."

Again at Article 30 – "National designation of third countries as safe countries of Origin," at paragraph 5 which states:

"5. The assessment of whether a country is a safe country of origin in accordance with this Article shall be based on a range of sources of information, including in particular information from other Member States, the UNHCR, the Council of Europe and other relevant international organisations."

And finally in relation to the withdrawal of refugee status under Article 38 - Procedural rules paragraph (1) (c):

"1. Member States shall ensure that, where the competent authority is considering withdrawing the refugee status of a third country national or stateless person in accordance with Article 14 of Directive 2004/83/EC, the person concerned shall enjoy the following guarantees:

(c) the competent authority is able to obtain precise and up-to date information from various sources, such as, where appropriate, from the UNHCR, as to the general situation prevailing in the countries of origin of the persons concerned;"

All UNHCR eligibility guidelines that are in the public domain are posted on UNHCR's Refworld website at <http://www.refworld.org> and regular alerts are sent to subscribers of the site to inform them about newly issued guidance.

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