Commentary

Union Citizenship as a Source of Rights? Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, Judgment of the Court (Third Chamber) 5 May 2011, nyr

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Abstract

McCarthy attempted to rely upon rights under Directive 2004/38 within a home state, but this was not a straightforward case of a purely internal situation, the applicant having acquired Irish nationality and claiming that she was a Union citizen living within the UK as a host Member State. The use of dual citizenship as a potential linking element with Union law follows from earlier developments in citizenship case law. Union citizenship has helped those who do not fully meet requirements of secondary legislation. The 'trigger' of cross-border movement has been weakened to some extent in the identity cases, and others such as *Carpenter*. *McCarthy*'s attempt to rely upon Union law without ever having moved, just by *being* a Union citizen, gave the Court of Justice of the European Union a chance to dispel ideas that being a dual Member State national was automatically a linking factor with EU law.

Keywords

Union citizenship; Dual nationality; Directive 2004/38; Free movement; Purely internal situations

Factual background

Mrs McCarthy is a UK and Irish dual-national. She has always lived within the UK, and was in receipt of State benefits. Her husband, a Jamaican national, lacked leave to remain under UK Immigration Rules. Mrs McCarthy applied for and obtained Irish nationality after her marriage; she and her husband then applied for a residence permit as a Union citizen and family member.[1] The Secretary of State refused their application, finding that Mrs McCarthy was not a 'qualified person,' hence, Mr McCarthy was not the spouse of a qualified person. Mrs McCarthy appealed against this decision, and the case reached the Supreme Court of the United Kingdom, which referred two questions to the Court of Justice:

[1] Case C-434/09, *McCarthy,* Judgment of the Court, 5 May 2011, nyr, paras 16-17

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1. Is a person of dual Irish and United Kingdom nationality who has resided in the United Kingdom for her entire life a "beneficiary" within the meaning of Article 3 of Directive 2004/38?

2. Has such a person "resided legally" within the host Member State for the purpose of Article 16 of the Directive in circumstances where she was unable to satisfy the requirements of Article 7 of the Directive?

Judgment of the Court of Justice of the European Union

The Court reworked the first question referred,[2] extending it to consider the relevance of Article 21 TFEU.[3] It did not address the Supreme Court's second question, finding its answer to the first rendered this redundant.

Beneficiary status under the Citizens' Directive

Article 3(1) of Directive 2004/38 reads:

> 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 as defined in point 2 of Article 2 who accompany or join them.[4]

The Court was very direct: "A literal, teleological and contextual interpretation of that provision leads to a negative reply"[5] to the question of Mrs McCarthy's ability to rely upon it. The Court emphasised the element of leaving one's home state required- the Member State must be other than that of which they are a national. The Court reiterated the Directive's aims- to facilitate and strengthen the right to move and reside freely- so it was not relevant without movement.[6] Domestic citizens' residence cannot be subject to conditions, so it was inappropriate for the Directive to apply to Union citizens enjoying unconditional residence rights due to also being host-state nationals.[7] Union citizens who had never exercised their right of free movement and always resided in a home Member State were not beneficiaries for the purposes of Article 3(1) of Directive 2004/38.[8] This was uninfluenced by the fact that "the citizen concerned is also a national of a Member State other than that where he resides".[9]

Potential Reliance upon the Treaty

The second element of the Court's question related to the application of Article 21 TFEU. Treaty rules do not apply to "situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State"[10] -a restatement of the purely internal rule.[11] However, the Court recognised that a lack of personal use of the right of movement is not

[2] As is its prerogative- see Case C-251/06, *ING. AUER,* [2007] ECR I-9689, para 38
[3] *McCarthy,* n 1 above, para 26
[4] Article 3(1) of Directive 2004/38
[5] *McCarthy,* n 1 above, para 31
[6] *Ibid.,* paras 32-33
[7] *Ibid.,* para 34
[8] *Ibid.,* para 39
[9] *Ibid.,* para 40
[10] *Ibid.,* para 45
[11] See Case 175/78, *Saunders,* [1979] ECR 1129, para 11

fatal to a cross-border element, demonstrated by *Schempp,* in which a man's ex-wife moved, affecting the applicable tax rules for him.[12]

The Court failed to find a genuine interference with Mrs McCarthy's right of free movement. Not taking her Irish nationality into account for the purposes of granting a residence right in the UK in no way affected her right to move and reside freely between Member States.[13] Mrs McCarthy's situation was contrasted with that of the Union citizens in *Ruiz Zambrano,* as she would not have been compelled to leave the territory of the EU if a right of residence was not given to her husband.[14] The Court of Justice also distinguished *McCarthy* from *García Avello* and *Grunkin and Paul,* referring to the 'serious inconvenience' liable to be caused in those cases, which was not due to dual-nationality, but to the interplay between two legal systems.[15] Mrs McCarthy's dual Member State nationality was insufficient to find that Article 21 TFEU was applicable.[16]

Comment

The Relevance of Union Citizenship

That *McCarthy* would fail was predictable, and the Court made the correct decision in finding that Mrs McCarthy was not a beneficiary under Directive 2004/38, as she had operated no right of free movement, and was not prevented from doing so. However, the potential for Treaty protection with regard to *García Avello* and *Grunkin and Paul* is more interesting. Union citizenship was also, in *McCarthy,* presented as something which had the potential to place Union law within reach for dual Member State nationals across the Union, and eliminate the possibility of purely internal situations for such people. Being a national of another Member State, and hence a Union citizen, was argued as a sufficient link to EU law without movement by the individual concerned. In *García Avello* it was emphasised that citizenship status was not intended to extend the scope *ratione materiae* of the Treaty to purely internal situations,[17] but there a link existed as the children of Mr García Avello, who were nationals of one Member State (Spain) were "lawfully resident in the territory of another Member State"[18] (Belgium). The children were treated as nationals of *another* Member State, despite also holding Belgian (host-state) nationality, which is seemingly a similar position to that of Mrs McCarthy. However, in *García Avello,* unlike *McCarthy,* this brought the applicants within the scope *ratione personae* of Treaty rights,[19] which is where the difficulty lies.

Leading to the decision, Belgium had only recognised the children's Belgian nationality,[20] whereas the UK was careful to take account of Mrs McCarthy's Irish nationality. The reconsideration of a Tribunal decision earlier in this case's history was ordered solely because of a failure to consider the consequences of Mrs McCarthy's dual nationality, reflecting the imperative that Union citizenship be acknowledged.[21] Someone possessing Union citizenship cannot be denied recognition of that status by a national authority- the UK could not automatically decide that Mrs McCarthy's Union citizenship was 'not real and

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[12] *McCarthy.,* n 1 above, para 46, citing Case C-403/03, *Schempp,* [2005] ECR I-6421, para 22
[13] *Ibid.,* para 49
[14] *Ibid.,* para 50
[15] *Ibid.,* paras 51-52
[16] *Ibid.,* para 54-5
[17] Case C-148/02, *García Avello,* [2003] ECR I-11613, para 26, citing Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 23).
[18] *Ibid.*, para 27
[19] *Ibid.,* para 23; See also Case C-85/96, *Martínez Sala,* [1998] ECR I-02691, para 61
[20] *Ibid., p*ara 28
[21] See *McCarthy v Secretary of State for the Home Department*, Court of Appeal (Civil Division), 11 June 2008, [2008] EWCA Civ 641, [2008] 3 C.M.L.R. 7, para 7

effective,'[22] and the existence of dual nationality has been wholly relevant when assessing the legal position of Union citizens in relation to their Member States of origin.[23] In *García Avello* the emphasis of the Court of Justice was upon the *different situation* of dual Spanish-Belgians compared to solely Belgian nationals,[24] who would not face two different legal systems to determine their name, and therefore ought not to be treated alike. The Court essentially took a different starting point- in *García Avello* the children were 'from' another Member State, whereas Mrs McCarthy was not seen as having moved from Ireland, so was not protected by free movement law. The lack of actual movement in both cases is striking, as is the inconsistency in reasoning the relevance of citizenship vs. movement to a logical and acceptable end-point.

If Mrs McCarthy had worked for five years, or would otherwise have qualified for the right of permanent residence under Articles 16 or 17 of Directive 2004/38, then her case would have been much stronger, as she would have been able to show that she could have resided as a Union citizen, and the Court of Justice would have had to fully address whether it is the (traditional) operation of free movement rights or the (newer) concept of link to Union law which is key to reliance upon Union law as a Union citizen. *García Avello* does not argue that the free movement rights of the children concerned were at risk if their names were recorded in the Belgian form, (unlike in *Grunkin Paul),*[25] and it is reliance upon the situation "being different" and hence causing "inconvenience"- which invoked protection from the Treaty.[26] The inconvenience of living in a different country from one's spouse is unmentioned in *McCarthy,* where emphasis was wholly on the lack of movement.[27]

Citizenship as the fundamental status of Member State nationals

Union citizenship has been heralded as the 'fundamental status' of Member State nationals,[28] but this is not in situations lacking a link to Union law; the status aims to "enable[e] those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to exceptions as are expressly provided for".[29] As AG Léger suggested in his Opinion for *Boukhalfa*, if citizenship were always the fundamental status of Member State nationals,

> every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations. Taken to its ultimate conclusion, the concept should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality [...].[30]

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[22] Opinion of AG Kokott for *McCarthy,* n 1 above, delivered on 25 November 2010, paras 32-33; Case C-369/90, *Micheletti and others,* [1992] ECR I-4239, para 10
[23] See Opinion for *McCarthy,* n22 above, para 33; *García Avello,* n 17 above, paras 32 to 37. *Micheletti, ibid.,* explains the relevance of dual nationality in EU law, but vis-à-vis a Member State of which the Union citizen concerned is not a national.
[24] *García Avello,* n 17 above, para 35
[25] Where 'future' free movement rights were threatened- Case C-353/06, *Grunkin and Paul,* [2008] ECR I-7639, paras 22; 29
[26] *García Avello,* n 17 above, para 36
[27] *McCarthy,* n 1 above, paras 39 and 45
[28] *Ibid.*, para 47; Case C-34/09, *Ruiz Zambrano,* Judgment of the Court, 8 March 2011, nyr, para 41; see, *inter alia,* Case C-184/99, *Grzelczyk,* [2001] ECR I-06193, para 31; Case C-413/99, *Baumbast,* [2002] ECR I-07091, para 82; *García Avello*, n 17 above, para 22; Case C-200/02, *Chen,* [2004] ECR 1-09925, para 25; and Case C-135/08, *Rottmann,* Judgment of the Court, 2 March 2010, para 43.
[29] *Grzelczyk,* n 28 above, para 31
[30] AG Léger in Opinion for Case C-214/94, *Boukhalfa,* [1996] ECR I-02253, delivered on 14 November 1995, para 63

The extent to which Union law is relevant to persons living within their home state varies on a case-by-case basis. *Carpenter* is an example of no movement but where a threat to a fundamental freedom brought the situation within the scope of EU law.[31]

In *Carpenter,* like *García Avello,* the Union citizen resided within their home state,[32] yet the Treaty provided a right of residence for Mr Carpenter's TCN spouse, where this was not found under national law. Instead of relying upon Union citizenship and the right to free movement of persons like *McCarthy, Carpenter*'s case was based upon the freedom to provide services- Article 56 TFEU. The Court of Justice found that if Mr Carpenter's spouse was unable to remain within the UK, his right to provide services to other Member States may be impeded. That the potential disturbance of this economic-right brought Mr Carpenter under the protection of the Treaty, yet Mr and Mrs McCarthy were unable to argue a corresponding right for Article 21 TFEU shows the limitations of Articles 20-21 TFEU, and that economic freedoms are still at the foundation of many personal and family rights within the EU.[33] If Mrs McCarthy had been a worker, there would have been the potential to argue that deporting Mr McCarthy would oblige her to cease work in order to care for her children, although on the facts of *McCarthy,* this was not possible. Nonetheless, the differing levels of protection afforded to economically active and inactive Union citizens underlines the economic foundations of the fundamental freedoms.

Is there any benefit to dual Member State nationality?

Where *McCarthy* failed to show interference with free movement, *Ruiz Zambrano* succeeded with only host state nationality- so the Union citizens were domestic citizens, rather than Union citizens having moved from elsewhere. *Ruiz Zambrano* involved the same situation as *McCarthy* on a basic level—a Union citizen within their home state wanted a TCN family member to be granted residence rights under EU law, as national law failed to provide these. However, unlike *McCarthy,* the Union citizens in *Ruiz Zambrano* were children,[34] and the family members were their parents. The result of this difference in age meant that the Belgian children faced having to leave Belgium if their parents did, while Mrs McCarthy would not have to leave the UK if her husband were unable to stay. On one hand, EU law appears to have little to do with the position of two Belgians residing in Belgium, who arguably required human rights protection, rather than posing a free movement issue for the Court of Justice. On the other hand, the Court recognised that if the children had to leave Belgium, they may have to leave the EU in its entirety, which would prevent the use of their free movement rights.

In *Ruiz Zambrano* there was no need for reliance upon dual nationality,[35] or movement—Article 20 TFEU was interpreted as precluding the refusal of a right of residence and a work permit for a TCN upon whom minor children Union citizens are dependent, "in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."[36] Thus Belgian children were able to rely upon the protection of Union citizenship to enable their TCN parents and brother to stay within Belgium. The Court's approach was different from that in *McCarthy*—that the children were within their home state was irrelevant; that their parents

[31] Case C-60/00, *Carpenter,* [2002] ECR I-06279, para 39
[32] *Ibid.,* para 14- Mr Carpenter regularly travelled to other Member States but resided in the UK.
[33] See Everson, 'The legacy of the market citizen' in Shaw and More (eds.), *New Legal Dynamics of European Union,* (Clarendon Press, Oxford, 1995), 73-90; Nic Shuibhne, 'The Resilience of EU Market Citizenship,' *CMLRev,* 2010, 47(6), 1597-1628
[34] The application was made by their father, a Columbian national
[35] The second and third children were Belgian nationals only, the first child and parents were Columbian nationals.
[36] *Ruiz Zambrano,* n 28 above, para 46

did not have sufficient means to support them without working was irrelevant;[37] and ineligibility for beneficiary status under Directive 2004/38 was irrelevant.[38] The Court gave the children protection due to the negative impact upon free movement rights which an alternate finding could have.

There are no provisions for free movement rights of children specifically; Article 20 TFEU merely states that all Member State nationals shall be Union citizens.[39] *Ruiz Zambrano* suggests that children have protection for their rights of free movement within the home state. Children are likely to be dependent upon relatives, and they need the most Treaty protection in situations where they are the only Union citizens in a family, as rights for ascending-line relatives under Directive 2004/38 only exist when the ascending-line relative is dependent upon the Union citizen,[40] which is unlikely. Free movement rights may well be at stake if TCN parents were unable to accompany the children to another Member State, though the threatened rights here seemed to be more the right to stay in Belgium than to move within the EU.

The right to stay *within the EU* as a whole is not normally considered in residence cases, as the Court has not previously taken such a holistic view of the Union. Gone were requirements of cross-border activity, and in place were statements about depriving the effect of citizenship and Article 20 TFEU.[41] *Ruiz Zambrano* is a very brief decision,[42] and the Court did not ground its arguments in case-law. It was quick to distinguish it in *McCarthy,* however, as "the national measure at issue... does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union... Mrs McCarthy enjoys, under a principle of international law, an unconditional right of residence in the United Kingdom since she is a national of the United Kingdom".[43] While the measure may not force Mrs McCarthy to leave, it could weaken her desire to stay, as she would be unable to enjoy a normal family life if her husband were in Jamaica and she remained in the UK. Furthermore, this argument is weakened by the last sentence- in *Ruiz Zambrano* the Union citizens also enjoyed an unconditional right of residence in Belgium, and it would be practical matters- finance, age, etc., which would compel them to leave- not technically a decision that their parents were unable to reside.

Has the Court in McCarthy restricted the application of Directive 2004/38 in relation to previous legislation?

In *Surinder Singh,* a returning UK national wife and her TCN husband relied upon Directive 73/148 EC to give a right of residence to the spouse within the UK:

> "A spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and resided in another Member State".[44]

Directive 2004/38 repealed and replaced Directive 73/148,[45] in its bid to strengthen and codify pre-existing rights,[46] which suggests that no right should be lost. In *McCarthy,* and

[37] So this was not a *Chen,* n 28 above, situation
[38] *Ruiz Zambrano,* n 28 above, para 39
[39] Art 20 (1) TFEU
[40] Article 2(2)(d) of Directive 2004/38
[41] *Ruiz Zambrano,* n 28 above, para 42
[42] *Ibid.*, paras 39-45
[43] *McCarthy,* n 1 above, para 50
[44] Case C-370/90, *Surinder Singh,* [1992] ECR I-04265, para 26
[45] Article 38(2) of Directive 2004/38
[46] Whereas (3) of Directive 2004/38

Ruiz Zambrano,[47] emphasis was placed upon the Directive being applicable where the host state was 'other than' that of which the Union citizen was a national, and that the Directive's conditions could not be applied to domestic citizens, who reside without the possibility of deportation, so that rights under the Directive were outside of such a person's reach. This potentially means that the rights of Union citizens have been restricted by the Court's approach to interpreting the text strictly in not allowing citizens of the host state to rely upon rights under the Directive, thus not acknowledging *Surinder Singh* type situations.[48] More careful phrasing of the judgment would have been advantageous, as it is doubtful that the Court intended to restrict the possibility for a Union citizen who had worked elsewhere to rely upon rights under the Directive.

Travelling and working abroad 'tactically' can, if *Surinder Singh* situations remain covered by the Directive, be conducive to rights of residence under EU law for TCN spouses without leave to remain. This could be seen as contrary to the integrationist aims of the Directive, and an 'abuse of rights,' but the Court of Justice held in *Akrich*[49] that there was no such abuse "where a couple moved on a temporary basis to work in another Member State in order to avoid the 'internal situation' problem and to acquire rights for a non-EU national in the spouse's Member State of origin."[50] While Mrs McCarthy may have tactically acquired Irish nationality, hypothetically she made it more difficult for herself to come under the remit of the Directive by utilising her right of free movement to work. This is because Ireland is the only other Member State with English as a first language, and this is now Mrs McCarthy's home-from-home, so even if she did move to Ireland and work, she may be unable to claim equal rights with those she would have had living in Ireland as a UK citizen, or be able to maintain such rights upon her return to the UK, as in *Surinder Singh,* due to there being no need for her to go to Ireland 'as a European,' as she could enter and reside as a domestic citizen.

Conclusion

The fundamental status of Union citizenship upon which *McCarthy* relied showed some of its limitations in this judgment. Merely becoming a citizen of another Member State did not bring Mrs McCarthy within the remit of free movement law- her rights to move and reside freely within the territory of the European Union were unrestricted, so the UK did not have to extend residence rights to Mr McCarthy. When compared to *Carpenter,* the importance of an economic link to another Member State is easily apparent as a reason to invoke Treaty protection. Where an economic link to other Member States prohibited the deportation of a TCN spouse, merely being a national of another Member State did not. However, Mrs McCarthy's position is also juxtaposed with that of the children in *Ruiz Zambrano,* where the strength of Union citizenship as a protector of free movement rights is highlighted- where there is a genuine threat to the free movement of a citizen of the Union, wherever they may be- abroad or at home- the Treaty may protect them.

The Court's approach to whether a situation comes within the remit of Union law in citizenship cases seems to veer between protecting certain 'links' to Union law[51] and requiring the operation of free movement rights to trigger Treaty protection. Directive

[47] *Ruiz Zambrano*, n 28 above, para 39
[48] *McCarthy,* n 1 above,, paras 32, 34, and 37. In para 38 the Court said one who has 'always' resided in their home state is not a beneficiary, and, para 43 said persons who never exercised their right of free movement cannot be beneficiaries. Though the latter two paragraphs suggest the potential for reliance by a Member State national within their home state, the arguments put forward by the Court as to why this should *never* be allowed to happen (i.e. text of Directive, lack of conditions under it) suggest that the applicability is unclear.
[49] Case C-109/01, *Akrich,* [2003] ECR I-09607, which has not been repealed on this point
[50] Craig and de Bùrca, *EU Law,* Fourth Edition, (Oxford University Press, Oxford, 2008), 783
[51] I.e. identity/dual nationality in *García Avello* and *Grunkin and Paul;* For discussion of the potential breadth of identity see Horváth, *Mandating Identity,* (Kluwer Law International, The Netherlands, 2007)

2004/38 states that Union citizenship is the fundamental status of Member State nationals "when they exercise their right of free movement"[52] yet this status has brought cases such as *García Avello* within the remit of Union law where the exercise of free movement rights is only distant (if foreseeable), while leaving Mr and Mrs McCarthy with only domestic law solutions with which to contend. A truly fundamental status it may not yet be, but Union citizenship is definitely testing the Court's adherence to its fundamental principles.

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[52] Whereas (3) of Directive 2004/38