Case – Case-Law – Law: *Ruiz Zambrano* as an Illustration of How the Court of Justice of the European Union Constructs Its Legal Arguments

Urška Šadl*

Reasoning of the Court of Justice of the European Union – Construction of arguments in the case-law of the Court – Citation technique – The use of formulas to transform case-law into 'law' – 'Formulaic style' – European citizenship as a fundamental status – *Ruiz Zambrano* – Reasoning from consequences – The use of social propositions

Introduction

The judgments of the Court of Justice might not be known for convincing arguments, clear language and discursive style. Quite the opposite, they are described as 'deductive, legalistic and magisterial',[1] leaving 'much to be desired.'[2] Time and again, the Court is criticized for impinging on the competences of the member states. The assessment of the reasoning of the Court is usually tangential to this issue. For instance, the Court might be criticized for disregarding written rules or creating ambiguity by decisions that do not square with the rest of the case-law, without convincing arguments and clear criteria, which will apply in future cases. This type of criticism has been particularly prominent in relation to EU citizenship.[3] It is not impossible to guess at the political, social and economic reasons which draw out criticism of the Court's stance in these matters. The fear of the corrosion

* PhD, Assistant professor at the Faculty of Law, University of Copenhagen. I would like to thank Jan Komarek, Joxerramon Bengoetxea and Felix Schulyok for valuable discussions and comments on earlier drafts.

[1] J.J. Barceló,'Precedent in European Community Law', in N. MacCormick and R.S. Summers (eds.), *Interpreting precedents* (Ashgate 1997) p. 411.

[2] M. d. S. O. L. E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2009) p. 356.

[3] P. Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis', 48 *CMLR* (2011) p. 395 at p. 412.

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of the welfare state[4] and the contestability of all questions surrounding solidarity[5] make sensible arguments.

When the reasoning of the Court is at the forefront, it usually involves the Court's methods of interpretation. With regard to the latter, the legal debate, it could be argued, has passed its most ardent phase. Legal scholars have found ways to navigate between questions of law and policy, thereby absorbing claims about the illegitimacy of the Court's policy-making or 'judicial activism'. One of these methodologically sound approaches was to acknowledge that law and policy overlap in the decision making of the Court,[6] and focus on the acceptability of the Court's arguments. Legal and policy arguments, it was argued, were justificatory reasons, and as long as they were universalisable, and as long as the outcomes 'made sense', i.e., being coherent with statute law and previous case-law, the external factors that prompted the Court to rule as it did could safely be disregarded.[7]

This is undoubtedly a step forward in thinking about the Court's reasoning, where coherence is a vital measuring rod of the acceptability of justification and good legal arguments. But even elaborate attempts by scholars to fit individual judicial decisions into the existing body of law, can easily remain subject to the 'likes and dislikes' of interpreters. Individual value judgments, political beliefs and personal taste with regard to judicial style, the acceptability of interpretative techniques and the role of courts,[8] bear witness to law's 'argumentative character'. Simpl(isticall)y put, the formulaic style of the Court, the vagueness of the reasons, the interpretative techniques and the open-endedness of answers bother some more than others. Overall, legal studies, be they comparative[9] or grounded in institutional legal positivism,[10] cannot provide conclusive answers to the difficult question of the *persuasiveness* of the Court's arguments.

[4] A.J. Menéndez,'European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human But Less Social?', in L. Miguel P. Maduro and Loïc Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) p. 363.

[5] J. Shaw,'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism', in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law*, 2nd edn. (Oxford University Press 2011) p. 575-609.

[6] J. Bengoetxea et al., 'Integration and Integrity in the Legal Reasoning of the European Court of Justice', in G. De Búrca and J. Weiler (eds.), *The European Court of Justice* (Oxford University Press 2001) p. 43, 44 and 50.

[7] For the distinction between justificatory reasons and explanatory and motivating reasons in judicial decisions, *see* N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005) p. 98-99.

[8] *See* for instance D. Kennedy, *A Critique of Adjudication: fin de siècle* (Harvard University Press 1997) p. 34-37.

[9] J. Komarek, *Precedent in European Union Law: Reasoning with Previous Decisions of the Court of Justice* (D. Phil. thesis) (University of Oxford 2010); Lasser, *supra* n. 2, at p. 9.

[10] Most notably, J. Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford University Press 1993) p. 21.

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The *Ruiz Zambrano*[11] ruling, which the Court handed down almost two years ago, can illustrate this point. In *Ruiz Zambrano* the Court held that third country nationals had to be granted work and residence permits in the EU, when their minor children would otherwise be deprived of the genuine enjoyment of their Union citizenship rights. The rule in that case also applied in situations where EU citizens never exercised their free movement rights. The decision was legally significant, judging from the composition of the Court and the interventions of member state governments. It turned out to be controversial, causing not a little public debate *re* the acceptability of the Court's decisions.[12] The response of doctrine was polarised. For some commentators, the *Ruiz Zambrano* ruling represented a desirable move from national to 'genuine' European integration,[13] 'reflecting the objective reality of EU integration.'[14] Moreover, it was interpreted as the will of the Court to take European citizenship seriously, and to uphold the commitments of the member states.[15] Others, however, have seen it as bypassing the intention of the legislature crowned with 'apodictic reasoning.'[16]

A coherence analysis of the chain of case-law in which *Ruiz Zambrano* is embedded renders at least two theoretically acceptable conclusions. Both are coherent with a certain 'vision of European citizenship.'[17] On the one hand, the development of the case-law could be applauded, because it consistently bred life into empty concepts. The Court's reasoning, going beyond the wording of the text or the purposes of the Founders, could be defended by the outcome that the Court sought to achieve; i.e., to establish European citizenship as a fundamental status. On the other hand, it could easily be condemned. The member states found themselves continuously unable to rely on (legitimate!) limits and conditions, which they laid down in the treaties and subsequent legislation, and to which

[11] ECJ 8 March 2011, Case C-34/09, *Gerardo Ruiz Zambrano* v. *Office national de l'emploi (ONEm)*.

[12] For an overview of media reactions, *see* I. Solanke, 'Using the Citizen to Bring the Refugee In: Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)', 75 *The Modern Law Review* (2012) p. 101 at p. 108-110.

[13] L. Azoulai, 'A Comment on the Ruiz Zambrano Judgment: A Genuine European Integration', <http://eudo-citizenship.eu/citizenship-news/457-a-comment-on-the-ruiz-zambrano-judgment-a-genuine-european-integration>, visited 14 May 2013. The author nevertheless admits the widening of EU competence over domestic competence in immigration matters, covering also non-mobile citizens.

[14] D. Kochenov and S.R. Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text', 37 *Eur. L. Rev.* (2012) p. 369.

[15] Solanke, *supra* n. 12 at p. 111.

[16] K. Hailbronner and D. Thym, 'Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011', 48 *CMLR* (2011) p. 1253 at p. 1256 (bypassing the legislature) and p. 1259, 1262, 1266 and 1270 (apodictic reasoning).

[17] Craig, *supra* n. 3, at p. 416.

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the rights of citizens were subject according to the treaty and Community legislation.[18]

The first line of development, it might be argued, is more coherent with the general principle of the legal protection of individuals, while the second furthers the principle of the legitimate expectations of the member states. Both are a product of the balancing act, and are coherent with European values (equality, etc.), which the Court protects. Both interpretations of the case-law are rationally acceptable, because, as pointed out, they satisfy the standards of coherence and consistency.[19]

This said – can one reasonably claim that the *Ruiz Zambrano* decision is poorly reasoned? The short answer is yes. Coherence has a formal and open-ended character.[20] It says nothing about the content of the decision. By contrast, persuasiveness *is* a matter of content. The justification of *Ruiz Zambrano* appears rickety to those who favour legitimate expectations over the protection of individual rights, and condemn the outcome, as well as to those who think the opposite. Un-persuasiveness is a looser, but not irrational, impression that is generated by the 'frustratingly vague' reasoning of the Court.[21] This frustration can be made intelligible.

The present article tries to ground the sentiment of un-persuasiveness and analyse the Court's reasoning by looking into how the *Ruiz Zambrano* decision is *constructed*. It follows references to past decisions, primary and secondary law, and examines whether – and if so – how they supply legal answers to legal questions. First, do statutes and precedents, which are *cited as authoritative* legal sources, resolve the conflict at hand and provide a solution to the legal question asked? Second, are citations informative, and do they enhance the reader's understanding of the legal problem? Whether the chains of references reflect genuine reasons, which the Court considered in fact, is not crucial.

Lastly, self-referentiality and justificatory dead-ends are to a large extent a practical necessity. The Court must put an end to the dispute and settle it. The chain of reasoning cannot be infinitely long. The difference between putting an end to disputes and justificatory dead-ends is first that the latter do not solve the legal problem. In this respect, they are not relevant,[22] hence they are not a valid author-

[18] *See* the text *supra* at n. 17.

[19] The standards of coherence and consistency are the standards guiding the rational acceptability of the justification of decisions on validity and interpretation drawn from contextual systemic arguments. The argument from coherence in legal justification presupposes a system, a coherent legal order (enacted by a legislature). By interpreting the law one should realise this desirable virtue of the system. J. Bengoetxea, 'Legal System as a Regulative Ideal', 53 *ARSP Beiheft* (1994) p. 66.

[20] R. Alexy,'Coherence and Argumentation or the Genuine Twin Criterialess Super Criterion', in A. Aarnio et al. (eds.), *On Coherence Theory of Law* (Juristforlaget i Lund 1998) p. 41-49.

[21] Lasser, *supra* n. 2, at p. 356.

[22] The question of relevance – or legal similarity – is not discussed in this article. For a discussion of how to establish relevance, and to distinguish between what is precedential and what is irrelevant, *see* F. Schauer, 'Precedent', 39 *Stanford Law Review* (1987) p. 571, at p. 578.

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ity. For instance, Article 21 TFEU regulates the free movement and residence rights of EU citizens. The Court rules that it applies to Mr. A, a Belgian citizen, who moves from Belgium to Luxembourg. The case of Mr. A will not be a valid authority for the case of Mr. B, who is not an EU citizen, but moves from Belgium to Luxembourg, because the rule of relevance in this case is not movement, but movement combined with EU citizenship. But it will be a relevant authority for Mr. C, who is a Spanish citizen, moving from Spain to Portugal. Second, justificatory dead-ends may leave the reader guessing at the possible underlying links between the case at hand and the cited case. For instance, if case A, which deals with the residence rights of minor EU citizens, is cited in support of case B, dealing with the pension rights of EU citizens, the relevance of case A is *prima facie* not evident, even if minor EU citizens and retired EU citizens are both not economically active. The link between cases must be made explicit to establish the relevance of cited cases.

The article is structured as follows. Section one reconstructs the reasoning of the Court in the *Ruiz Zambrano* case, setting out the model of the Court's argument. Sections 2, 3 and 4 engage with it in greater detail. The argument from *Ruiz Zambrano*, paragraph 40, which is based on Article 20 TFEU, is analyzed by tracking citations to demonstrate how a series of citations loops on the level of language (form) and leads to dead-ends in justification on the level of legal meaning (content). Namely, the piled up citations often refer to the same text, without deepening the legal argument. Second, the argument taken from the fundamental status formula is analyzed in the same manner. It follows the references that the Court cites in *Ruiz Zambrano*, paragraph 41, throughout the case-law to the source of the formula (constituting a justificatory dead-end). Similarly, the Court's arguable use of factual propositions as legal principles is briefly outlined in section four. In section five, the arguments are summed up.

Citations as reasons

The conclusion of the Court in *Ruiz Zambrano* is based on three mutually reinforcing arguments, which will be analysed in turn: (1) an argument from Article 20 TFEU; (2) a judge-made rule of the intended fundamental status and cases cited in the opinion of the Court; and (3) by the argument from practical consequences of the decision:

> 40. Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State (see, inter alia, Case C-224/98 D'Hoop [2002] ECR I-6191, paragraph 27, and Case C-148/02 Garcia Avello [2003] ECR I-11613, paragraph 21). Since Mr Ruiz Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the

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> Member State in question to lay down (see, to that effect, inter alia, Case C-135/08 Rottmann [2010] ECR I-0000, paragraph 39), they undeniably enjoy that status (see, to that effect, Garcia Avello, paragraph 21, and Zhu and Chen, paragraph 20).
>
> 41. As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 31; Case C-413/99 Baumbast and R [2002] ECR I-7091, paragraph 82; Garcia Avello, paragraph 22; Zhu and Chen, paragraph 25; and Rottmann, paragraph 43).
>
> 42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, Rottmann, paragraph 42).
>
> 43. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.
>
> 44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.'[23]

Figure 1 is a graphic representation of the model of reasoning of the Court, with references to legal sources (the Treaty and the case-law) that the Court states in support of the decision. The middle column (Circumstances 1 & 2) is a concise restatement of the Court's arguments and the solution that follows (in *Ruiz Zambrano*, paragraph 42). The column on the left side contains the citations in *Ruiz Zambrano,* paragraph 40, and the column on the right side the citations in *Ruiz Zambrano*, paragraph 41. The outer columns on both sides include the legal sources to which the references in the two mentioned paragraphs in their turn refer, and so on. For instance, the Court in *Ruiz Zambrano*, paragraph. 40, refers to *Rottmann*, paragraph 39,[24] which further refers to *Micheletti*, paragraph 10;[25] *Mesbah*, paragraph 29,[26]

[23] *Ruiz Zambrano*, paras. 40-44.

[24] ECJ 2 March 2010, Case C-135/08. *Janko Rottmann* v. *Freistaat Bayern*.

[25] ECJ 7 July 1992, Case C-369/90 *Mario Vicente Micheletti and others* v. *Delegación del Gobierno en Cantabria*.

[26] ECJ 11 Nov. 1999, Case C-179/98 *Belgian State* v. *Fatna Mesbah*.

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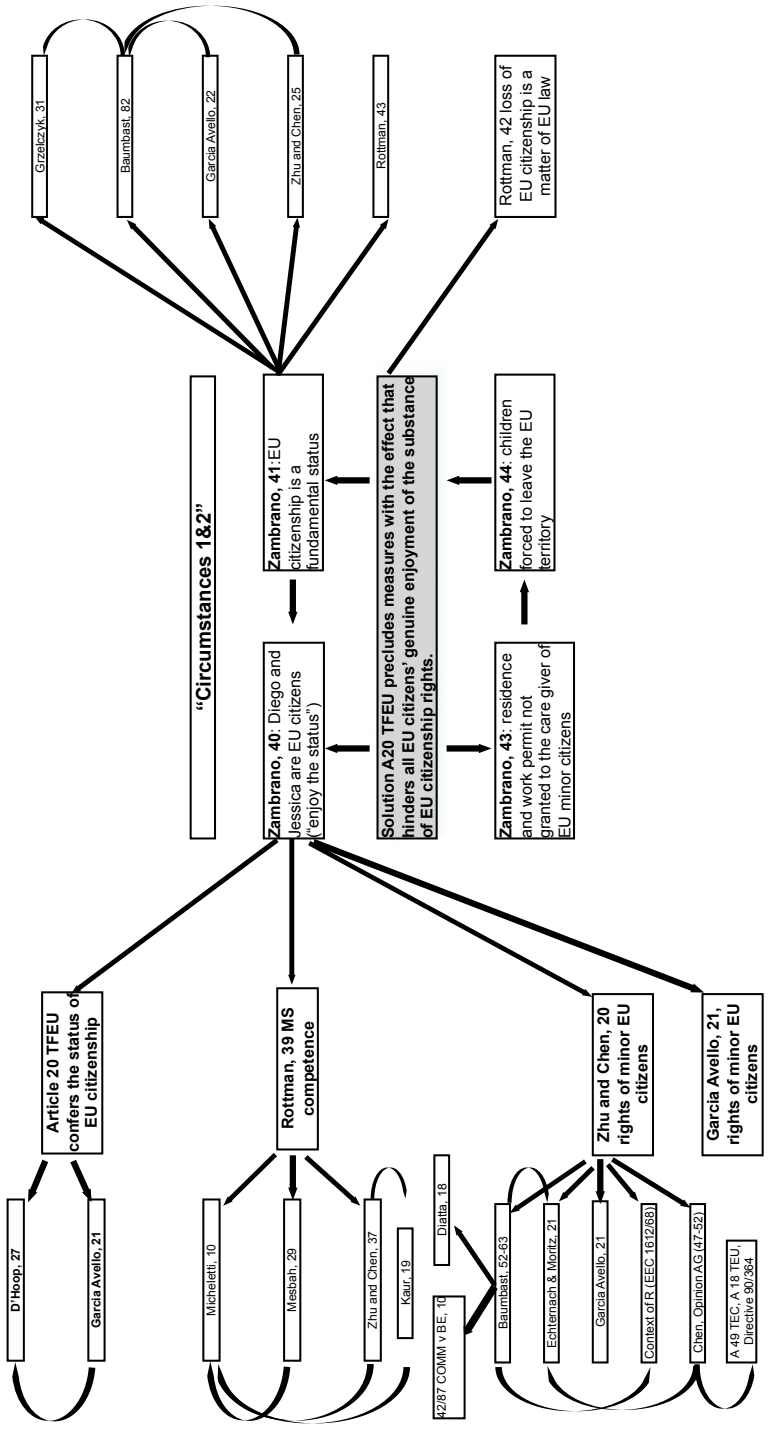

Figure 1. The reasoning chart of *Ruiz Zambrano* (Case C-34/09)[27]

[27] The numbers next to the name of the cases indicate the paragraphs of the decisions (*Mesbah*, 29); the arrows indicate citations and point from the citing case (paragraph) to the cited case (paragraph).

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which in turn refers to *Micheletti*, paragraph 10; *Zhu and Chen*, paragraph 37,[28] which refers to *Kaur*, paragraph 19,[29] which in turn refers to *Micheletti,* paragraph 10, just like *Zhu and Chen*, paragraph 39, thus closing the loop; this example is repeated and further discussed in the following section.

The arguments of the Court will be analysed in isolation, even though they mutually support each other, and the final conclusion of the Court should ideally be weighed against their cumulative weight.[30] While treating them collectively would be more appropriate to asses their justificatory force and their validity, their separate treatment better illustrates the construction of the arguments.

The analysis assumes that the case-law is in fact a source of law. The Court cites past decisions 'with remarkable self-assurance'[31] and all players are expected to address, engage with and conform to it.[32] In this sense, the normative status of the case-law would come closer to a common law court. The referencing technique, however, is reminiscent of a civil law court. The Court, generally, makes little effort to discuss the facts of prior cases and justify the rules and principles that it asserts.[33] Moreover, it continuously repeats general statements, coined in prior cases, with slight variations in language.[34] These accumulate and become precedents.[35] The detachment of rules, for which decided cases stand, from the facts is often considered to be typical of continental, so-called civil law courts, and not unacceptable or unsophisticated *per se*.[36] A lack of engagement with the facts and the principles is a matter of judicial style. But, it is submitted, it might be a matter of poor style, when general judicial statements contradict statutory law, use fuzzy language, and rely on inconsistent and imprecise references to case-law.

Citation loops

To establish that Diego and Jessica Ruiz Zambrano enjoy the status of European citizens (*Ruiz Zambrano*, paragraph 40), the Court makes a brief reference to

[28] ECJ 19 Oct. 2004, Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen* v. *Secretary of State for the Home Department.*

[29] ECJ 20 Feb. 2001, Case C-192/99 *The Queen* v. *Secretary of State for the Home Department, ex parte: Manjit Kaur*.

[30] Bengoetxea, *supra* n. 10, at p. 262.

[31] Lasser, *supra* n. 2, at p. 112.

[32] Lasser, *supra* n. 2, at p. 109.

[33] Barceló, *supra* n. 1, at p. 411. This might not be entirely correct, as more recent studies suggest that the Court often engages in a discussion of prior cases, and occasionally distinguishes precedents. *See* J. Komarek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent', 61 *American Journal of Comparative Law* (2013) p. 149.

[34] Barceló, *supra* n. 1, at p. 427.

[35] R.S. Summers and M. Taruffo,'Interpretation and Comparative Analysis', in N. MacCormick and R.S. Summers (eds.), *Interpreting Statutes: A Comparative Study* (Dartmouth 1991) p. 488.

[36] Komarek, *supra* n. 33, at p. 160-161.

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Article 20 TFEU, and lists three separate, but related arguments. The first argument, that the children are EU citizens, appears to be taken from Article 20 TFEU (the text of which is not reproduced), but on a closer reading it follows from the interpretation of Article 20 TFEU in *D'Hoop*[37] and *Garcia Avello*.[38] The second one is a statement that the member states alone lay down the conditions for the acquisition of national citizenship, with reference to *Rottmann*.[39] The third one is tacit, and can be read between the lines – the reference to *Zhu and Chen*, paragraph 20, and *Garcia Avello*, paragraph 21, is intended to establish that Diego and Jessica *as minors* enjoy the full panoply of citizenship rights.

Citizenship status for all nationals of a member state

With regard to all three arguments, the Court refers to its established case-law. This is somewhat curious, given that the status of EU citizenship in the case of Diego and Jessica Ruiz Zambrano as Belgian citizens was not contested.[40] For the purposes of the analysis, however, it is interesting to observe that the first part of the argument (the highest bracket in the upper left corner of Figure 1 is constructed by the reference to *Garcia Avello*, paragraph 21, and *D'Hoop,* paragraph 27. The latter simply confirms that 'Article 8 of the Treaty confers the status of citizen of the Union on every person holding the nationality of a Member State. Since she [Ms. D'Hoop] possesses the nationality of a Member State, Ms D'Hoop enjoys that status.' In *Garcia Avello*, paragraph 21, the Court refers to *D'Hoop*, repeating that

> Article 17 EC confers the status of citizen of the Union on every person holding the nationality of a Member State (see, in particular, Case C-224/98 D'Hoop [2002] ECR I-6191, paragraph 27). Since Mr Garcia Avello's children possess the nationality of two Member States, they also enjoy that status.

The first loop, as can be seen from Figure 2, consists of the reference in *Ruiz Zambrano*, paragraph 40 – Article 20 TFEU – *Garcia Avello* – *D'Hoop* – Article 17 EC (now Article 20 TFEU). *See* Figure 2 for a graphical representation.

The citations on this occasion are superfluous detours, which are lined up to restate the obvious.

[37] ECJ 11 July 2002, Case C-224/98, *Marie-Nathalie D'Hoop* v. *Office national de l'emploi*.

[38] ECJ 2 Oct. 2003, Case C-148/02 *Carlos Garcia Avello* v. *Belgian State*.

[39] *Ruiz Zambrano*, para. 40, referring to *Rottmann*, para. 39.

[40] This paragraph as a whole appears superfluous, as the citizenship status of Jessica and Diego was self-evident.

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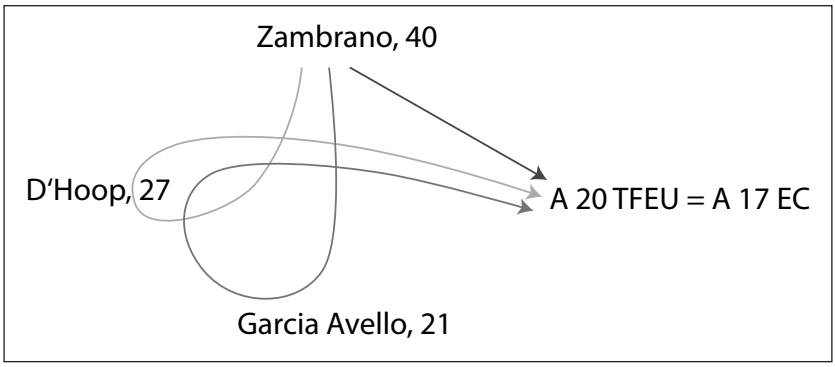

Figure 2. The reference loops in *Ruiz Zambrano*, paragraph 40

The competence to lay down the rules of national citizenship

In the second tenet of the argument, namely that the member states lay down the conditions for the acquisition of national citizenship, the Court in passing refers to *Rottmann*, paragraph 39 ('the conditions for the acquisition of which it is for the member state in question to lay down (*see*, to that effect, *inter alia*, Case C-135/08 Rottmann [2010] ECR I-0000, paragraph 39'). In the latter the Court held that

> [i]t is to be borne in mind here that, according to established case-law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality (Micheletti and Others, paragraph 10; Case C-179/98 Mesbah [1999] ECR I-7955, paragraph 29; and Case C-200/02 Zhu and Chen [2004] ECR I-9925, paragraph 37).[41]

As can be observed from Figure 1, in *Rottmann*, paragraph 39, the Court further refers to *Micheletti*, paragraph 10, *Mesbah*, paragraph 29, and *Zhu and Chen*, paragraph 39, which further refers to *Kaur*, pararaph 19 (*Kaur* itself refers to *Micheletti*). In *Zhu and Chen*, paragraph 37, the Court states that:

> under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality (see, in particular, Case C-369/90 Micheletti and Others [1992] ECR I-4329, paragraph 10, and Case C-192/99 Kaur [2001] ECR I-1237, paragraph 19)[42]

[41] The 'due regard to Community law', from *Rottmann*, para. 39, is left out in *Ruiz Zambrano*, para. 40.

[42] *Zhu and Chen*, para. 37.

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In *Mesbah*, paragraph 29, and *Kaur*, paragraph 19 (the two are identical) the Court refers to *Micheletti*, paragraph 10:

> Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.[43]

All reference paths (Figure 2.1), some with more detours, others with fewer, lead to *Micheletti*. *Micheletti* contains no further references. It is the 'sink case',[44] The above formulation in *Micheletti*, which has often been repeated in subsequent case-law, was not the decision of the Court on the division of competences between the Community and the member states with regard to nationality. In fact, *Micheletti* was decided *before* the Treaty of Maastricht, establishing EU citizenship, entered into force.[45] It was an introduction into the Court's ruling in that case (i.e., *obiter* rather than the *ratio*) but through *Chen* and *Rottmann*, it metamorphosed from case-law into law. This is, in the words of Advocate-General (AG) Jacobs, law-making *via* phrase-building.[46] In *Ruiz Zambrano*, it can be illustrated as follows.

The similarity between *Micheletti* and the cases that refer to it is on the level of a specific formulation only and not on the level of facts or the legal problem.[47] *Micheletti* primarily concerned the limits of the exercise of the right of establishment.[48] In *Rottmann*, *Micheletti* served as the authority to extend the jurisdiction of the Court to matters of nationality, where the loss of EU citizenship was at

[43] *Micheletti*, para. 10.

[44] In citation network analysis, the sink case is the document that makes no citations.

[45] *Micheletti* was decided in July 1992, whereas the Treaty of Maastricht entered into force on 1 Nov. 1993. It was, however, signed in February 1992.

[46] L.N. Brown and F.G. Jacobs, *The Court of Justice of the European Communities*, 3rd edn. (Sweet & Maxwell 1989) p. 46.

[47] *Micheletti* concerned a dentist, Mario Micheletti, who held Argentine and Italian nationality. After having his Argentinian diploma recognised by Spain, he applied for a permanent residence card there as a Community national, to work as a dentist. The Spanish authorities refused his application for residence on the basis of Art. 9 of the Spanish Civil Code, according to which, in cases of dual nationality where neither nationality is Spanish, the nationality corresponding to the habitual residence of the person concerned before his arrival in Spain was to take precedence. Thus Mr. Micheletti, being (also) Argentinian and having lived there before his arrival in Spain, could not commence his practice in spite of the Treaty freedoms granted to him as (also) an Italian national.

[48] In the Eur-Lex database, for example, the subject matter of the case is: 'freedom of establishment and freedom to provide services, Right of establishment'; with the keywords: 'Freedom of movement for persons – Freedom of establishment – Community rules – Class of persons covered – National of a Member State possessing at the same time the nationality of a non-member country – Included.'

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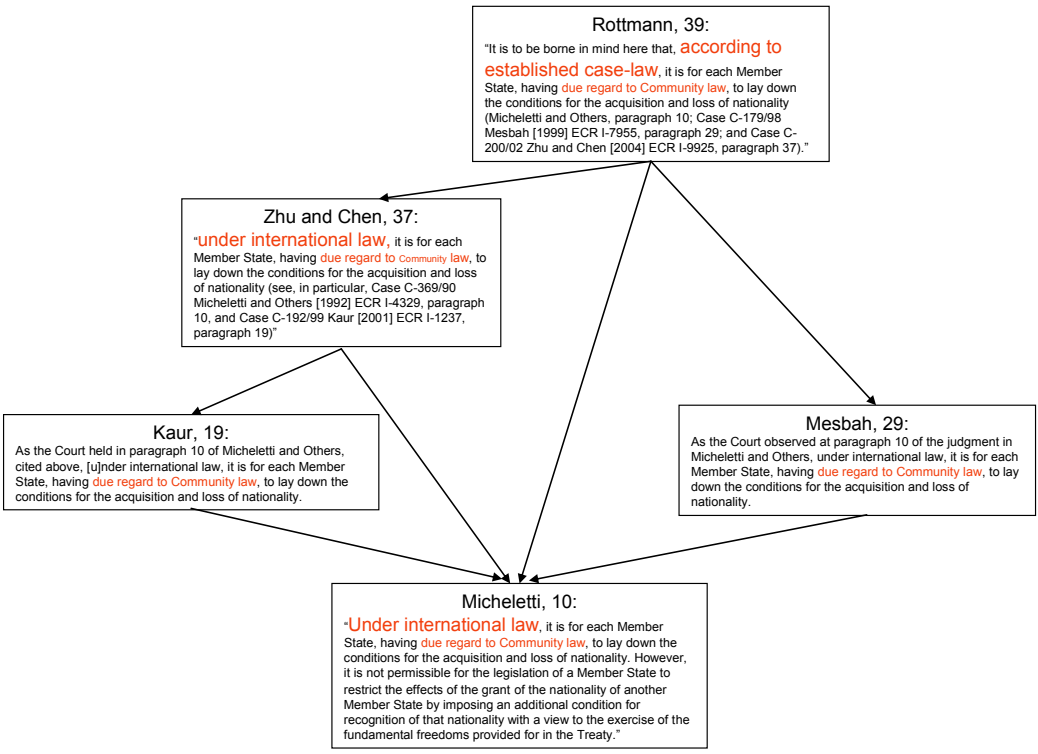

Figure 2.1 Case – case-law – law

stake. It was additionally supported by the arguments of non-discrimination and the fundamental status of EU citizenship.[49] In *Ruiz Zambrano* this competence of the Union was extended to illegal immigration *via Rottmann* (limits to the revocation of national citizenship). It was supported only with the argument of the fundamental status, which is a judge-made 'principle'. This principle (which, it will be argued, is just another general formulation) was modified in order to fit the facts of *Ruiz Zambrano*.

The fundamental status was decoupled from the non-discrimination principle, to which it was originally tied in *Grzelzyk*. The effect is the following: *Micheletti,* which solved the question of competence between two member states, has become the key reference for solving questions of the division of competence between a member state and the EU in *Rottmann*. The 'principle' which links the cases is 'due regard to Community law.' In this sense, it is just one more example of the distinction between the *existence* of the competence of the member states and the *exercise* of that competence by the member states, which had to pay due regard to

[49] *Rottmann*, paras. 41-46.

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EU law.[50] Moreover, *Micheletti* solved the question of competence with regard to freedom of establishment, but it has been extended to cover the conditions for granting national citizenship, illegal immigration, conditions for free movement and so on. A glance at the wording would support this reading: from the rules of international law, the principle turned into settled case-law (see Figure 2.1).

The reference in *Ruiz Zambrano* to *Rottmann* appears unnecessary, and uninformative. Also, due to the Court's unfortunate dictum, it is even contradictory. Namely, the wording 'due regard to Community law,' which was present in *Micheletti* and *Rottmann*, was deleted. Hence if the rationale of *Rottmann* is that the member states must have regard to Community law when exercising the conditions for nationality in case they might impact the exercise of fundamental freedoms, then it could be interpreted as being diametrically opposed to the rationale of *Ruiz Zambrano*, paragraph 40, where the Court seems to suggest that it is the member states alone that lay down the conditions for the acquisition of nationality.

Citizenship rights of minor EU citizens

The third tenet of the argument, that the citizenship rights of Diego and Jessica are not dependent on their age, is implicit. The Court includes the reference to *Zhu and Chen*, paragraph 20, in which it is stated *obiter* (under the part of the judgment entitled 'Preliminary observations', and taken from the opinion of the AG in the case)[51] that the

> capacity of a national of a Member State to be the holder of rights guaranteed by the Treaty and by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally.

The argument is salient for *Ruiz Zambrano*, involving minor EU citizens and parents, who are third country nationals.

Chen refers to the 'context' of Regulation No. 1612/68 and to case-law: 'Joined Cases 389/87 and 390/87 Echternach and Moritz [1989] ECR 723, paragraph 21, and Case C-413/99 Baumbast and R [2002] ECR I-7091, paragraphs 52 to 63, and, in relation to Article 17 EC, Garcia Avello, paragraph 21.'[52] In Figure 3, which is extracted from Figure 1, the references in *Chen* and the cases, to which it refers, are further explored:

[50] On this distinction, *see* L. Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?', 4 *EJLS* (2011) p. 192.

[51] Opinion of AG A. Tizzano delivered on 18 May 2004 in Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen* v. *Secretary of State for the Home Department*, paras. 41-50.

[52] *Zhu and Chen*, para. 20.

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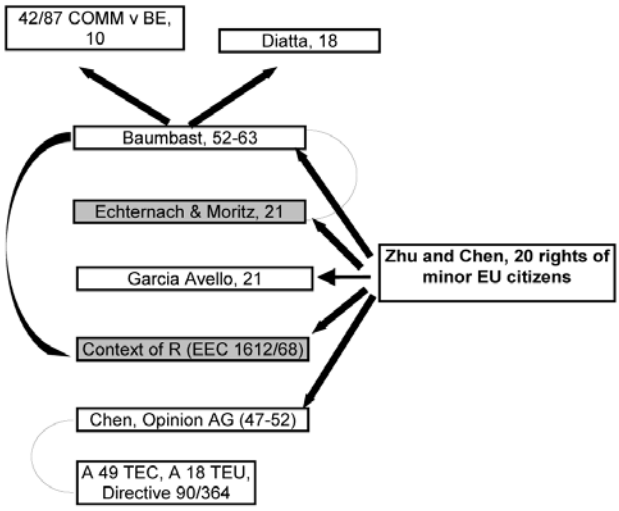

Figure 3. The references in *Zhu* and *Chen*, paragraph 20, and successive references

The numerous references and cross-references obfuscate the point made in *Chen*, paragraph 20. The citations in *Zhu and Chen* point to *Garcia Avello*, paragraph 21; the context of Regulation 1612/68; *Echternach and Moritz*, paragraph 21; and the AG's opinion (the AG also refers to *Echternach and Moritz*). The end-point of the third tenet of the argument thus seems to be *Echternach and Moritz,* paragraph 21,[53] with an imprecise reference to the 'context of Regulation 1612/68' (Figure 3, marked in grey). *Echternach and Moritz,* as the end-point, would be expected to clarify why the capacity to hold citizenship rights could not be conditional upon age.

The case concerns a child of a Community worker, who returns to his respective member state, leaving the child in the host member state. In paragraph 21, to which the Court points in *Chen*, the Court held that:

> [f]or such integration to come about, a child of a Community worker must have the possibility of going to school and pursuing further education in the host country, as is expressly provided in Article 12 of Regulation No 1612/68, in order to be able to complete that education successfully. When, after his father's return to the Member State of origin, the child of such a worker cannot continue his studies there because there is no coordination of school diplomas and has no choice but to return to the country where he attended school in order to continue studying, he retains the right to rely on the provisions of Community law as a child 'of a national of a

[53] ECJ 15 March 1989, Joined Cases 389/87 and 390/87, *Echternach and Moritz* v. *Minister van Onderwijs en Wetenschappen*.

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> Member State who is or has been employed in the territory of another Member State' within the meaning of Article 12, cited above.[54]

Clearly, *Echternach and Moritz* does not answer the question, because it addresses the rights of minors in a completely different context. The link between the cases is hard to establish (if this can be done at all). The same is true when *Echternach and Moritz* is analogised to *Baumbast*,[55] to which *Chen* also refers in the same sentence. In *Echternach and Moritz* the children had no choice but to return to the host member state in order to pursue their studies. Namely, the member state of origin failed to recognise high school diplomas completed in the host member state during the parent's employment there. In *Baumbast*, paras. 52-63, the Court discussed the possibility of the children to continue their education after their parent (Community worker) had either ceased to be a worker (in the case of Baumbast) or the children no longer lived together with the Community worker after the divorce (as was the case of R). While the argument of the Court in *Echternach and Moritz* seems to be based on the fact that the child was forced to complete his education in the host member state due to the differences in the educational systems, the rationale in *Baumbast* is that the rights of the children could not depend on such circumstances; in fact, they were irrelevant.[56]

Finally, *Chen* is an example of how the right of the children metamorphoses from a derived right in *Echternach via* a self-standing right in *Baumbast* to a right from which rights of third country nationals could be derived (*Chen*) through cross-references. On a more general level, *Baumbast* and *Echternach and Moritz* reflect the concern of Community workers as to the educational possibilities for their children, after they cease to be Community workers for whatever reason. The rationale is well known: if the migrant worker cannot secure education to her children, her fundamental right to work, move and reside freely is impeded. This, however, differs from the rationale of *Chen.* The latter is concerned with the right of minors as inactive EU citizens to reside in the Union.[57] In the first two cases the children retain the right to rely on the provisions of Community law as children

[54] *Echternach and Moritz*, para. 21.

[55] ECJ 17 Sept. 2002, Case C-413/99, *Baumbast and R* v. *Secretary of State for the Home Department*.

[56] '[…] children of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation No 1612/68. The fact that the parents of the children concerned have meanwhile divorced, the fact that only one parent is a citizen of the Union and that parent has ceased to be a migrant worker in the host Member State and the fact that the children are not themselves citizens of the Union are irrelevant in this regard' (*Baumbast,* para. 60).

[57] In *Baumbast*, para. 59, the Court clearly states that the provisions of the Regulation 'seek to facilitate the integration of the migrant worker and his family in the host Member State in order

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'of a national of a Member State who is or has been employed in the territory of another Member State' within the meaning of Article 12' [of Regulation 1612/68)], while in the third case the right to residence is primary, in the sense of being *un*-derived and detached from the free movement.

The reference in *Zhu and Chen* to *Garcia Avello*, paragraph 21, in which the Court states that 'Article 17 EC confers the status of citizen of the Union on every person holding the nationality of a Member State (*see*, in particular, Case C-224/98 D'Hoop [2002] ECR I-6191, paragraph 27). Since Mr. Garcia Avello's children possess the nationality of two Member States, they also enjoy that status', completes the loop with the reference to *D'Hoop*, paragraph 27 (which is the first reference in *Ruiz Zambrano*, paragraph 40), and doubles the argument of the first sentence of *Ruiz Zambrano*, paragraph 40. It is therefore unnecessary.

The intriguing fundamental status

The second justificatory argument in *Ruiz Zambrano* relies on one of the best known formulations (formulas) in European jurisprudence,[58] stemming from *Grzelczyk*, paragraph 31, where the Court famously stated: 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.'[59] The decision in *Grzelczyk* was itself based on the ruling in *Martinez Sala*,[60] in which this particular formulation did not explicitly appear. In the judgment, the Court did not refer to the AG, who spoke of the 'fundamental status' in his opinion in the *Sala* case (*see* paragraph 31):

> Citizenship of the Union comes through the fiat of the primary norm, being conferred directly on the individual, who is henceforth formally recognised as a subject of law who acquires and loses it together with citizenship of the national state to which he belongs and in no other way. Let us say that it is the fundamental legal status guaranteed to the citizen of every Member State by the legal order of the Community and now of the Union. This results from the unequivocal terms of the two paragraphs of Article 8 of the Treaty.[61]

to attain the objective of Regulation No. 1612/68, namely freedom of movement for workers, in compliance with the principles of liberty and dignity.'

[58] Azoulai, *supra* n. 50, at p. 194.

[59] ECJ 20 Sept. 2001, Case C-184/99, *Rudy Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*.

[60] ECJ 2 May 1998, Case C-85/96, *María Martínez Sala* v. *Freistaat Bayern*.

[61] *See* Opinion of AG La Pergola delivered on 1 July 1997 in Case C-85/96, *María Martínez Sala* v. *Freistaat Bayern*.

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AG La Pergola delivered his opinion in July 1997. In October that year the Treaty of Amsterdam was signed and Article 8 of the TEU was amended, adding that 'Citizenship of the Union shall complement and not replace national citizenship.'[62] Two interpretations of Article 8 *post*-Amsterdam are possible. First, that EU citizenship is a fundamental (primary) status (situation juridique *de base* [emphasis in the original], *grundlegende Rechtsstellung*) because it is conferred by the primary norm (Article 8). Second, that it is complementary, because it is attached to national citizenship. AG La Pergola came to the conclusion that EU citizenship was the fundamental status by relying on the 'unequivocal terms of the two paragraphs of Article 8.'[63] Citizenship rights, he argued, could be interpreted as autonomous rights, whether or not their exercise was limited by other provisions of Community law.

The Treaty of Amsterdam made the terms of Article 8 decidedly less unequivocal. The two interpretations are not mutually exclusive – one could imagine that EU citizenship rights are primary rights of EU citizens, when they move to another member state, and complement the rights, which these citizens preserve in the member state of their nationality. But it is safe to argue that the former places more weight on the first sentence of Article 8(1) TEU, the second on the third. The Court opted for the former interpretation. The following passages examine the use of the concept of fundamental status, what substance it acquired in the case-law and what are its practical implications.

Following the formulation in the case-law, it can be observed that the *Grzelczyk* formulation of Union citizenship was shortened in *Baumbast,* paragraph 82: 'Under Article 17(1) EC, every person holding the nationality of a Member State is to be a citizen of the Union. Union citizenship is destined to be the fundamental status of nationals of the Member States (*see*, to that effect, Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 31). The limitations and conditions, to which the rights were subject', were discussed,[64] but separately from the fundamental status. While Mr. Grzelczyk was a student exercising his freedom of movement by moving from one member state to the other member state, Mr. Baumbast was not economically active.

For the purposes of *Baumbast,* the fundamental status had to be generalised. It could not remain limited to all nationals of the member states *who found themselves in the same situation*, but 'raised' from the facts and generalised to every person *holding the nationality of a Member State.* Only this generalisation could include citizens like Mr. Baumbast, who no longer enjoyed the rights of EU migrants. The *Grzelczyk* formulation, the Court stated in *Baumbast,* had to be interpreted *to that*

[62] *OJ* C-340, 10 Nov. 1997.
[63] Opinion of AG La Pergola, para. 18.
[64] *Baumbast*, paras. 86-91.

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effect, thus effectively detatched from the facts of *Grzelczyk*. It was not limited to other similar factual situations, but on the non-discrimination of EU citizens generally. In the context of the legal-theoretical considerations the constraint of 'precedent' was lifted,[65] and the normative status of the judicial formula was elevated to the level of an abstract (free-floating) rule. By not repeating the clause on the exceptions, as were expressly provided for, that the Court had added in *Grzelczyk*, the Court effectively turned the citizenship of the EU into an 'absolute' status.[66]

This is confirmed by *Garcia Avello*: '[a]s the Court has ruled on several occasions (*see*, *inter alia*, Case C-413/99 Baumbast and R [2002] ECR I-7091, paragraph 82), citizenship of the Union is destined to be the fundamental status of nationals of the Member States.' The fundamental status also covered situations where future (or hypothetical) movement was likely to be impeded, irrespective of the free movement *and* economic activity *and* discrimination (the applicant in *Garcia Avello* was a minor EU citizen, who possessed double nationality, Belgian and Spanish).

In *Zhu and Chen*, paragraph 25, the citizenship formulation was cited as it appeared in *Baumbast*. Like in the case of *Garcia Avello*, *Grzelczyk* was not mentioned: 'By virtue of Article 17(1) EC, every person holding the nationality of a Member State is a citizen of the Union. Union citizenship is destined to be the fundamental status of nationals of the Member States (*see*, in particular, Baumbast and R, paragraph 82).' *Chen* further broadened the original (*Grzelczyk*) formulation to extend it to the facts of that case. The function of the fundamental status formula in *Chen* was to reinterpret the wording of Article 1 of Directive 90/364 and grant baby Catherine the right of residence. The Directive covered the situations where minor citizens were the dependants who could install themselves in another member state with the holder of the right of residence. Its wording did not cover minor EU citizens, not even those with comprehensive sickness insurance and sufficient resources. But European citizenship, interpreted as fundamental status, could remove the obstacle created by secondary legislation. The Court could not change the wording of Article 1, but it could reduce the importance of the wording in the light of the purpose of the Directive and the principle of the fundamental status, which could override secondary legislation. The Court did not elaborate on the meaning of the fundamental status, or on why the reference

[65] The argument could be conceived in terms of levels of generality of the Court's reasoning with the same conclusion. *See* for instance G. Conway, 'Levels of Generality in the Legal Reasoning of the European Court of Justice', 14 *European Law Journal* (2008) p. 787.

[66] This, of course, is problematic from the standpoint of member states' competences in the area of national citizenship.

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to *Baumbast* (of all possible cases) was pertinent in the context of *Chen*, but merely restated the principle, as a major premise.

In *Rottmann*, paragraph 43, the Court referred to both cases, *Grzelczyk* and *Baumbast*, reproducing the formulation of the latter: 'As the Court has several times stated, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (Case C184/99 Grzelczyk [2001] ECR I-6193, paragraph 31; Case C-413/99 Baumbast and R [2002] ECR I-7091, paragraph 82).'[67] In *Rottmann*, *Grzelczyk* is tacitly incorporated (absorbed) into the *Baumbast* formulation.[68]

In *Ruiz Zambrano*, paragraph 41, the whole palette of cases is cited to the same effect, using the translation from *Rottmann*:

> As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 31; Case C-413/99 Baumbast and R [2002] ECR I-7091, paragraph 82; Garcia Avello, paragraph 22; Zhu and Chen, paragraph 25; and Rottmann, paragraph 43).

The effect of the repetition is the weakening of the argument (and perhaps even of the concept as such). On the surface, it appears rather sloppy. Because the Court refers to several cases, which are transformed into a 'doctrine' by the wording, rather than by their underlying rationale, it waters down the relevant *substance* of particular decisions and adds little to the content of the argument.

It can be observed from Figure 4 that if one follows the arrows, which represent references to case-law, from *Ruiz Zambrano*, as they appear in the six cases, one will eventually, no matter which path one chooses to travel on, end at *Grzelczyk*. This in itself is logical (and again, perfectly in line with the civil law notion of *jurisprudence constante* or the concretisation of the norm), but it is deficient justificatory-wise. If one reads paragraph 41 of *Ruiz Zambrano* without any prior knowledge of the legal development in the area of European citizenship, one hopes to find an explanation of what the meaning (the content) of the fundamental status is in the case itself. But one surely expects, if he is to trace the formulation all the way to its origin (not to *Martinez Sala*, which is not revealed, but to *Grzelczyk*), that the concept would be at some point, and in any case at the end, explained, filled with content and meaning or any sort of detailed observation of why it was necessary to construct it. Due to the division of labour in the EU judicial system,

[67] *Intended* and *destined* are sometimes interpreted as an intentional change of language, but are in fact only different in the English version. Both are translations from the French *a vocation à être* ('le statut de citoyen de l'Union a vocation à être le statut fondamental des ressortissants des États membres'). In French, the wordings of *Grzelczyk, Rottman* and *Baumbast* are identical.

[68] The same in *Ruiz Zambrano*, discussed *infra*.

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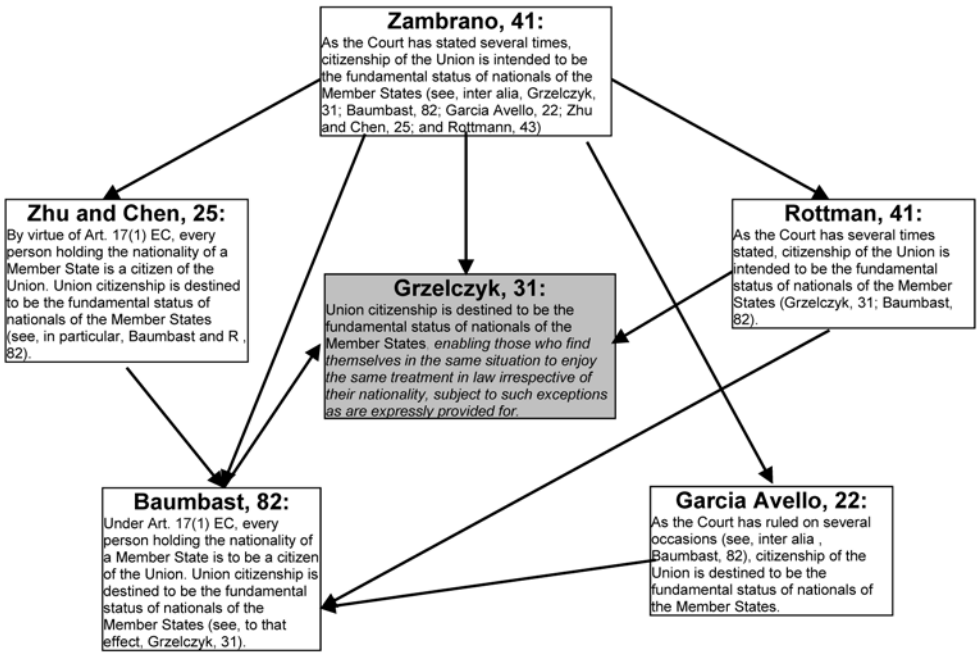

Figure 4. The fundamental status formulation from *Ruiz Zambrano* to *Grzelczyk*

this will be left to the speculations of scholars in case notes, articles and monographs.

The above analysis confirms Lasser's claim of the 'higher status' of the Court's case-law and its use as a definite answer. In this case, it is only worsened by infelicitous drafting. Because the text of Article 20 TFEU is not reproduced in the judgment, the case-law seems to assume a 'dominant' interpretive role, the function of which is to inhibit, if not to close, the debate.

Negative consequences and social propositions

The Court bases its last argument on the negative consequences for minor EU citizens, Diego and Jessica. According to the Court, if Article 20 TFEU was to be interpreted as not preventing the member state in question from issuing a deportation order to their father, the children would be forced to leave the Union in accordance with Belgian law. Leaving the Union would hinder the genuine enjoyment of the substance of their rights as citizens of the EU. The Court also stipulates that Mr. Ruiz Zambrano would have to be issued with a working permit in order to provide for the children. Otherwise, the children would need to leave the Union.

In *Ruiz Zambrano*, paragraph 42 (Figure 5), the Court refers to *Rottmann*, which reads as follows:

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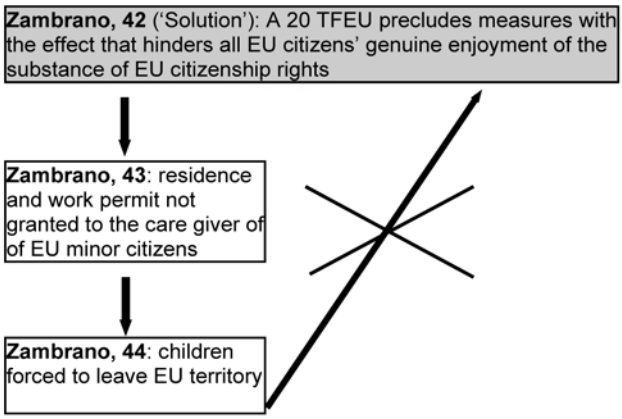

Figure 5. The argument of the genuine enjoyment of rights

> 42. It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.[69]

Because it is doubtful that from paragraph 42 of *Rottmann* one could deduce what kind of concrete national measures Article 20 TFEU precluded in the *Ruiz Zambrano* case (or what kind of action it requires on behalf of the Belgian authorities), the reference should probably be read as an argument, which established the competence of the EU in cases of withdrawals of citizenship status. However, the Court does not state this, but assumes competence where there is first a need to establish one. While *Rottmann* seems to bring EU nationals who would lose their EU citizenship following the withdrawal of national citizenship (i.e., national measures) within the ambit of EU law, *Ruiz Zambrano* assumes that 'EU law applies' and on that assumption prohibits certain national measures. Put differently, the Court puts the cart in front of the horse: instead of arguing that the matter was not purely internal to establish competence, before considering any adverse effects, it considers adverse effects to establish competence.

Some have argued that the argument of the Court was *consequentialist*, i.e., an argument based on the consequences of the contested national measure.[70] However, the argument does not become a valid *consequentialist* argument just by

[69] *Rottmann*, para. 42.
[70] Azoulai, *supra* n. 13.

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stating that. First, in order for the Court's argument from consequences to be valid – in theory – it must be of a second order. According to MacCormick, a solution, no matter how desirable on consequentialist grounds, must also be warranted by the law as it is. In that sense, arguing from consequences only supplements 'deductivism'.[71] The argument from consequences is furthermore a way of making a choice when the (interpretation of) the law leaves us with several possibilities. The Court, on the contrary, uses the argument from consequences as a 'first order' argument, not to supplement but to replace the syllogism.

The same matter could be framed in terms of the 'best fit'. The solution that fits the practice, and shows it in its best light, must be one of the legally possible ones to be justified (Dworkin's requirement of *fit* is not an open ticket). In this view the Court, wishing to argue from consequences, would first have to establish that there are several legally possible solutions to the problem at hand. Then, it would have to argue that the consequences of the best solution show the principle involved in its best light.

Second, suppose that the Court's decision is justifiable. Paragraphs 42-44 of *Ruiz Zambrano* can be rewritten in the form of a simple syllogism:

> National measures which preclude the EU citizens to enjoy the substance of their EU citizenship rights under Article 20 TFEU, (to move and reside freely) are contrary to EU law (the major).
>
> National measure X in effect forces EU citizens to leave the Union territory and thereby negates their right to move and reside freely (the minor).
>
> National measure X is contrary to Article 20 TFEU (conclusion).

The conclusion is correct, because it follows from the premises (the decision is thus said to be internally justified). We can further suppose that the interpretation of Article 20 TFEU (the major premise) is derivable from the text of the treaty and its purpose, and acceptable because it reflects and promotes the core values of European integration, the fundamental freedom to move and reside, the equality among EU citizens, and solidarity (Article 20 TFEU is thus to be interpreted as guaranteeing EU citizens the right to a genuine enjoyment of the substance of their right to move and reside freely on the territory of the Union). We can even suppose that a residence permit for a third country national is essential for the children to be able to reside in the EU and that a working permit of a parent is necessary in order to provide for the children (and that the argument is sound). The decision then seems to satisfy the demands of external justification (the acceptability of the premises).

[71] N. MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) p. 106-107.

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Even if we make all the above assumptions, the argument from consequences is valid only if the consequences of judicial decisions are duly evaluated and tested against the values, such as legal certainty, equality or legitimate expectations, which the law makes relevant (and the Court must protect). The result of an evaluation without showing the working out thereof, but merely asserting that it is conclusory, not argumentative: 'it states the result of an evaluation without showing the working out of it.'[72] This is especially pertinent where the Court's interpretation of Article 20 TFEU is, if not outright *contra legem*, then at least less obvious. It is not a proper argument from consequences.[73]

Third, the consequentialist argument, in order to serve as a justifying reason (and to satisfy the demand of formal justice to treat like cases alike), would have to be universalisable.[74] If the justifying reason in *Ruiz Zambrano* was indeed the genuine enjoyment of EU citizenship rights disregardful of the cross-border element (or the protection of the status of EU citizenship as such),[75] it is rather doubtful whether it was extendable in the first place, given the later clarifications of the standard in *McCarthy*[76] and *Dereci*.[77] Both were explicitly distinguished from *Ruiz Zambrano*, but on different grounds, in situations, which one could argue, were similar. The problem occurs with regard to the clear reference to *Garcia Avello* in *McCarthy.* In defining what the genuine enjoyment of citizenship rights means in *McCarthy*, the Court juxtaposed the situation of Ms. McCarthy with the facts of *Garcia Avello*. In the latter the Court held that the genuine enjoyment of EU citizenship rights was hindered in situations in which EU citizens would experience serious inconvenience at both professional and private levels, and had difficulties in benefiting from the legal effects of diplomas or documents due to discrepancies in surnames.[78]

In *Dereci*, the Court clarified that mere economic reasons or the wish to keep the family together would not force EU citizens to leave the EU, hence not deprive them of the genuine enjoyment of citizenship rights.[79] The genuine enjoyment was only at stake where citizens were forced to leave the EU as a whole. It could be argued that professional and personal inconvenience due to the inability to

[72] MacCormick 2005, *supra* n. 7, at p. 112.

[73] Teleological-evaluative arguments are 'consequentialism by another name.' *See* MacCormick 2005, *supra* n. 7, at p. 132.

[74] On the demand for universalizability when it comes to precedents, *see also* R. Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford University Press 2010) p. 275.

[75] Azoulai, *supra* n. 13.

[76] ECJ 5 May 2011, Case C-434/09, *Shirley McCarthy* v. *Secretary of State for the Home Department*.

[77] ECJ 15 Nov. 2011, Case C-256/11, *Murat Dereci and Others* v. *Bundesministerium für Inneres*.

[78] *McCarthy*, para. 51, referring to *Garcia Avello*, para. 36.

[79] *Dereci*, para. 68.

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benefit from the legal effects of diplomas was at least as serious as the personal inconvenience caused by living apart from one's family members. For the present purpose it is more important to establish that the genuine enjoyment of rights, which arguably justified *Ruiz Zambrano*, did not serve as a justifying reason in post-*Ruiz Zambrano* case-law, hence it is doubtful whether it can be considered as a valid justifying reason.

Another, related but simpler way of scrutinising the same argument is through a prism (or vocabulary) of social propositions. The Court's assumption of the children leaving the Union is such a proposition. Let us imagine that the unemployment rate in Belgium is considerable and that in times of a dire financial crisis Mr. Ruiz Zambrano would be unable to find work. We can also imagine that most illegal immigrants are illegally employed, just as Mr. Ruiz Zambrano, or take up occasional work to make a living. Or, that the migrants, even if unemployed, are reluctant to leave Belgium. Perhaps Belgium offers free healthcare to all residents, legal or illegal, as well as free education and subsidised study loans. Maybe it has favourable social transfers. These circumstances might be common knowledge to some, but certainly not to all.

The Court probably considered social, political and economic circumstances, and reasonably so. The knowledge of the Court with regard to these was most likely based on non-legal sources, be it newspaper articles or national financial reports. If they played a critical role in the way the Court shaped the arguments, and if they heavily influenced the decision, the Court should have explicitly acknowledged it. There is no guarantee that they were trustworthy, but this was exactly why they had to be set out and tested against other solutions. Furthermore, if the consequences of the contrary decision are not evaluated and tested against previous case-law and competing concerns, the reasoning remains one-dimensional. One such concern is certainly the competence of the member states to regulate immigration, and the consequences of legalising the status of illegal immigrants for their social systems.

Social propositions are often a necessity in the judicial application of law and a lot of vexing disputes would be solved were there sufficient empirical knowledge.[80] But justification without the evaluation of the non-legal sources appears *suspicious* when the Court makes a rule *via* making a factual determination as to which most of the evidence appeared to come from the judges' own experiences, hunches, intuitions, and armchair sociology[81] (and one could add, affected by the way the Court perceived the individual factual situation).

[80] For a further classification of social propositions, *see* M.A. Eisenberg, *The Nature of the Common Law* (Harvard University Press 1988) p. 14-42.

[81] F.F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press 2009) p. 215.

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Conclusion

This article focused on the question of the persuasiveness of the Court's reasoning by looking into (1) the use of citation of authority and (2) the unnecessary multiplication and circularity of references to the sources of law, which make up for the lack of 'thicker' reasoning, and (3) the '*ad hoc*' use of social propositions. These elements in the Court's reasoning, taken together, it was argued, account for the 'thin' justification of its decision (they constitute justificatory dead-ends). They are often seen as formal or even as formalistic features of the Court's justificatory pattern.

Firstly, the tracking of citations in individual judgments shows that the justificatory arguments of the Court are found in its previous decisions, which are cited out of their immediate context (legal and factual), and repeated in subsequent novel situations almost at random. Sometimes the clearly *obiter* statements metamorphose into key legal grounds for decisions, and at other times, even if the citation is followed to the initial decision (to the original citation), it does not provide a solution to the legal problem, for which it is cited as an authority, either because it is factually or legally decoupled from it. What holds the cases, which are cited in support of the Court's argument, together, is language (the Court's rhetoric). This leads to the second point, namely, that the repetition of formulas renders the decisions rather unpersuasive in the sense of being one-dimensional. Secondly, the employment of social (empirical) propositions as consequentialist arguments without acknowledging the contestability of such propositions gives the reasoning an *ad hoc* and circular tinge. Clearly, this invites criticism of illegitimacy, incoherence and unbridled policy-making.

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