Revisiting the Ruiz Zambrano Doctrine and Exploring the Potential for Its Extensive Application

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With the tenth anniversary of the seminal Ruiz Zambrano judgment looming, there is scantly a better time to reassess its legacy and reflect on how its doctrine can be brought forward to foster the protection of fundamental rights in the European Union (EU). This article looks back at the reasons that make this decision a landmark in EU law, and discusses the potential for an expansive reading of the Ruiz Zambrano doctrine. It analyses to what extent the doctrine's scope can be extended to subjects other than minors within the specific context of derived residence rights for third country nationals. On the whole, this article argues in favour of the expansive application of this doctrine by looking at a case study: that of persons with disabilities. In testing the potential application of the Ruiz Zambrano doctrine to protect the genuine enjoyment of rights that the status of EU citizens confers upon persons with disabilities, the article problematizes the idea of 'dependency'. While this concept might be perceived as problematic from a disability perspective, the article reconciles this apparent tension by applying the concept of 'empowering dependency'. The article concludes by highlighting the constitutional spill-over that a broader application of the Ruiz Zambrano doctrine may bring.

Keywords: Ruiz Zambrano, EU citizenship, fundamental rights, persons with disabilities, constitutional spill-over

1 INTRODUCTION

With the tenth anniversary of the seminal *Ruiz Zambrano* judgment of the Court of Justice of the European Union (CJEU),[1] it seems a particularly apt time to reassess its history and legacy and reflect on how its doctrine can be brought

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** This article is the product of a joint reflection and a discursive process. However, Delia Ferri wrote sections 1, 3 and 5, while Giuseppe Martinico wrote sections 2, 4 and 6. The article is the latest of various iterations on which we received several comments and positive criticism. It has also benefited from exchanges of views and discussion with many colleagues. In particular, we are grateful to Niamh Nic Shuibhne, Leandro Mancano and Charles Edward O'Sullivan for their helpful remarks on earlier versions of this article. The usual disclaimer applies. Giuseppe Martinico, Full Professor of Comparative Public Law, Scuola Superiore Sant'Anna, Pisa, Italy. Email: giuseppe.martinico@santannapisa.it.

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

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forward to foster the protection of fundamental rights in the European Union (EU). While looking back at the reasons that make this decision a landmark in EU law, this article aims to offer an extensive reading of the *Ruiz Zambrano* doctrine. It does so by analysing whether the scope of this doctrine can be expanded to subjects other than minors within the specific context of derived residence rights for the family members of third country nationals (TCNs).

Early commentaries on the decision had contended that it was 'unlikely' that future application of the principle in *Ruiz Zambrano* could be confined merely to the parent/child relationship on grounds of physical dependency.[2] More recently, Hyltén-Cavallius highlighted that nothing implies 'that the genuine enjoyment doctrine could not recognize other family relationships' outside of those between a parent and their child.[3] In spite of these isolated statements, and even after *Rendón Marín*[4] and *Chavez-Vilchez*,[5] the scope of the *Ruiz Zambrano* doctrine somehow remains blurred and under-researched. This article addresses this gap in legal scholarship. It argues in favour of the expansive application of the *Ruiz Zambrano* doctrine within the scope of family relations. In this vein, this article deliberately focuses on TCNs that are family members. However, it does acknowledge that such an expansive interpretation would potentially open up additional scenarios (which are outside the scope of this article) and the possibility to extend certain derived rights of residence to caregivers that are not family members.

This article tests as a case study the potential of the *Ruiz Zambrano* doctrine to protect the 'genuine enjoyment of the substance of the rights' that EU citizenship confers upon people with disabilities (within the central area of derived TCNs' residence rights). Kroeze has already suggested that future case law will need to show whether a broader scope for application is a 'realistic possibility, for instance for the (sole) carer of a […] Union citizen [with disabilities]',[6] and Cortés Martín has already put forward the application of the *Ruiz Zambrano* doctrine to persons with disabilities.[7] Building on these arguments, this article further investigates the

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2 A. Lansbergen & N. Miller, *European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM)*, 7(2) Eur. Const. L. Rev. 287–307, at 296 (2011). On purely internal situations in EU law, *see* A. Arena, *The Wall Around EU Fundamental Freedoms: The Purely Internal Rule at the Forty-Year Mark*, 38 Y.B. Eur. L. 153–219 (2019).

3 For a recent analysis, *see* K. Hyltén-Cavallius, *Who Cares? Caregivers' Derived Residence Rights from Children in EU Free Movement Law*, 57 Common Mkt. L. Rev. 399–432, at 418 (2020).

4 Case C-165/14, *Rendón Marín*, EU:C:2016:675.

5 Case C-133/15, *Chavez-Vilchez and Others* EU:C:2017:354.

6 H. Kroeze, *The Substance of Rights: New Pieces of the Ruiz Zambrano Puzzle*, 44(2) Eur. L. Rev. 238–256 (2019). In the original text, the author uses the word 'handicapped'. In this piece, by contrast, we refer to persons with disabilities, using the people first language (A. Broderick & D. Ferri, *International and European Disability Law and Policy: Text, Cases and Materials* (Cambridge University Press 2019)).

7 JM Cortés Martín, *Sobre lo esencial de los derechos vinculados a la ciudadanía y su articulación con el derecho fundamental a la vida familiar*, 40 Revista de Derecho Comunitario Europeo 871, at 883 (2011).

extent to which this is not only a realistic possibility but also a desirable outcome. Given that the *Ruiz Zambrano* doctrine has been progressively shaped by a series of rulings (*infra*) of the Court of Justice which focusses on the condition of dependency of children, this article engages with the concept and discusses how it can be framed within the disability context.

Following these introductory remarks, the second section recalls the core tenets of the *Ruiz Zambrano* ruling. The third section recalls subsequent judicial developments and the blurred scope of the *Ruiz Zambrano* doctrine. Particular attention is paid to *K.A*,[8] *Rendón Marín*[9] and *Chavez-Vilchez*[10] which are key to unlocking an expansive reading of *Ruiz Zambrano*. This line of case law occupies a key position in the study of EU citizenship and, more broadly, of EU law, and is often taught to students of EU law as part of the curriculum. However, it seems important to revisit these decisions and to highlight the key issues that support an expansive reading of the doctrine under discussion. The fourth section discusses the core concept of dependency and explains the extent to which the genuine enjoyment doctrine can be extended beyond the case of minors. Relying on the discussion in section four, section five tests the likely expansion of the doctrine in disability-related cases. In particular, it examines whether family caregivers of EU citizens with disabilities, other than children with disabilities (who already fall within the personal scope of the *Ruiz Zambrano* doctrine) – for example, adults or older people with disabilities – would be able to derive a residence right from Article 20 of the Treaty on the Functioning of the European Union (TFEU). This section is not concerned with free movement of persons with disabilities in general and does not attempt to articulate on that issue.[11] In fact, the article does not aim to discuss the place of disability rights within EU citizenship as such. Rather, the disability case study aims to support a broad principle of effectiveness of established citizenship rights in light of the *Ruiz Zambrano* doctrine. The concluding section presents some reflections on the impending constitutional challenges of this potentially expansive application of the *Ruiz Zambrano* doctrine.

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8 Case C-82/16, *K.A. and others*, EU:C:2018:308.

9 Case C-165/14, *Rendón Marín*, EU:C:2016:675.

10 Case C-133/15, *Chavez-Vilchez and Others* EU:C:2017:354.

11 A general discussion of free movement of persons with disabilities has already been conducted by L. Waddington, *The Potential for, and Barriers to, the Exercise of Active EU Citizenship by People with Disabilities: The Right to Free Movement*, in *The Changing Disability Policy System: Active Citizenship and Disability in Europe Volume 1* 196–214 (R. Halvorsen, B. Hvinden, B. J. Bickenbach, D. Ferri & AM Guillén Rodriguez eds, Routledge 2017).

2 THE RUIZ ZAMBRANO DOCTRINE

Originally, EU citizenship was described as possessing a 'Cinderella' character which did not add anything substantive to an individual's 'real' citizenship, that is, their national citizenship.[12] This approach was implicitly supported by the wording of the former Treaty on the European Community, in which Article 17 read as: 'Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship'. The wording of this provision led scholars to consider Union citizenship as a derivative status in that one can be a European citizen only if they are already a citizen of a Member State. The Lisbon Treaty, however, seems to endorse a slightly different approach to citizenship. Article 20 TFEU currently states that: '[c]itizenship of the Union shall be additional to and not replace national citizenship'; the adjective 'additional' conveys the idea of the relative autonomy of EU citizenship from national citizenship. This idea appears, albeit implicitly, to have been endorsed by the CJEU in the landmark *Ruiz Zambrano* case and, as will be discussed later in this article, in most recent decisions.

Since *Ruiz Zambrano* has already been extensively commented upon,[13] we will limit ourselves in this section to highlighting the core tenets of the decision and to putting forth some considerations regarding the impact of this judgment. The case originated from a preliminary reference raised by the *Tribunal du travail de Bruxelles* and concerned two Colombian citizens, Mr Zambrano and his wife, who moved from Colombia to Belgium with their first child. Belgian authorities rejected their application for asylum but because of the local situation in Colombia, also decided not to send them back. Mr Zambrano and his family continued their life in Belgium and applied for residence permits, which were rejected by the Belgian authorities. Mr Zambrano, however, found a job in 2001 and from that year he worked and regularly contributed to the social security system. He and his wife had two other children, both with Belgian citizenship. The children had never left Belgium. When the Belgian authorities realized that Mr Zambrano was working without a work permit, they claimed that he did not have a right of residence and, consequently, did not enjoy a right to work in

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[12] J. Shaw, *Contrasting Dynamics at the Interface of Integration and Constitutionalism*, RSCAS 2010/60 (2010), https://cadmus.eui.eu/bitstream/handle/1814/14396/RSCAS_2010_60.corr.pdf?sequence=3 (accessed 8 Dec. 2021).

[13] Among the copious literature, *see* K. Hailbronner & 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 CML Rev. 1253–1270 (2011); H. van Eijken & S. de Vries, *A New Route Into the Promised Land? Being a European Citizen After Ruiz Zambrano* (2011) 36 Eur. L. Rev. 704–721; D. Kochenov, *EU Citizenship: From an Incipient Form to an Incipient Substance?*', 37 Euro. L. Rev. 369–396 (2012); D. Kochenov, *The Right to Have What Rights? EU Citizenship in Need of Clarification,* 9 Eur. L. J. 502 (2013). *See also* N. Nic Shuibhne *Seven Questions for Seven Paragraphs*, 36 Eur. L. Rev. 161 (2011).

Belgium. In front of the national court, Mr Zambrano argued that he did, in fact, enjoy these rights given that his two children were Belgian and thus EU citizens, and that the denial of those rights would require the family (including the two children with EU citizenship) to leave Belgium. The core question, as interpreted by the CJEU, concerned whether EU citizenship confers on the third country national parent of EU citizen children – who are dependent upon that TCN and who never exercised their right to move across the Union – a right of residence in the Member State of which these children are nationals.[14]

As noted by Nic Shuibhne, 'having conflated all of the issues and questions into one constitutional maelstrom',[15] the CJEU delivered a groundbreaking judgment 'in seven slender paragraphs',[16] characterized by a poor and obscure legal reasoning.[17] The Court, relying on Article 20 TFEU,[18] established that this provision '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'.[19] The CJEU inferred from this that the situation of the two children was relevant for EU law (that is, it did not constitute a mere internal situation, or it arguably did, but that situation was not devoid of factors connecting it to EU law). Consequently, the CJEU extended the right of residence of the children to Mr Ruiz Zambrano following the rationale applied in *Chen,*[20] albeit in a different context. The Court held that the refusal to grant a right of residence to a TCN 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 the effect of undermining the substance of EU citizens' rights. The Court thus inferred from the right of

14 *Ruiz Zambrano*, para. 36.
15 Shuibhne, *supra* n. 13, at 162.
16 *Ibid*.
17 Hailbronner & Thym, *supra* n. 13.
18 On this point, *see* Kroeze, *supra* n. 6.
19 *Ruiz Zambrano*, para. 42.
20 Case C-200/02, *Zhu and Chen* EU:C:2004:639. As AG Sharpston clarified in *Zhu and Chen*, the situation was not understood as a purely internal one for reasons linked to the national legislation. Indeed, on that occasion, there was no cross-border movement at all. 'In Zhu and Chen, (63) Catherine Zhu was born in one part of the United Kingdom (Northern Ireland) and merely moved within the United Kingdom (going to England). The laws then granting Irish nationality to anyone born on the island of Ireland (including in Northern Ireland), coupled with good legal advice, enabled her to rely on citizenship of the Union to found a right of residence in the United Kingdom for herself and her Chinese mother, since otherwise it would have been impossible for her, as a toddler, to exercise her rights as a citizen of the Union effectively', Opinion of AG Sharpston Case C-34/09 Ruiz Zambrano ECLI:EU:C:2010:560, para. 37.

residence of the children in the EU territory a right to work for their parents (or, at least in this case, for one of them, Mr Ruiz Zambrano).

Ruiz Zambrano is revolutionary in many respects. It abandons the distinction between static and dynamic citizenship and the necessity of an intra-EU cross-border component and expanded the jurisdiction of the Court of Justice and ultimately the scope of EU law. In that regard, O'Brien has underlined that 'the Court established that EU citizenship is not parasitic upon exercising free movement between Member States, but has some autonomous content',[21] while Coutts has suggested that '[f]rom the perspective of Union citizenship, [*Zambrano*] contained the potential of a truly federal citizenship, generating its own set of autonomous rights enforceable throughout the Union'.[22] As noted by Leanerts, this decision was ground breaking in that it focused on the rights linked to the status of citizen of the Union, which 'may be relied upon, even in the absence of a cross-border element, against any national measure causing the deprivation of those rights'.[23]

3 THE POST-ZAMBRANO CASE LAW AND THE BLURRED SCOPE OF THE DOCTRINE

3.1 Moving Away from Ruiz Zambrano

After *Ruiz Zambrano*, the Court returned several times to the topic of EU citizenship rights, but decisions like *McCarthy*,[24] *Dereci*[25] and *Iida*[26] moved in their substance significantly away from its initial doctrine. All of these rulings have raised more questions than they answered and have been extensively criticized by scholars.[27] In *McCarthy*, the Luxembourg judges held that the *Ruiz Zambrano* doctrine did not apply to TCN family members of adult Union citizens who had not exercised their free movement, even though they had dual nationality. That

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[21] C. O'Brien, *'Hand-to-mouth' Citizenship: Decision Time for the UK Supreme Court on the Substance of Zambrano Rights, EU Citizenship and Equal Treatment*, 38 J. Soc. Welfare & Family L. 228, at 232 (2016).

[22] S. Coutts, *The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Rights*, 21 Cambridge Y.B. Eur. Legal Stud. 318, at 323 (2019).

[23] K. Lenaerts, *EU Citizenship and the European Court of Justice's 'Stone-by-Stone' Approach*, Int'l Comp. Jurisprudence 1 (2015).

[24] Case C-434-09, *Shirley McCarthy v. Secretary of State for the Home Department* EU:C:2011:277.

[25] Case C-256/11, *Dereci and others v. Bundesministerium für Inneres* EU:C:2011:734. For a critical comment, *see* N. Níc Shuibhne *(Some) of the Kids are All Right*, 49 CML Rev. 349, spec. at 378–379(2012). *See also* A. Wiesbrock, *Disentangling the 'Union Citizenship Puzzle'? The McCarthy Cas*, 36 Eur. L. Rev. 861 (2011); and S. Adam & P. Van Elsuwege, *Citizenship Rights and the Federal Balance Between the European Union and Its Member States*, 37 Eur. L. Rev. 176 (2012).

[26] Case C-40/11, *Iida* EU:C:2012:691.

[27] Among others, *see* N. Nic Shuibhne *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, 52 Common Mkt. L. Rev. 889–937, spec. at 901–903 (2012).

decision was critically considered to exhibit 'the beginnings of a more wide-scale and sustained recent shift from predominantly rights-opening to predominantly rights-curbing assessments of citizenship rights'.[28] In *Dereci*, the Court argued that:

> the mere fact that it might appear desirable to a national of a Member State for their third country national family member to reside in the territory for economic reasons or in order to keep his family together in the territory of the Union … is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.[29]

A similar approach was taken in *Iida*, in which the Advocate General (AG) Trstenjak explicitly suggested that, in order to trigger the application of Article 20 TFEU, the denial of residence rights to a TCN would have to 'substantially' undermine the Union citizen's rights.[30] Along those lines, the Court limited itself to mentioning that 'any rights conferred on third country nationals by the Treaty provisions on Union citizenship are not autonomous rights of those nationals, but rights derived from the exercise of freedom of movement by a Union citizen'.[31] Another comparable 'rights-curbing' slant was adopted in *Ymeraga*[32] and *A.D. Alokpa,*[33] in which the CJEU centred its analysis on the fact that the EU citizen would not have to leave the territory of the Union should the TCN family member be obliged to do so. In particular, *A.D. Alokpa* concerned the right of residence in a host Member State (Luxembourg) of a family consisting of two minors, both EU citizens and nationals of another Member State (France), and a TCN mother (Mrs Alokpa). The main difference with *Ruiz Zambrano* is that the minors involved did not reside in the territory of their national Member State. The Court found that the Zambrano doctrine could, in fact, be applied but ultimately held that the refusal to grant Mrs Alokpa the right to reside in Luxembourg would not necessarily force her children to leave the territory of the EU given that she could claim a derived right of residence in France.[34]

These decisions not only fail to offer a clear interpretive path but demonstrate a trend towards the progressive narrowing of the *Ruiz Zambrano* doctrine, and they do not substantively engage with the concept of dependency-. This tightening trend is also evident in *O.S. v. Maahanmuuttovirasto*,[35] even though this case did

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28 *Ibid*., at 902.
29 *Dereci*, para. 68.
30 Opinion of AG Trstenjak Case C-40/11 *Iida* EU:C:2012:296.
31 *Iida* para. 67. On *Iida, see* S. Reynolds, *Exploring the 'Intrinsic Connection' Between Free Movement and the Genuine Enjoyment Test: Reflections on EU Citizenship After Iida,* 38 Eur. L. Rev. 376–392 (2013).
32 Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* EU:C:2013:291.
33 Case C-86/12, *Alokpa and Moudoulou* EU:C:2013:645.
34 For a critical overview, *see* C. Raucea, *European Citizenship and the Right to Reside: No One on the Outside has a Right to be Inside?*' 22 Eur. L. J. 470–491 (2016).
35 Case C-356/11 and C-357/11, *OS v. Maahanmuuttovirasto, and Maahanmuuttovirasto v. L.* EU: C:2012:776.

open up a slightly wider concept of dependency. This case concerned the step-parent of an EU citizen. The appellant (O) was a TCN married to the second appellant (S), a TCN living in Finland on a permanent residence permit. O was refused a residence permit by the Finnish immigration office because he did not have secure means of subsistence, and his subsequent appeal against this decision was rejected. When the case was brought before the Supreme Administrative Court, it sought a preliminary ruling from the CJEU. The Finnish court asked, in essence, whether Article 20 TFEU precludes a TCN from being refused a residence permit due to a lack of means of subsistence in a family situation in which his spouse has custody of a child who is a citizen of the Union but the TCN is not the child's parent and does not have custody of that child. The Luxembourg judges noted that:

> since Ms S and Ms L have sole custody of the Union citizens concerned who are minors, a decision by them to leave the territory of the Member State of which those children are nationals, in order to preserve the family unit, would have the effect of depriving those Union citizens of all contact with their biological fathers, should such contact have been maintained up to the present. Secondly, any decision to stay in the territory of that Member State in order to preserve the relationship, if any, of the Union citizens who are minors with their biological fathers would have the effect of harming the relationship of the other children, who are third country nationals, with their biological fathers.[36]

However, the CJEU goes on to state that:

> the mere fact that it might appear desirable, for economic reasons or in order to preserve the family unit in the territory of the Union, for members of a family consisting of third country nationals and a Union citizen who is a minor to be able to reside with that citizen in the territory of the Union in the Member State of which he is a national is not sufficient in itself to support the view that the Union citizen would be forced to leave the territory of the Union if such a right of residence were not granted.[37]

Without examining the decision in detail, it suffices to recall that the CJEU concluded that Article 20 TFEU does not preclude a Member State from refusing to grant a TCN a residence permit on the basis of family reunification when that national seeks to reside with his/her spouse, 'provided that such a refusal does not entail, for the Union citizen concerned, the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union'. Walking on a tightrope, the CJEU seemed to imply that in principle, family caregivers other than a biological parent could benefit from family reunification on the basis of *Ruiz Zambrano*.

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[36] *Ibid*., para. 51.
[37] *Ibid*., para. 52.

On the whole, the immediate post-*Zambrano* case law confirmed that the *Ruiz Zambrano* doctrine is only applicable when the Citizenship Directive[38] is not, that is, in situations that, from a merely formal point of view, do not fall within the scope of EU Law[39] and is only relevant in residual circumstances, that is, in 'very specific situations'.[40] Those circumstances require that the genuine enjoyment of rights attached to EU citizenship is undermined because the TCN would need to leave the Union as a whole.[41] The Court took the view that merely economic motives or the intention to keep the family together do not amount to circumstances in which a derived right of residence must be granted under Article 20 TFEU. However, in all of these cases, the CJEU failed to clarify the meaning to be given to the concept of 'substance of the rights' connected to Article 20 TEU, nor did it engage (arguably with the exception of *O.S. v. Maahanmuuttovirasto*) with the related definition of dependency which is at the forefront in the latest wave of case law.

3.2 Ruiz Zambrano Reloaded: Rendón Marín, Chavez Vichez and K.A

Did *Ruiz Zambrano* represent an extraordinary decision? Looking at the judicial developments in its aftermath, the answer to this question is more than likely yes. For a period of time, the *Ruiz Zambrano* doctrine proved to be, in practice, immaterial to cases decided by the CJEU. However, *C.S.*[42] and *Rendón Marín*[43] altered the course.[44] The second decision is the most interesting for the purpose of this analysis, despite being a very ambiguous case. Mr Rendón Marín was a Colombian national who lived in Spain together with his Spanish national son and his daughter of Polish nationality.[45] His application for a residence permit was rejected by Spanish authorities because he possessed a criminal record. Although the Advocate General found that the situation fell within the ambit of Directive 2004/38,[46] the CJEU mostly focused on Article 20 TFEU. Interestingly, in *Rendón Marín*, the Court discussed the possibility of

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38 Directive 2004/38/EC of the European Parliament and of the Council of 29 Apr. 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158/77.

39 *Ibid.,* para. 72.

40 *Ibid*., para. 71. *See also* Case C-87/12, *Ymeraga and Ymeraga-Tafarshiku* EU:C:2013:291, paras 34 et seq. (spec. para. 36).

41 On the territorial dimension, *see* N. Nic Shuibhne, *The 'Territory of the Union' in EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives* 38 YEL 267–319 (2019).

42 *Secretary of State for the Home Department v. CS* (Case C-304/14) EU:C:2016:674.

43 *Rendón Marín v. Administración del Estado* (Case C-165/14) EU:C:2016:675.

44 On those cases, *see* P. J. Neuvonen, *EU Citizenship and Its 'Very Specific' Essence: Rendón Marin and CS*, Common Mkt. L. Rev. 1201–1220 (2017).

45 *Ibid*., para. 14.

46 Opinion AG Szpunar, *Rendón Marín v. Administración del Estado* (C-165/14) EU:C:2016:75, para. 106.

Mr Rendón Marín moving to Poland, that is, the Member State of nationality of his daughter. The Court, however, held that:

> Mr Rendón Marín, for his part, stated at the hearing that he maintains no ties with the family of his daughter's mother, who, according to him, does not reside in Poland, and that neither he nor his children know the Polish language.[47]

In this regard, the CJEU stated that:

> it is for the referring court to check whether, in the light of all the circumstances of the main proceedings, Mr Rendón Marín, as the parent who is the sole caregiver of his children, may in fact enjoy the derived right to go with them to Poland and reside with them there, so that a refusal of the Spanish authorities to grant him a right of residence would not result in his children being obliged to leave the territory of the [EU] as a whole.[48]

The CJEU recalled the *Ruiz Zambrano* doctrine as a last resort, but went on to state that Article 20 TFEU 'does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security'.[49] Consequently, a right to reside may arise under Article 20 TFEU but be limited under conditions that are analogous to those contained in the Citizenship Directive. Interestingly, the Court referred to the Charter of Fundamental Rights of the EU (CFR or simply 'the Charter') by stating that 'in so far as Mr Rendón Marin's situation falls within the scope of EU law, assessment of his situation must take account of the right to respect for private and family life, as laid down in [Article] 7 of the Charter',[50] which must be read in conjunction with the obligation to protect the child's best interests, recognized in Article 24(2) CFR.[51]

While *Rendón Marín* confirms that the *Ruiz Zambrano* doctrine is applicable only as an *extrema ratio*,[52] it provides, as noted by Coutts, for a 'slightly looser test' with regard to the actual possibility for the family to reside in the EU.[53] This looser test seems to be a key difference from cases like *McCarthy* or *Alokpa* which have been discussed above. Furthermore, the inclusion of the Charter is an important novelty. These two elements are brought forward in *Chavez Vilchez*.[54] Ms

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47 *Rendón Marín v. Administración del Estado*, para. 79.
48 *Ibid*.
49 *Ibid*., para. 81.
50 *Ibid*.
51 *Ibid*.
52 In the same sense, Case C-836/18, *Subdelegación del Gobierno en Ciudad Real v. RH* ECLI:EU:C:2020:119.
53 S. Coutts, *The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Rights,* 21 Cambridge Y.B. Eur. Legal Stud. 318–341 (2019).
54 Case C-133/15, *Chavez-Vilchez and Others* EU:C:2017:354. *See* H. van Eijken & P. Phoa, *The Scope of Article 20 TFEU Clarified in Chavez-Vilchez: are the Fundamental Rights of Minor EU Citizens Coming of Age?*, 43(6) Eur. L. Rev. 949–970, at 951 (2018); M. Haag, *Case C-133/15 Chávez-Vílchez and Others*

Chavez-Vilchez and other TCNs were mothers of minor children who had Dutch nationality. They had been denied social assistance or other child-related benefits by Dutch authorities because they did not have a right of residence in the Netherlands. During the appeal proceeding against these refusals, the Dutch court decided to refer questions to the CJEU and asked whether the TCNs, as mothers of minor EU citizens for whom they had caring responsibilities, acquired a right of residence under Article 20 TFEU in the Member State of nationality of their child. The referring court also asked whether it is 'relevant that it is that parent on whom the child is entirely dependent, legally, financial and/or emotionally and, furthermore, that it cannot be excluded that the other parent, who is a national of the Member State, might in fact be able to care for the child'.[55]

The CJEU recalled its previous decisions and confirmed that Article 20 TFEU can be invoked in cases where the denial of residence rights for the TCN result in the EU citizen being deprived of the effective enjoyment of his/her rights, that is, in which the Union citizen will have to leave the territory of the EU altogether. Moreover, the Court reiterated that it is the:

> relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardize the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in practice, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal.[56]

In assessing the dependency, national authorities must take into account the right to respect for family life and the best interests of the child, both recognized within the Charter. The CJEU stated that the fact that the other parent (a Union citizen):

> is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is *not in itself a sufficient ground* for a conclusion that there is not, between the third country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that [TCN].[57]

The Court refers to specific parameters 'including the age of the child, the child's physical and emotional development' as well as to 'the extent of his *emotional ties*' both to the Union citizen parent and to the TCN parent and 'the risks which separation from the latter might entail for that child's equilibrium'.[58] In sum, in

– *Taking EU Children's Rights Seriously* 2017, https://europeanlawblog.eu/2017/05/30/case-c-13315-chavez-vilchez-and-others-taking-eu-childrens-rights-seriously/ (accessed 8 Dec. 2021).

55 *Chavez-Vilchez and Others* para. 39.

56 *Ibid*., para. 69.

57 *Ibid*., para. 71. Emphasis added.

58 *Ibid*., para. 72. Emphasis added.

Chavez-Vilchez, the Luxembourg judges not only reaffirmed the Zambrano doctrine but also, as in *Rendón Marin*, gave a broad interpretation of the concept of dependency.

The latest move is represented by *K.A,* in which the CJEU agreed (although somewhat reluctantly and by implication) to consider the extension of the *Ruiz Zambrano* doctrine to cases that do not involve minors by stating that Article 20 TFEU must be interpreted to mean that:

> where the Union citizen is an adult, a relationship of dependency, capable of justifying the grant to the [TCN] concerned of a derived right of residence under Article 20 TFEU, is conceivable only in exceptional cases, where, in the light of all the relevant circumstances, any form of separation of the individual concerned from the member of his family on whom he is dependent is not possible. [59]

It then reiterated what was already established in *Chavez Vilchez* with regard to the assessment of the existence of such a relationship of dependency. Furthermore, the CJEU held that '[t]he existence of a family link with that third-country national, whether natural or legal, is not sufficient, and *cohabitation with that third-country national is not necessary*, in order to establish such a relationship of dependency'.[60] In our view, this is a ground-breaking clarification which, as will be discussed in the subsequent section, paves the way for a new golden era of EU citizenship.

4 BROADENING THE CONCEPT OF DEPENDENCY AND SHEDDING A NEW LIGHT ON THE 'SUBSTANCE OF RIGHTS'

The most recent case law, as discussed above in section 3, consistently confirms that the application of Article 20 TFEU is linked to the concept of dependency. The impossibility for the TCN to continue residing within the territory of the EU determines that Union citizens themselves are not able to remain in the EU because they are dependent upon the TCN. Hyltén-Cavallius contends that '[t]he emphasis on one-sided dependency means that adult family members, such as spouses, as in *McCarthy*, are generally not perceived to depend on one another in a way that qualifies for [Article] 20 TFEU residence'.[61] Nevertheless, cases such as *Rendón Marín, Chavez-Vilchez* and *K.A.* suggest that the concept of 'dependency' has a distinct and broader emotional dimension[62] which adds to and goes beyond both a mere financial dependence of family members envisaged in Article 2 of the Citizenship Directive and a functional dependence (which we consider being

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59 *K.A.*, para. 76.
60 *Ibid*.
61 Hyltén-Cavallius, *supra* n. 3, at 399–432.
62 *See* E. Dubout, *The European Form of Family Life: The Case of EU Citizenship*, 7 Eur. Papers, 3–40, at 31 (2020).

connected to the impossibility to autonomously carry out some daily tasks or functions). Albeit subtly, in making reference to this emotional dependency (which seems to us an additional and wide-ranging dimension of dependency), the CJEU illuminates a model of dependency that is akin to a relationship of mutual support. In that connection, the fact that cohabitation with the TCN is not essential in order to establish such a relationship of dependency has opened up scenarios in which the Union citizen has a degree of autonomy but would still be reliant on the support of the TCN which is deemed essential for them to live a meaningful life and enjoy their rights. Those scenarios go beyond the parent–child relationship as they seem to embrace various layers of 'dependency' in which the number of hours per day that the TCN dedicates to caring or the level and nature of caring may vary according to the individual psychological and behavioural patterns of the EU citizens.

The approach in *K.A.* is crucial in that it seems to state that, in principle, the *Ruiz Zambrano* approach is valid only with regard to children, but the Court of Justice seems open to be persuaded otherwise. In that decision and, most recently, in *Rendón Marín*[63] and *Chavez-Vilchez,*[64] having conceptualized dependency in a broad manner, the Luxembourg judges also pave the way to a wider application of the *Ruiz Zambrano* doctrine when it comes to the 'substance of rights'. In *Chavez-Vilchez*, the concept of dependency (which encompasses financial, functional and emotional dimensions) is linked to the enjoyment of the right to family life, which is explicitly recalled. In fact, scholars have already acknowledged that 'the right to family life has the potential to push the application of [*Ruiz Zambrano*] from an exception to a rule with significant consequences for national immigration regimes'.[65] *Chavez-Vilchez* seems to shed new light on a formula that was already defined as 'both uncertain and promising, for it provides for a new dimension in the legal design of the citizenship of the Union without specifying its core implications and material content'.[66] While the Court treads very carefully, it seems to suggest that in purely internal situations, the genuine enjoyment of the substance of citizenship rights could be impaired by an interference with family life in the Member State of nationality. This, in fact, comes close to the scenario that was alluded to as unlikely and tricky by Iglesias Sanchez in 2014, that is, 'admitting that *any* violation of fundamental rights would trigger the protection of the new formula, paving the way for a complete incorporation of EU fundamental rights against Member States'. The Court has not yet gone so far. However, we contend

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63 Case C-165/14, *Rendón Marín*, EU:C:2016:675.

64 Case C-133/15, *Chavez-Vilchez and Others* EU:C:2017:354.

65 J. Snell, *Do Fundamental Rights Determine the Scope of EU Law?*, 43(4) Eur. L. Rev. 475–476 (2018).

66 S. Iglesias Sanchez, *Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?*, Eur. L. J. (2014).

that in light of the *Ruiz Zambrano* doctrine, the latest case law moves in the direction of considering the Charter applicable when Article 20 TFEU is applicable. This would entail that a breach of the genuine enjoyment of the substance of rights associated with the status of EU citizen occurs when any of the fundamental rights conferred upon the EU citizens are seriously undermined. Such a reconstruction tallies with that offered by certain academic scholarship, such as Bogdandy et al.,[67] but had also been supported earlier by Advocate General (AG) Maduro in his opinion in *Centro Europa 7*.[68] Maduro overtly stated that he does not 'discount, offhand, the idea that a serious and persistent breach of fundamental rights might occur in a Member State, making it impossible for that State to comply with many of its EU obligations and effectively limiting the possibility for individuals to benefit fully from the rights granted to them by EU law'.[69] The AG goes on to affirm that it would be difficult 'to envisage citizens of the Union exercising their rights of free movement in a Member State where there are systemic shortcomings in the protection of fundamental rights'.[70] He then suggests that:

> serious and persistent violations which highlight a problem of systemic nature in the protection of fundamental rights in the Member State at issue, would […] qualify as violations of the rules on free movement, by virtue of the direct threat they would pose to the transnational dimension of European citizenship and to the integrity of the EU legal order.[71]

While we are conscious that AG Maduro pushed the boundaries of EU citizenship far more than the CJEU in *Chavez Vilchez* or *K.A,* his opinion clearly indicates further steps that the Court might take.

On the whole, the CJEU approach in the immediate aftermath of the *Ruiz Zambrano* case law reveals a careful approach to the connection between EU citizenship and fundamental rights. In most recent decisions, a broad understanding of the concept of dependency and its explicit connection with the right to family life in the Charter opens up to a reconstruction of the notion of the substance of the rights attached to Union citizenship. Further, in *Chavez Vilchez* and *K.A,* the 'substance of the rights conferred by EU citizenship' has become susceptible to an extensive reading which encompasses all fundamental rights as part of the substantial content of citizenship of the Union.

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67 A. von Bogdandy et al., *Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States*, 49 Common Mkt. L. Rev. 489–520 (2012).
68 Opinion of AG Poiares Maduro Case C-380/05 *Centro Europa 7 Srl* EU:C:2007:505.
69 *Ibid*., para. 21.
70 *Ibid*.
71 *Ibid*., para. 22.

5 THE DISABILITY FIELD AS A TEST-BED TO UNLOCK THE RUIZ ZAMBRANO POTENTIAL

The previous section has put forward a scholarly reconstruction that should be further substantiated by subsequent judgments that move definitively away from the narrow reading in *McCarthy* or *Dereci* and from the application of the *Ruiz Zambrano* doctrine to family reunification cases involving children. A disability-related case could be an important test-bed to unlock the potential of *Ruiz Zambrano* and to prompt an expansive interpretation of the doctrine by the CJEU. Predictably, such a case might lead the CJEU to elaborate on the concept of dependency and look overtly beyond the right to family life and consider the protection of fundamental rights more holistically. As yet, the relevance of disability in the case law on EU citizenship has been extremely limited. Most decisions, such as *Trojani*[72] and *Stewart*,[73] concern free movement of EU nationals and the rules allowing for the coordination of national welfare systems that facilitates this free movement. However, by the end of 2020, one-fifth of the EU population is expected to have some form of disability,[74] and it is not implausible (and possibly likely) that a *Ruiz Zambrano*-type case will end up in front of the Court. In fact, as noted in the introduction, previous scholarship has already alluded to this type of case. Considering this scenario, the disability field offers the ideal case study to validate that the concept of 'dependency' in its three dimensions could be linked not only to the right to family life but to other rights.

5.1 A preliminary step: reconciling dependency and the social-contextual model of disability

Before discussing this case study, it seems important to explore how the concept of dependency elaborated by the CJEU could fit in a disability scenario. It is ostensible that the concept of dependency might *per se* be perceived as problematic from a disability perspective, in particular in light of the social-contextual model of disability and the human rights paradigm envisaged in the Convention on the Rights of Persons with Disabilities

[72] Case C-456/02 *Michel Trojani v. Centre public d'aide sociale de Bruxelles (CPAS)* EU:C:2004:488.
[73] Case C-503/09 *Lucy Stewart v. Secretary of State for Work and Pensions* EU:C:2011:500.
[74] Data reported by the European Commission. *See*, https://ec.europa.eu/social/main.jsp?catId=1137&langId=en (accessed 8 Dec. 2021)

(CRPD) and embraced (albeit mostly formally)[75] by the CJEU[76] and evoked in the Charter.

While legal scholarship has not been fully consistent in the use of this terminology, the social-contextual model is said to represent an elaboration of the 'pure' social model[77] and considers disability as an interactive process between people with impairments and external barriers.[78] The human rights model of disability brings the social model even further. Quinn and Degener clarified that 'the end goal from the perspective of the human rights model is to build societies that are genuinely inclusive, societies that value difference and respect the dignity and equality of all human beings regardless of difference'.[79] These distinctive features of the human rights model underpin the United Nations (UN) CRPD,[80] which now forms an integral part of EU law.[81] In fact, the CRPD views disability as stemming from the interaction between the individual's impairment and social and environmental barriers.[82] It places emphasis on the dignity of persons with disabilities and their *independence*, rather than on the functional limitations linked to their impairments.[83] Embracing the idea of disability as part of human diversity,[84] the CRPD recognizes the inherent dignity of people with disabilities, who are to be valued because of their self-worth.[85] In Article 3(a)

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75 C. O'Brien, *Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability*, in *EU Citizenship and Federalism: The Role of Rights* 509 (D. Kochenov ed., Cambridge University Press 2017).

76 D. Ferri & S. Favalli, *Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints*, 22 Eur. Pub. L. 537 (2016).

77 C. Barnes & G. Mercer, *The Social Model of Disability: Europe and the Majority World* (Disability Press 2005). This model contrasts sharply with the medical model of disability, which views disability as a health 'problem'. Since its first elaboration, criticism of the social model has been put forward (*see* e.g., T. Shakespeare & N. Watson, *The Social Model of Disability: An Outdated Ideology?*, 2 Research in Soc. Sci. & Disability 9–28 (2001)).

78 A. Broderick & D. Ferri, *International and European Disability Law and Policy: Text, Cases and Materials* (Cambridge University Press 2019).

79 G. Quinn & T. Degener, *Human Rights and Disability*, United Nations 2002. *See also* A. Lawson & A. E. Beckett, *The Social and Human Rights Models of Disability: Towards a Complementarity Thesis*, Int'l J. Hum. Rhts (2020).

80 Annex I UN Convention on the Rights of Persons with Disabilities, 13 Dec. 2006, in force 3 May 2008, UN Doc. A/RES/61/106.

81 The CRPD has been concluded by the EU by means of Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35. L. Waddington, 'The European Union' in L. Waddington and A. Lawson, *The UN Convention on the Rights of Persons with Disabilities in Practice. A Comparative Analysis of the Role of Courts* 131 (Oxford University Press 2018).

82 *See* para. (e) of the preamble to the CRPD and Art. 1(2) CRPD. The latter provision reads as follows: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

83 *See* e.g., Arts 1 and 3(a) CRPD.

84 *See* paras (i) and (m) of the preamble to the CRPD and Art. 3(d) CRPD.

85 T. Degener, *Disability in a Human Rights Context*, Laws 3 (2016).

CRPD, dignity is related to individual autonomy, which is underpinned by the affirmation of the equal legal capacity of people with disabilities, as further articulated in Article 12 CRPD. Furthermore, by proclaiming the right to live independently and be included in the community in Article 19 CRPD alongside the right to family life in Article 23 CRPD, the Convention reaffirms the social nature of people with disabilities as members of society.

Since *HK Danmark*,[86] the CJEU has referred to the CRPD almost verbatim. In *HK Danmark*, the Court stated that 'if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments *which in interaction with various barriers* may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of 'disability' within the meaning of Directive 2000/78'.[87] While reminiscences of a medicalized view of disability revolving around the role of the physical impairments rather than social barriers has remained,[88] the Court does attempt to engage with the social-contextual model of disability and refers to the CRPD as a normative benchmark for the protection and promotion of disability rights.[89]

The Charter, alongside mentioning disability as one of the grounds upon which discrimination is prohibited (Article 21 CFR), includes a specific provision on the integration of persons with disabilities in society (Article 26 CFR). The latter affirms that 'the Union recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their *independence*, social and occupational integration and participation in the life of the community'. As noted elsewhere, in spite of its '(probably deliberately) vague' scope and effects,[90] Article 26 of the Charter can be considered reflective of the social-contextual model of disability in that it focuses on participation in society and the need to ensure the independence of persons with disabilities within their communities.[91]

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86 Joined cases C- 335/11 and C- 337/11, *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab* (C-335/11) *and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation* (C-337/11) (*HK Danmark*) ECLI: EU:C:2013:222.

87 *HK Danmark*, para. 41. Emphasis added.

88 *See* e.g., Case C-395/15 *Mohamed Daouidi v. Bootes Plus SL, Fondo de Garantía Salarial, Ministerio* Fiscal ECLI: EU:C:2016:917.

89 D. Ferri & A. Broderick, *Introduction*, in *Research Handbook on EU Disability Law* (D. Ferri & A. Broderick eds, Edward Elgar 2020).

90 O'Brien, *supra* n. 75, 509, at 514.

91 D. Ferri, *The Unorthodox Relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination,* Eur. Const. L. Rev. 275–305 (2020).

On the whole, the concept of dependency seems *prima facie* at odds with the social-contextual model of disability, the CRPD and the Charter itself. It might be perceived as a further stumbling block towards the promotion of the rights of persons with disabilities and as an obstacle in their way to gaining control and retaining choice over their lives. As noted, inter alia, by Arstein-Kerslake, the CRPD aims to actually reduce the levels of dependency of individuals with disabilities.[92] Interestingly, she also suggests (mostly in relation to the exercise of legal capacity and the actual enjoyment of rights) that a relationship between a person with a disability and a person supporting them (for example, a family caregiver) 'must be characterized by *empowering* dependency, with obligations and respect on both sides of the relationship', in which 'autonomy is *created* by, and intricately tied to, dependency'.[93] This scholarly reconstruction tallies with a wealth of literature that reconceptualizes autonomy as a relational concept,[94] given that the formation of the person's attitudes and behaviour is shaped not only by social norms, social institutions and cultural practices but also by *relationships*.[95] It is also in line with the recent reconstruction proposed by Davy, who suggested that 'agency and autonomy of individual persons can only emerge relationally, through the support and enablement of others'.[96] Interestingly, for the purpose of this analysis, Arstein-Kerslake, supported by the philosophical work of Kittay,[97] also contends that the concept of 'empowering dependency' is linked to the right of people with disabilities to have control over their own lives, which includes the opportunity to make choices and take decisions regarding how, where and with whom to live. Hence, empowering dependency encompasses the right to family life and (as paradoxical as it may seem) the right to live independently and be included in the community. While acknowledging that there is an ambivalent attitude towards the role of family members of persons with disabilities in the discourse concerning independent living and in the interpretation of the CRPD, this article does not engage with this debate. Rather, it is premised on the

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92 The term has been used with reference to persons with disabilities by A. Arstein-Kerslake on the basis of Kittay's work (E. F. Kittay, *Love's Labor. Essays on Women, Equality, and Dependency* (Routledge 1999); E. F. Kittay, *The Ethics of Care, Dependence, and Disability*, (211) Ratio Juris 49–58). *See* A. Arstein-Kerslake, *An Empowering Dependency: Exploring Support for the Exercise of Legal Capacity*, 18 Scandinavian J. Disability Res. 77–92 (2016).

93 *Ibid*.

94 Literature on dependency and care is vast. Among many others, *see* M. Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: The New Press 2004).

95 *See* for instance, the volume: *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (C. Mackenzie & N. Stoljar eds, New York, Oxford: Oxford University Press). *See also* L. Davy, *Philosophical Inclusive Design: Intellectual Disability and the Limits of Individual Autonomy in Moral and Political Theory*, 30(1) Hypatia 13 (2015).

96 L. Davy, *Between an Ethic of Care and an Ethic of Autonomy*, 24(3) Angelaki. J. Theoretical Humanities, 101 (2019).

97 Kittay, *supra* n. 92.

assumption that families, according to the Preamble of the CRPD, are 'the natural and fundamental group unit of society and [are] entitled to protection by society and the State'.[98] It is also underpinned by the idea that families remain the most immediate environment within which persons with disabilities can develop their personal potential and enjoy a fulfilling life. This article is thus premised on the idea that family caregivers in many instances support people with disabilities in the full enjoyment of their rights and facilitate their independence.

Without engaging in a theoretical discussion on the social-contextual model of disability and on the large body of scholarly work on the relationship between autonomy and dependency in a disability context, the conceptualization of empowering dependency as well as the idea that care and support are functional to the protection of autonomy seems to reconcile dependency with the social-contextual model of disability.

5.2 Dependency as 'empowering dependency': Is this the key to unlock the Ruiz Zambrano potential?

The concept of 'empowering dependency' is not mentioned as such in *Chavez Vilchez* or other cases. However, as noted above, in making reference to emotional dependency, the CJEU evokes an idea of dependency akin to a relationship of mutual support. In *Rendón Marín, Chavez-Vilchez* and *K.A.*, the Luxembourg judges stated that the mere existence of a family link, whether natural or legal, between the minor Union citizen and their TCN parent cannot *per se* be a sufficient ground to justify the grant under Article 20 TFEU of a derived right of residence to that parent.[99] The Court has alluded to an 'emotional dimension' of dependency in addition to the mere financial (and functional) dependency, which could embrace a relationship of support between an EU citizen with disabilities and their TCN family caregiver. The broad concept of dependency would hence fully encompass an 'empowering dependency', in that it could recognize the right of persons with disabilities to be supported by a person with whom they have an emotional connection and to maintain a relationship with the family caregiver.

The *Ruiz Zambrano* doctrine, if focused on this emotional (and empowering) dimension of dependency, would allow an EU citizen with a disability to keep their family support, would enhance their right to retain choices and control over their life and, ultimately, to live independently and be included in the community. Should the TCN be obliged to leave, the person with a disability would in fact be deprived of their right to retain choice and control over their life, be obliged to

[98] Paragraph (x) of the preamble to the CRPD.
[99] Case C-82/16 *KA* para. 75.

seek support provided by services or, in some countries, would de facto be obliged to be institutionalized (which is in breach of the CRPD and arguably not in line with the principle explicated in Article 26 CFR). The application of the *Ruiz Zambrano* doctrine would not depend on the availability of public provision of care for the person because it links to fundamental rights of people with disabilities to live independently and retain control over their lives.

Interpreting dependency in a broad manner in the disability context would hence allow the Luxembourg judges to open up to a wider application of the *Ruiz Zambrano* doctrine when it comes to the 'substance of rights'. In fact, even if applied only with regard to TCN family caregivers, the rights of the EU citizen with a disability which are at stake go beyond the right to family life to cover human dignity, equality and non-discrimination as well as the right to be included in the community. Such a recognition would unlock the application of the *Ruiz Zambrano* doctrine to situations affecting the enjoyment of other rights conferred by citizenship in the Union. Furthermore, should the Court recognize the right of residency to family TCN, such an expansion could (likely) open the door to the further extension of residence rights to non-family caregivers.

On the whole, the interpretation of dependency in the terms argued here would not only create an indissoluble link between the fundamental rights protected by the Charter and EU citizenship, in line with Maduro's words, but would also be in line with the commitments the EU has undertaken under the CRPD. The choice to resort to EU citizenship rights in a disability scenario would activate the substance of fundamental rights embedded in the Charter. The CJEU, through what has been termed a 'stone-by-stone approach',[100] could certainly bring forward the claims in *Rendon Marin*, for example, in a disability context by making reference to Articles 1, 21 and 26 of the Charter. Such an expansive application of the *Ruiz Zambrano* doctrine could also be supported by a reference to the CRPD as an interpretive aid.

6 CONCLUDING REMARKS

The literature on citizenship is wide and multifaceted. Alongside a great deal of commentaries on the *Ruiz Zambrano* ruling[101] and on subsequent case law, scholars have widely discussed theoretical issues related to Union citizenship,[102] as well as

[100] Lenaerts, *supra* n. 23.

[101] Among many others, *see* L. Azoulai, *Euro-Bonds'. The Ruiz Zambrano Judgment or the Real Invention of EU Citizenship* Perspectives on Federalism (2011).

[102] For example, on the critique of the autonomous model, *see* the recent contribution of M. Van den Brink, *A Qualified DPfence of the Primacy of Nationality Over European Union Citizenship*, 69(1) I.C.L.Q. 177–202 (2020). There is also a wealth of scholarship on the dichotomy between economically active

the relationship between rights to reside derived from Article 20 TFEU and Article 21 TFEU, and how and when they are respectively activated.[103] The relationship between EU citizenship and fundamental rights has also been thoroughly explored in the last ten years.[104] Building on this scholarship, this article has focused on the scope of application of the *Ruiz Zambrano* doctrine, revisiting the debate on the concept of dependency and the substance of rights.

As most recently opined by van Eijken and Phoa, although the Court clarified the 'broad and vague "activation" of Article 20 TFEU as an autonomous source of rights', several questions in the post-*Ruiz Zambrano* case law have been left open. These include what does dependency mean and what does the substance of Union citizenship rights entail (and, in that connection, what is the relationship between Article 20 TFEU and fundamental rights protected by the Charter). The CJEU has treaded carefully, but the latter questions have been somewhat answered in most recent rulings.[105] Furthermore, in *Rendón Marín* and in *Chavez Vilchez*, the Court has been more explicit, paving the way for looking beyond the right to family life to fundamental rights more holistically.

Iglesias Sanchez has suggested that:

> the intersection between European citizenship and fundamental rights is extremely complex to articulate without pushing the contours of one of them beyond the carefully built-up constitutional balances, since their underlying rationales give rise to significant tensions and difficulties when assessing the possible ways forward.[106]

Most recently, Snell has suggested that extending the application of the *Ruiz Zambrano* doctrine presents constitutional challenges, and the Court seems to be 'relying on a circular argument where rights applying within the scope of the Treaty serve to determine that scope'.[107] We also recognize that 'undermining these limits is risky, even when it is done in the name of fundamental rights'.[108] However, we contend that outside the Charter's scope of application, a Union citizen cannot rely on EU fundamental rights as long as it can be presumed that their respective essence is safeguarded in the Member State concerned. Should this presumption be rebutted, the 'substance' of Union citizenship – within the meaning of *Ruiz Zambrano* – comes into play. We feel that fundamental rights are of

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and inactive citizens; among many others, *see Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (D. Thym ed., Hart Publishing 2017).

103 Among the most recent contributions, *see* Kroeze, *supra* n. 6.

104 *See* M Van den Brink, *EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?*, 39 Legal Issues Econ. Integration 273 (2012).

105 Eijken & Phoa, *supra* n. 54, at 951.

106 S. Iglesias Sanchez, *Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?*, Eur. L. J. (2014).

107 J. Snell, *Do Fundamental Rights Determine the Scope of EU Law?*, 43(4) Eur. L. Rev. 475–476 (2018).

108 *Ibid*.

critical importance for the EU legal order, perhaps more than 'the jurisdictional limits that the EU's system of divided government depends upon'.[109]

The article on the basis of an accurate account of the *Ruiz-Zambrano* doctrine, reflecting on the concept of dependency, has argued that an Article 20 TFEU case in which a TCN family carer of an EU citizen with disabilities is facing deportation on grounds that the person could, for example, receive care, in an institution or that another subject could, in principle, assume the role would be an ideal test-bed for widening the scope of application of the *Ruiz Zambrano* doctrine. It would, in fact, allow the CJEU on the basis of *Chavez Vilchez* to consider the right to family life and the right of people with disabilities to choose the support they wish in conjunction with the right to inclusion in the community and ask the national court to weigh them in order to verify the potential deprivation effect. The line of reasoning of the CJEU in the last wave of decisions offers potential avenues for a significant advancement of the *Ruiz-Zambrano* doctrine.

Unlocking the *Ruiz Zambrano* doctrine in the disability field would not only be important to protect and promote the rights of EU citizens with disabilities as such, but would arguably commence a constitutional spill-over, which might restore a more fundamental rights-oriented citizenship.[110]

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[109] *Ibid*.

[110] The clarification of the scope of the *Ruiz Zambrano* doctrine and an active use of the Charter of Fundamental Rights in this area must be at the heart of the Court of Justice's agenda and could make a fundamental contribution to unlocking the federal potential of the European integration process. This is, however, food for another paper. *See* the considerations made by AG Sharpston: AG Sharpston Case C- 34/09 Ruiz Zambrano ECLI:EU:C:2010:560, paras 172–173. *See also* A. Torres Pérez, *Rights and Powers in the European Union: Towards a Charter that Is Fully Applicable to the Member States?*, 22 Cambridge Y.B. Eur. Legal Stud. 279 (2020).