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## Background

The questions posed to the ECJ in *Dereci* arose in light of the Court's earlier decision in *Ruiz Zambrano*. In that case the Court held that Article 20 TFEU precludes a Member State from denying residence to the third country national parent of an EU citizen child, notwithstanding that that EU citizen had yet to exercise his right of free movement within the Union, 'in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen'.

(See a [summary of Ruiz Zambrano](#) by [Rainer Bauböck](#), an [analysis of the implications of the judgment](#) by [Anja Wiesbrock](#) and a [comment](#) by [Loïc Azoulai](#))

The subsequent case of *McCarthy* applied the test established in *Ruiz Zambrano*, yet did little to clarify its scope. On the facts of the case the Court decided that, unlike in *Ruiz Zambrano*, an EU citizen would not be 'deprived of the genuine enjoyment of the substance of her rights' by refusal of a residency permit to her third country national spouse.

(See a [comment](#) on *McCarthy* by [Stephen Coutts](#) and a [note](#) by [Helena Wray](#))

Against this context, the questions presented to the court in *Dereci* attempt to clarify the scope and application of the 'genuine enjoyment' test for the right of residence of third country national family members of static EU citizens set out in *Ruiz Zambrano*.

## Facts

Case C-256/11 is a joint case of five applicants, each of whom is a third country national wishing to reside in Austria with his/her Austrian family member. None of the applicants' family members have exercised their right to free movement within the Union.

The nature of the familial relationship, the current place of residence and the regularity of initial entry into Austria differs for each applicant. The factual situations of each of the applicants can be summarised as follows:

- **Mr Dereci** is a Turkish national who entered Austria illegally and married an Austrian citizen. He and his wife had three children, all of whom are Austrian citizens and minors. Mr Dereci is currently resident with his family in Austria.
- **Mr Maduiké** is a Nigerian national who entered Austria illegally and married an Austrian national. He and his wife reside together in Austria.
- **Mrs Heiml** is a Sri Lankan national who married an Austrian national. She then entered Austria as a regular migrant, and continues to reside in Austria with her husband, despite her residence permit having since expired.

- **Mr Kokollari** entered Austria legally at age of 2 with his parents, who were then Yugoslav nationals. Now 29 years old, he resides in Austria and claims to be maintained by his mother who has assumed Austrian nationality.
- **Mrs Stevic** is a Serbian national who resides in Serbia with her husband and three adult children. She seeks family reunification with her father, a naturalised Austrian citizen resident in Austria, from whom she receives monthly financial support.

All five applicants have had their applications for residence permits rejected by the Austrian Bundesministerium für Inneres, which refused to apply provisions under Directive 2004/38/EC for family members of EU citizens on the grounds that the Union citizen concerned has not exercised right of free movement. Mr Dereci, Mr Maduiké, Mrs Heiml and Mr Kokollari have in addition been subject to expulsion orders and individual removal orders.

The action before the referring court (Verwaltungsgerichtshof) pertains to the rejection of the applicants' appeals against the refusal of the grant of residency permits to them. By order of the President of the Court of 9 September 2011 the accelerated procedure was applied to the preliminary reference. Under this procedure the Advocate General does not issue a formal Opinion but rather a 'view', which is currently available in 19 languages including [French](#) and [German](#).

### Questions Referred to the ECJ

The issues to be decided by the Court can be summarised as follows:

1. Does Art 20 TFEU preclude Member States from refusing residence permits to the applicants, notwithstanding that each respective Union citizen is not dependent upon his/her family member for their subsistence?
2. If the answer to question one is yes, does this right of residence flow directly from Union Law, or is it sufficient for Member State to grant residence under national provisions?
3. If a right of residence flows from Union law, under what exceptional conditions does a right of residence for such family members not exist under EU law, or under what conditions can a third country national family member be deprived of right of residence? If a right of residence can be satisfied under national provisions, under what conditions may a third country national family member be denied right of residence, notwithstanding the obligation in principle on Member States to enable that person to acquire residence?

The referring court also posed an ancillary question in relation to Mr Dereci's circumstances, concerning the appropriate conditions of initial entry to be applied to Turkish citizens in light of the 'standstill clause' in the Association Agreement with Turkey:

4. Does Article 41 of the Additional Protocol preclude the application of legislation governing conditions on initial entry of Turkish citizens that is more restrictive than previous legislation, but that is not more stringent than that legislation in force at the date of entry into force of the Additional Protocol?

## Judgment

The Court first determined that Directives 2003/86/EC and 2004/38/EC do not apply to the applicants in the current case. Article 3(3) of Directive 2003/86/EC stipulates that it does not apply to family members, whilst Article 3(1) of Directive 2004/38/EC states that Union citizens who have not exercised their right of free movement do not fall within the scope of the Directive. [see paras. 44 – 57]

In turning to consider the relevance of the Treaty provisions concerning citizenship of the Union, the Court noted that *'the situation of a Union citizen...who has not made use of right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation'* [para. 61]

The Court noted the previous decision in *Ruiz Zambrano*, that *'Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status'* [para. 64]

In applying the test of 'genuine enjoyment of the substance' of citizenship rights, the Court states that:

*'it follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.*

*That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.*

*Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have nationality of a Member State to be able to reside with him 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.'* [paras. 66 – 68]

Turning to consider the right to respect for private and family life, the Court notes that the meaning and scope of Art 7 of the Charter are the same as those laid down in Art 8(1) of ECHR, yet the Charter addresses Member States only when they are implementing European law. The Court leaves the issue of whether the current situation falls within the scope of EU law to be determined by the referring court, in line with their evaluation of whether or not the family members of the applicants

were deprived of the genuine enjoyment of the substance of the rights by the decision of the Bundesministerium. [paras. 70-72]

In relation to the issue of the limits of the Association Agreement with Turkey, the Court held that the standstill obligation extends to any new obstacle that makes more stringent the conditions at any given time, so that Member State cannot depart from objective of standstill clauses by reversing measures that they have adopted in favour of the free movement of Turkish workers subsequent to the entry into force of the Additional Protocol. [Para 94] Furthermore, the fact that Mr Dereci entered Austria irregularly does not prevent him from benefiting from standstill clause, as at the time at which he made his application he had a right of establishment by reason of his marriage to an Austrian national. [Para 99]

### Answers to questions referred

Issues 1 – 3 were answered as follows:

***‘European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to free movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.’***

Issue 4, regarding the association agreement with Turkey, was answered as follows:

*‘Article 41(1) of the Additional Protocol...must be interpreted as meaning that the enactment of new legislation more restrictive than the previous legislation which, for its part, relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of entry into force of that protocol in the Member State concerned must be considered a ‘new restriction’ within the meaning of that provision.’*

### Comments

The immediate significance of *Dereci* lies in its re-assertion of the ‘genuine enjoyment’ test established in *Ruiz Zambrano*, and specifically the limitations that the Court places upon the scope of that test.

The Court emphasises in para. 66 that for the test to be satisfied, the Union citizen must be in a situation where he *‘has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole’*. This statement seems to suggest that a European Union citizen who has the option to reside with his family member within a second

Member State will not satisfy the condition of deprivation of genuine enjoyment. This would, however, render the *Ruiz Zambrano* test meaningless in its application to non-minor EU citizens that can independently exercise a right of movement within the Union: Member States are prohibited from applying immigration control to third country national family members of migrant EU citizens following the decision of the Court in *Metock*, and thus all Union citizens capable of exercising their right to free movement have the option to reside with their family members in a second Member State.

The decision of the Court highlights the exceptional nature of those situations in which EU citizens will be deprived of the genuine enjoyment of the substance of their rights through a refusal of a residency permit to their third country national family member (para. 67). The Court thus offers a limited clarification to the scope of application of the *Ruiz Zambrano* test, stating that the desirability of residing together with a family member is insufficient to prove that the EU citizen will be forced to leave Union territory in the event that that right is not granted (para. 68). Whilst this statement significantly narrows the potential scope of the decision in *Ruiz Zambrano*, the negative clarification offered by the Court retains a broad scope of discretion for national courts to apply what remains a highly indeterminate test.

The Court's treatment of fundamental rights in *Dereci* will afford little comfort to those struggling to satisfy the 'genuine enjoyment' test. In leaving the national court to determine whether the applicants' situations fall within the scope of EU law, the Court highlights that Article 7 CFR is triggered only in those 'exceptional' circumstances in which the *Ruiz Zambrano* test is satisfied and thus is not a 'purely internal situation' outwith the scope of EU law. In those situations in which reliance upon a fundamental rights argument would be most needed Article 7 will thus not bind Member States, and when Article 7 is applicable it will be redundant in light of an infringement of citizenship rights already having been established. Whilst this may be unfortunate for those applicants wishing to invoke fundamental rights in favour of their claim to residency, this position of the Court is in keeping with established case law of the Court on the scope of fundamental rights as recognised by Advocate General Sharpston in her Opinion on *Ruiz Zambrano*.

Commentaries on the cases of *Ruiz Zambrano* and *McCarthy* have drawn significance from the diverging reference by the Court to Arts. 20 and 21 TFEU respectively. The Court in *Dereci* refers to the 'citizenship provisions' collectively, bypassing the significance of alignment with prior caselaw or with reformulated treaty provisions under Lisbon. This establishes clearly the decision of the Court as founded within a 'teleological and contextual' interpretation of the scope of EU citizenship (see para.54 of judgment) and further indicates the willingness of the Court to liberally interpret the text of Treaties in the pursuit of EU citizenship as the '*fundamental status*' of Member State nationals.

The Court in *Dereci* also does not appear to distinguish between categories of familial relationship in applying the test of 'genuine enjoyment'. Whereas the decision in *McCarthy* may have suggested that the spousal relationship by its nature will fail where the dependency relationship of a parent and child (*Ruiz Zambrano*) will succeed, such distinction gains little substantiation in the joint cases of *Dereci* and others.

The judgment in *Dereci* does not resolve an ambiguity surrounding the application of a 'sufficient resources' requirement to the third country national family member seeking family reunification

(see Lansbergen and Miller, [EUConst June 2011\(7\) : pp 287-307](#)), though it is to be hoped that the Court will offer further clarification on this point when deciding on the pending case [C-356/11](#).