Ties that bind and ties that compel

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TIES THAT BIND AND TIES THAT COMPEL: DEPENDENCY AND THE *RUIZ ZAMBRANO* DOCTRINE

FULVIA RISTUCCIA*

Abstract

In EU citizenship law, dependency is a pivotal concept when it comes to the rights of non-EU family members of Union citizens. Under certain circumstances, those family members may earn a derived right to reside, either because they are dependent on a Union citizen or the latter depends on them. The concept of dependency is particularly crucial in the Ruiz Zambrano doctrine, according to which Article 20 TFEU grants a derivative right to reside in the EU citizen's home State to the non-EU family member if their departure would compel the dependent Union citizen to leave the territory of the EU as a whole, thus impinging on the substance of citizenship rights. Due to the significance of dependency in Ruiz Zambrano cases, where it triggers the application of EU law, that concept is continuously evolving. This article, therefore, aims to review the development of the notion of dependency, its intertwined dimensions – legal, financial, and emotional – highlighting the differences in the degree of dependency expected in free movement (when required) and in Ruiz Zambrano cases, and the increasingly divergent role of fundamental rights in the appraisal of dependency for children and adults.

1. Introduction

One of the remarkable features of EU citizenship is that while it is "destined to be the fundamental status of nationals of the Member States",[1] it is actually for those who *are not* EU citizens that it produces some of its most noteworthy effects. Family members of Union citizens may obtain derivative residence rights even if they are a third-country national (TCN), and for those family

* Assistant Professor in EU law, University of Maastricht. I am particularly grateful to Eleanor Spaventa for her comprehensive feedback on earlier drafts of this article, and to the anonymous reviewers for their helpful comments and suggestions. My gratitude goes also to the MCEL members at Maastricht University, who took the time to discuss my draft. All errors are mine only.

1. Case C-184/99, *Grzelczyk*, EU:C:2001:458, para 31.

members, the concept of dependency bears special significance, as it may act as a trigger for their rights. When there is a cross-border element, dependency is necessary, in some cases, to establish derivative residence rights for family members of Union citizens. Absent that cross-border element, dependency becomes the crucial linking factor to EU law for family members of citizens who have not moved from their home State. In its ground-breaking *Ruiz Zambrano* judgment, the Court of Justice of the European Union established that in very specific situations, despite the absence of a cross-border element, Article 20 TFEU secures a derivative residence right in a Union citizen's home State for non-EU family members on whom that Union citizen depends, if their departure compelled the EU citizen to leave the territory of the Union altogether, thus impinging on the substance of citizenship rights (*Ruiz Zambrano* cases).[2]

Despite its relevance across various areas of EU citizenship law, dependency is not a uniform concept and is far from being entirely settled in *Ruiz Zambrano* cases. This article, thus, aims to review the notion of dependency, its evolution, and its implications under the *Ruiz Zambrano* doctrine. In section 2, it will first analyse the multifaceted nature of dependency under Article 20 TFEU, comparing it with free movement law. Section 3 will examine the divergent evolution of the case law on dependent minors and adults, when it comes to the assessment of dependency in light of fundamental rights. That assessment has become more generous for children, while leaving fundamental rights of adults in the shadow. Section 4 seeks to discuss and explain the axes along which the notion of dependency varies: the difference between children and adults and the lower degree of dependency required in free movement than in *Ruiz Zambrano* cases. Overall, it is concluded that while there may be objective reasons to explain the variance, the latter creates distortions in the protection of rights for citizens and their family members.

2. The nature and dimensions of dependency

In *Ruiz Zambrano*, given the EU minors' dependency on their TCN parents, denying residence to the latter would have forced the children to follow them

2. Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124, paras. 42–44. This article will predominantly refer to leaving the Union territory, because this has been the origin and the domain of application of the *Ruiz Zambrano* doctrine so far. However, in a recent case, the Court has held that *Ruiz Zambrano* also applies when the EU citizen has never lived in the Union; Case C-45 9/20, *Staatssecretaris van Justitie en Veiligheid (Mère thaïlandaise d'un enfant mineur néerlandais*), EU:C:2023:499, para 38.

outside the EU.[3] Such a forced departure would have had the effect of depriving those children of the "genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union".[4] Subsequently, in *Dereci*, the Court highlighted that residence under Article 20 TFEU is "specific" and "exceptional" and relates to situations where the citizen has "to leave not only the territory of the Member State of which [they are] a national but also the territory of the Union as a whole".[5] Furthermore, *Ruiz Zambrano* residence is residual, as it can only be invoked when there is no other avenue for protection under EU law.[6]

In *Ruiz Zambrano* cases, "it is in the light of the intensity of the relationship of dependency . . . that the recognition of a right of residence under Article 20 TFEU must be assessed".[7] That relationship forces the citizen out of the Union along with their non-EU family member in circumstances which would otherwise be purely internal, because they occur in the citizen's home State. Dependency has the power to attract within the scope of EU law situations that have no cross-border element, thus impinging on delicate national immigration matters. It is not surprising, therefore, that much of the case law following *Ruiz Zambrano* focussed precisely on that concept.[8]

It should first be noted that unlike free movement rights, *Ruiz Zambrano* residence is exceptional and cannot benefit from an expansive interpretation. Because of its momentous implications for the scope of EU law, the tie able to trigger Article 20 TFEU must be particularly compelling. Reasons of economic convenience or the mere desirability to keep the family together are not enough to bring about the bond that would force the EU citizen to leave the Union with their relative, were the latter to be denied residence.[9] That degree of compulsion occurs generally in the relationship between minors and their caregivers. In contrast, the Court underlined in *K.A.* that "an adult is, as a general rule, capable of living an independent existence apart from the

3. Case C-34/09, *Ruiz Zambrano*, para 43.
4. Ibid., para 42.
5. Case C-256/11, *Dereci*, EU:C:2011:734, para 66.
6. Case C-115/15, *N.A.,* EU:C:2016:487, para 72. *Ruiz Zambrano* ordinarily applies in the home State of the Union citizen; however, the Court has acknowledged in *Rendón Marín* that *Ruiz Zambrano* can be invoked in the host State if returning to the home State is not a viable option; Case C-165/14, *Rendón Marín*, EU:C:2016:675, para 79. See Hyltén-Cavallius, "Who cares? Caregivers' derived residence rights from children in EU free movement law", 57 CML Rev. (2020), 399–432, at 419–420.
7. Case C-624/20, *E.K.* v. *Staatssecretaris van Justitie en Veiligheid* (Nature du droit de séjour au titre de l'article 20 TFUE), EU:C:2022:639.
8. Neier, "Residence right under Article 20 TFEU not dependent on sufficient resources: *Subdelegación Del Gobierno En Ciudad Real*", 58 CML Rev. (2021), 549–570, at 562–563.
9. Case C-256/11, *Dereci*, para 68.

members of [their] family".[10] The bonds between adults do not make them inseparable in a way that expelling the TCN would compel the Union citizen to follow unless exceptional circumstances prevent their separation.

The present section looks into the dimensions of dependency that the Court accepted as supporting residence based on Article 20 TFEU. For *Ruiz Zambrano* residence to accrue to a non-EU family member, an objective and factual state of dependency must occur at the moment when national authorities take their decision,[11] meaning that the way the relationship has developed in the past is not relevant as long as dependency is present and liable to affect the substance of citizenship rights.[12] The factual nature of dependency implies that it is – in principle – a matter for the referring court or national authorities to assess,[13] and its objective nature means that dependence matters regardless of why it occurs. This is rather straightforward for minor children, yet, even for adults, the motives behind their dependency should be irrelevant; otherwise, EU citizens would be compelled to leave the Union if the reasons for their dependency are not persuasive enough. The case law confirms this. For instance, in *K.A.*, the Court established that the time when dependency came about is irrelevant, even if it arose after the imposition of an entry ban on the family member – suspiciously, according to the national authorities. When dependency genuinely and objectively occurs, the possibility of some artificiality in the family circumstances cannot prevail over the risk that the dependent EU citizen would be forced to leave the Union.[14]

In *O. and S.*, the Court held that Article 20 TFEU grants derivative residence when the EU citizen is "*legally, financially or emotionally dependent"* on the non-EU family member.[15] Although the Court has never systematically explained what legal, financial, or emotional dependency means or how those criteria interact,[16] it has clarified that the Union citizen and the non-EU citizen

10. Case C-82/16, *K.A.*, EU:C:2018:308, para 65.

11. The same in free movement, when dependency is required: Case C-1/05, *Jia*, EU:C:2007:1, para 35.

12. Case C-459/20, *Staatssecretaris van Justitie en Veiligheid*, paras. 52–53.

13. Case C-256/11, *Dereci*, para 74. Yet, in many instances, the Court entered the domain of facts. Nic Shuibhne, "(Some of) The kids are all right: Case C-434/09, *Shirley McCarthy* v. *Secretary of State for the Home Department*; Case C-256/11, *Dereci and Others*", 49 CML Rev. (2012), 349–380, at 363.

14. Case C-82/16, *K.A.*, paras. 78–81; Opinion of A.G. Sharpston in Case C-82/16, *K.A.*, EU:C:2017:821, para 65.

15. Joined Cases C-356 & 357/11, *O. and S.,* EU:C:2012:776, para 56 (emphasis added).

16. Neier, op. cit. *supra* note 8, 564–565.

do not need to be blood relatives,[17] and that symmetrically, the existence of a family relationship, natural or legal, cannot alone establish dependency.[18] The same goes for cohabitation which is not decisive,[19] just one of the elements in the appraisal of dependency.[20] Nevertheless, if the family lives separately, this could have an impact on the evaluation of the degree of dependency.[21]

The case law has given fragmented indications on what constitutes legal, financial, or emotional dependency. In systematizing that case law, the following sections will rely on comparisons with free movement law which knows several instances where the residence right of family members is conditional upon a relationship of dependency with the Union citizen. Those instances fall broadly within five categories: family members of citizens residing in a Member State other than that of nationality under Directive 2004/38;[22] primary carers of mobile citizens whose derived residence is based on Article 21 TFEU;[23] caregivers of children of EU workers when the former remain in education in the host State;[24] family members of "circular migrants";[25] "enablers" of movement who reside based on Treaty provisions.[26] Both in free movement and in *Ruiz Zambrano* cases, the nature of those rights is derivative since the focus of EU law remains – unsurprisingly – the Union citizen.[27]

In free movement law, the case law has developed on the concept of dependency more comprehensively than in *Ruiz Zambrano* cases, where,

17. Joined Cases C-356 & 357/11, *O. and S.,* para 55. Guild, Peers and Tomkin, *The EU Citizenship Directive: A Commentary*, 2nd ed. (OUP, 2019), p. 68. Ferri and Martinico, "Revisiting the *Ruiz Zambrano* doctrine and exploring the potential for its extensive application", 27 EPL (2021), 685–706, at 686. To simplify, however, the present contribution will refer to family members.

18. Case C-82/16, *K.A.*, para 75.

19. Joined Cases C-356 & 357/11, *O. and S.*, para 54.

20. Case C-82/16, *K.A*., para 73. The practice in some Member States is inconsistent in this regard: see Migration Law Clinic – VU University Amsterdam, "Reviewing the application of *Chavez-Vilchez* in the Netherlands" (2020), pp. 12–13.

21. Ibid., 12.

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

23. Case C-200/02, *Zhu and Chen*, EU:C:2004:639.

24. Case C-413/99, *Baumbast and R*, EU:C:2002:493.

25. Case C-370/90, *Singh*, EU:C:1992:296; and Case C-456/12, *O. and B.*, EU:C:2014:1 35. Spaventa, "Family rights for circular migrants and frontier workers: *O and B*, and *S and G*", 52 CML Rev. (2015), 753–777.

26. Case C-60/00, *Carpenter*, EU:C:2002:434.

27. Case C-218/14, *Kuldip Singh*, EU:C:2015:476, para 50; Case C-200/02, *Zhu and Chen*, paras. 45–46; Case C-624/20, *E.K.*, para 51. This inevitably has consequences for the rights of TCNs: Solanke, "Another type of "other" in EU law? AB (2) *MVC* v. *Home Office* and *Rahman* v. *Secretary of State for the Home Office*", 76 MLR (2013), 383–400, at 388.

conversely, the Court has rather reasoned by exclusion or inclusion of specific family relationships. Thus, the present article will draw comparisons with known concepts in free movement law seeking to sketch the contours of dependency under the substance of rights doctrine. Still, it should be noted that what happens in free movement cannot straightforwardly apply to *Ruiz Zambrano* cases, since the notion of dependency when there is a cross-border element is broader, as the analysis will show.

2.1. *Legal dependency*

Starting from legal dependency, what matters is not the formal label, but that dependency makes it impossible for the EU citizen to act and lead an independent life without the family member. This may happen in the case of sole custody of minor children and in cases of compulsory legal representation for persons with no or diminished legal capacity.[28] Yet, there is no requirement that a legally sanctioned relationship exists[29] and, in turn, legal obligations within the family with no underlying dependency are not enough. In *Subdelegación del Gobierno en Ciudad Real*, the Court ruled that the obligation for a married couple to live together could not per se establish dependency since international law prevents Member States from enforcing legal obligations arising from marriage by compelling own nationals to leave to follow their TCN spouse.[30]

Likewise, parental responsibility towards an EU-citizen child is, alone, not sufficient. In *Iida*, the Japanese father of an EU citizen shared his parental responsibility with the (EU citizen) mother and sought to obtain residence in the Member State of origin of his wife and daughter, who lived in another Member State. The Court excluded that denying *Ruiz Zambrano* residence to the father would compel the child to leave the Union, despite shared parental responsibility.[31] The fact that the child and her mother had already exercised free movement and lived separately from the TCN father played an important role, and the possibility for the father to apply for long-term residence under Directive 2003/109[32] created another route to trigger the application of EU law than the substance of rights.[33] Still, in *Iida*, the Court did not mention

28. Neier, op. cit. *supra* note 8, 564–565.

29. Ibid. See, in free movement, Case C-1/05, *Jia*, paras. 35–36.

30. Case C-836/18, *Subdelegación del Gobierno en Ciudad Real*, EU:C:2020:119, paras. 60–62. Moreover, under the domestic legislation that obligation was not judicially enforceable.

31. Case C-40/11, *Iida*, EU:C:2012:691, paras. 72 and 76.

32. Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, O.J. 2004, L 16/44.

33. As Case C-40/11, *Iida*, paras. 74 and 75 clarify. On the restrictive assessment of impediments to move in *Iida*, see Reynolds, "Exploring the 'intrinsic connection' between free

shared parental responsibility as a relevant element in the assessment of the situation. This is not to say that the question of custody is irrelevant: in subsequent case law, the Court held that it is a significant aspect,[34] but not decisive to establish dependency on the non-EU parent.[35] As the Court recently held in *Staatssecretaris van Justitie en Veiligheid*, "effective dependency cannot descend directly . . . from the legal relationship that binds the parent, who is a citizen of a third country, to their minor child".[36] Legal custody alone is not a sufficient factor: rather, it is decisive to examine which are the crucial relationships that the child cannot part from.

Such a substantive understanding of dependency is similar to the Court's approach towards caregivers in free movement law. In *Baumbast*, the Court of Justice (ECJ) recognized that Article 10 of Regulation 492/2011[37] ascribes the right to reside in the host State to the primary carer of children of (former) mobile workers when the children are in education (hereinafter Article 10 residence).[38] Similarly, pursuant to *Zhu and Chen*, the primary carer of an underage EU citizen has a right of residence in the host State based on Article 21 TFEU: to deny residence to the caregiver "would deprive the child's right of residence of any useful effect"[39] since an infant can only enjoy their movement rights if they are accompanied by the person on whom they depend.[40] Both Article 10 and *Zhu and Chen* residence hinge on a functional reasoning: the caregiver has the right to reside because otherwise the dependent child would not be able to exercise their rights.[41] In all those cases, including *Ruiz Zambrano*, what counts is the "actual" custody, i.e. who is the effective primary caregiver,[42] and not the formal label of the relationship.

In contrast to that approach, in several instances, Directive 2004/38 differentiates family members based on the legal relationship with the mobile

movement and the genuine enjoyment test: Reflections on EU Citizenship after *Iida*", 38 EL Rev. (2013), 376–392, at 387–389.

34. Case C-356/11, *O. and S.*, para 51; Case C-133/15, *Chavez-Vilchez*, EU:C:2017:354, para 68. Neier, op. cit. *supra* note 8, 564–565.

35. Case C-133/15, *Chavez-Vilchez*, para 71.

36. Case C-459/20, *Staatssecretaris van Justitie en Veiligheid*, para 60, own translation.

37. Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, O.J. 2011, L 141/1.

38. Case C-413/99, *Baumbast and R*, paras. 71–75. Directive 2004/38 has codified the latter right in Art. 12(3) also for children in education of non-economically active citizens. Notably, Art. 12 Directive 2004/38 refers to the "parent" who has the actual custody and not to caregivers more generally.

39. Case C-200/02, *Zhu and Chen*, para 45.

40. The caregiver's residence is based on Art. 21 TFEU and – unlike the child's residence – does not fall within the scope of Directive 2004/38, since it is the mobile EU citizen who is dependent on their non-EU family member.

41. Hyltén-Cavallius, op. cit. *supra* note 6, 412.

42. Ibid., 405.

Union citizen. As is known, Article 2(2) of the Directive protects the automatic residence right, *with no requirement of dependency*,[43] of specific family members,[44] such as spouses or underage descendants, who enjoy a legally privileged status that warrants the assumption that any limitation to those family members' right to join the Union citizen would fundamentally impinge on the latter's family life.[45] The Directive sees those family members' rights as necessary to exercise free movement in dignity,[46] and not to be compelled to choose between movement and family. Conversely, "other family members",[47] identified under Article 3(2) Directive 2004/38,[48] do not enjoy a right to reside; rather, Member States should facilitate their entry and residence.[49] Yet those other family members, despite not being considered absolutely necessary to exercise fundamental rights compliant free movement, share close and stable emotional ties and thus enjoy stronger protection than other non-EU citizens.[50]

43. Direct descendants above 21 and direct ascendants of the citizen or of the spouse/registered partner need to show that they are dependent on the EU citizen. A.G. Sharpston argued that spouses are presumably interdependent: Opinion in Case C-457/12, *S. and G.*, EU:C:2013:842, para 155.

44. Family members pursuant to Art. 2(2) Directive 2004/38: the spouse, including same-sex spouse (Case C-673/16, *Coman and Others*, EU:C:2018:385, paras. 39–40); the registered partner (only if the host State recognizes registered partnership as marriage); direct descendants under the age of 21 of the citizen or the spouse/registered partner – including adopted children, since it is only necessary that there is a parent-child relationship (Case C-129/18, *S.M. (Child placed under Algerian kafala*), EU:C:2019:248, paras. 52 and 54); dependent ascendants and descendants above 21. If the host Member State does not recognize registered partnership as marriage, the partner falls within Art. 3 Directive 2004/38, as partner in a durable relationship. Belavusau and Kochenov, "Same-sex spouses: More free movement, but what about marriage? *Coman*", 57 CML Rev. (2020), 227–242, at 229.

45. Case C-127/08, *Metock*, EU:C:2008:449, para 56.

46. Recitals 4–8 Directive 2004/38. A.G. Sharpston underlined that "workers are human beings, not automata. They should not have to leave behind their spouse or other family members, in particular those who are dependent on them, in order to become migrant workers." (Opinion in Case C-457/12, *S. and G*, para 46). Also Davies, "The right to stay at home: A basis for expanding European family rights" in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017), pp. 481–482.

47. Solanke, op. cit. *supra* note 27, 385–386.

48. Dependent relatives not listed in Art. 2(2) or members of the latter's household; family members that need the Union citizen's care for serious health reasons, and the "partner with whom the Union citizen has a durable relationship, duly attested".

49. Although Member States have discretion on the criteria to assess the relationship, the other family members should enjoy more advantageous admission conditions than other TCNs, including "an extensive examination" of their personal situation, covering "economic or physical dependence". The decision on refusal should state reasons and be open to judicial review. Case C-83/11, *Rahman and Others*, EU:C:2012:519, paras. 21–25.

50. Case C-22/21, *Minister for Justice and Equality*, EU:C:2022:683, paras. 23 and 28. Opinion of A.G. Pitruzzella in Case C-22/21, *Minister for Justice and Equality*, EU:C:2022:1 83, para 40.

The difference between family members within the "inner circle"[51] and the others lies in legal system's viewpoint on the legal relationships between the family members. For the inner circle, the legislature has assumed that the legal qualification of the relationship corresponds to a bond such that the Union citizen would not move without them,[52] and that any interference with that bond affects a core of family life that cannot be compressed, be it because of the legal relationship solely or the combination of legal qualifications and dependency, as is the case for ascendants and adult descendants. The legal system does not attach the same assumption to the ties with other family members under Article 3(2) Directive 2004/38, who, even in case of dependency, only have a right to facilitated entry and residence.

In Directive 2004/38, the formal qualification of the family relationship, thus, acts as a legal proxy for the existence of close interpersonal connections, as a consequence of the decision to grant privileged status to certain family ties.[53] Then, the category of other family members functions as a residual solution when the legal system fails to attach special value to given relationships,[54] and here dependency may be relevant to establish the degree of closeness.[55] For instance, in *S.M.,* the Court held that the Islamic guardianship of a minor (*kafala*) does not establish a parent-child relationship, thus the minor does not become, thanks to the *kafala*, the descendant of the guardian under Article 2(2) Directive 2004/38, because, in the eyes of the ECJ, that relationship is not equivalent to adoption.[56] Nevertheless, the minor falls within Article 3(2) Directive 2004/38 and, hence, Member States should examine the relationship between the Union citizen and the non-EU minor in light of the protection of family life and the child's best interest.[57] The ruling underlined that under the case law of the European Court of Human Rights

51. Ibid., Opinion, para 36.

52. Case C-22/21, *Minister for Justice and Equality*, para 28.

53. Those legal distinctions are the result of political compromise on the delicate matter of family relationships, as is clear from the example of registered partners whose right to reside depends on the recognition as marriage by the host State, to the detriment of the protection of family rights of those couples. Solanke speaks of a traditionalist view of family with a "focus on formality" and compares it to the more substantive perspective of the ECtHR. Both courts stress the "'commitment' expressed through marriage or civil partnership between adults, and biological ties between parent and child". Solanke, op. cit. *supra* note 27, 385–386.

54. This is particularly relevant for same-sex couples, who, at the time of adoption of the Directive, could get married only in two Member States, so for them registered partnership was the only option (if any) in other Member States. This severely limited their rights to move. More widespread recognition of same-sex marriage and the *Coman* judgment improved the protection of free movement for same-sex couples. Rijpma, "You gotta let love move", 15 EuConst (2019), 324–339, at 332–333; Belavusau and Kochenov, op. cit. *supra* note 44, 229.

55. For partners under Art. 3(2)(b) Directive 2004/38 dependency is not required.

56. Case C-129/18, *S.M.*, paras. 54–56.

57. Ibid., paras. 64–68.

(ECtHR), which is of guidance in the interpretation of the provisions of the Charter of Fundamental Rights of the EU (CFR), Article 8 European Convention on Human Rights (ECHR) on the protection of family life may cover the *kafala*, "having regard to the time spent living together, the quality of the relationship, and the role which the adult assumes in respect of the child".[58] If that appraisal shows that the minor is dependent on their EU guardians with whom they are genuinely a family, their fundamental rights should be protected, *in principle*, through residence, to enable the child to live with their family.[59] It is unclear whether, in the opposite situation, where the child is a static EU citizen placed under *kafala* with a non-EU guardian, *Ruiz Zambrano* would apply. Arguably, as long as there is dependency, the fact that the legal label does not establish a parent-child relationship should not stand in the way.

This overview has shown that whereas under Directive 2004/38, the legal relationship has a significant bearing on the derivative rights of family members, when it comes to *Ruiz Zambrano* cases, the legal configuration is part of the assessment of dependency, but neither necessary nor sufficient. This is because, as section 4 will discuss in greater detail, in free movement law under Directive 2004/38, the safeguard of the fundamental right to family life assumes a predominant position; therefore, family ties receive greater protection. On the other hand, when the rights of the non-EU citizen are functional to the substance of citizenship rights, the crux of the problem is ensuring that actual dependency does not prompt the loss of those rights rather than safeguarding family bonds.

2.2. *Financial dependency*

In free movement law, dependency is typically understood as a relationship of financial, material support between the family members.[60] Financial dependency occurs when "having regard to [the dependent person's] financial and social conditions, they are not in a position to support themselves" and

58. Ibid., para 66.

59. Ibid., para 71.

60. Case C-1/05, *Jia*, para 35. At the time of writing, a case is pending on the notion of financial dependency under Directive 2004/38 and the impact of receiving social assistance on the dependent family member's residence right. A.G. Capeta pleaded for a notion of dependency that does not terminate when the EU citizen ceases to financially support the family member thanks to welfare benefits. Opinion in Case C-488/21, *Chief Appeals Officer and Others*, EU:C:2023:115, paras. 52–65.

cannot meet their "essential needs",[61] and not that they seek to attain a "desired standard of living",[62] which cannot warrant a finding of dependence. On the interplay between legal and financial dependency, the Court has ruled that a right to maintenance is not necessary for dependency; otherwise, the application of EU rights would depend on national legislation.[63]

In *Ruiz Zambrano* cases, the Court has not yet defined financial dependency and even less referred to free movement rulings on that notion. The first notable difference between residence in the host State under Directive 2004/38 and residence pursuant to Article 20 TFEU is that the latter is economically unconditional, both for the own national – obviously – and the non-EU family member. Economic residence requirements – such as those provided for in Article 7 Directive 2004/38 for economically inactive citizens – are disproportionate to the objective of preserving the Member State's finances when the substance of EU citizenship rights is at stake.[64] Those residence requirements also distinguish *Ruiz Zambrano* from *Zhu and Chen* residence, which is conditional on the minor Union citizen having sufficient resources under Directive 2004/38, and generally it is the caregiver who provides those resources.[65]

Unlike Directive 2004/38, which has the protection of the host State's public finances among its objectives,[66] in *Ruiz Zambrano* cases, that issue is not relevant since there is no question of transnational solidarity. What is more, because denial of welfare could force the family to leave the Union if they cannot make ends meet, *Ruiz Zambrano* residents likely have a right to social assistance,[67] and for the same reason, Member States cannot deny them a work permit.[68] On the right to welfare benefits, however, in *C.G.*, a case on free movement of economically inactive citizens, the Court distinguished

61. Case C-1/05, *Jia*, respectively paras. 37 and 43. Regular payments "for a substantial period" from the EU citizen to the non-EU family member are liable to prove dependency; Case C-423/12, *Reyes*, EU:C:2014:16, para 24.

62. Case C-1/05, *Jia*, para 22.

63. Case 316/85, *Lebon*, EU:C:1987:302, para 21. *Lebon* concerned family members of mobile workers, and predated Directive 2004/38, but the Court has applied the same concept of financial dependency in cases on the Directive (see Case C-423/12, *Reyes*, para 23).

64. Case C-836/18, *Subdelegación del Gobierno en Ciudad Real*, paras. 48 and 53.

65. Case C-200/02, *Zhu and Chen*, paras. 30 and 41. The Union citizen does not need to personally possess the resources since there is "no requirement whatsoever" as to their origin, even when they derive from the irregular work of one of the parents; Case C-93/18, *Bajratari*, EU:C:2019:809, paras. 30–31.

66. Recital (10) Directive 2004/38. See Case C-719/19, *F.S.*, EU:C:2021:506, para 72.

67. It should also be queried what happens if the EU citizen receives social assistance and becomes financially independent. In the field of free movement, see Case C-488/21, *Chief Appeals Officer and Others*, pending at the time of writing.

68. Case C-34/09, *Ruiz Zambrano*, para 44.

"*equal* access to *social assistance*"[69] from public support granted to ensure respect for human dignity under Article 1 CFR, the protection of family life[70] and the best interest of the child, when children are involved.[71] One may therefore wonder whether the same distinction applies to *Ruiz Zambrano* residents: whether they enjoy full-fledged equal treatment or whether they only have a right to minimal public support just sufficient to ensure respect for human dignity and avoid relocation outside of the EU, but not more.[72]

Aside from that – fundamental – difference in the residence requirements and their interaction with welfare benefits, we may hypothesize that some of the above-illustrated features of financial dependency in free movement law apply in *Ruiz Zambrano* cases too. Since the Court held in *Dereci* that economic reasons that would make it merely desirable for the TCN to live with the EU citizen in the latter's home State do not justify *Ruiz Zambrano* residence,[73] dependency under Article 20 TFEU must be related to vital material necessities and not to the achievement of a desired standard of living, and it thus overlaps, at least partially, with the notion of financial dependence in free movement law. It is when the Union citizen relies on their TCN family member to meet their basic needs that a risk of "absolute deprivation"[74] of the substance of rights – as Reynolds called it – materializes, because, in those cases, if the TCN is expelled, the EU citizen would be compelled to follow or become destitute.

However, contrary to Directive 2004/38, which typically covers the financial dependency of the family member on the Union citizen, including between adults, in *K.A.*, the Court held that when the adult family member depends materially on the EU citizen, *Ruiz Zambrano* does not apply.[75] In such

69. Haag, "The coup de grâce to the Union citizen's right to equal treatment: *CG* v. *The Department for Communities in Northern Ireland*", 59 CML Rev. (2022), 1081–1106, at 1102 (emphasis in the original). As Haag underlined, in *CG* the Court did not refer to Art. 21(2) CFR prohibiting discrimination based on nationality because the latter only applies when Art. 18 TFEU applies, which was not the case in that judgment.

70. Art. 7 CFR.

71. Art. 24(2) CFR.

72. Neier, op. cit. *supra* note 8, 561–562. The Court has yet to rule on the matter. See O'Brien, "Acte cryptique? *Zambrano*, welfare rights, and underclass citizenship in the tale of the missing preliminary reference", 56 CML Rev. (2019), 1697–1732. And on the practice of UK courts in social assistance for *Ruiz Zambrano* residents, which does not seem consistent with the respect for the right to live in dignified conditions under the *CG* approach; O'Brien, "The great EU citizenship illusion exposed: Equal treatment rights evaporate for the vulnerable (*CG* v. *The Department for Communities in Northern Ireland*)", 46 EL Rev. (2021), 801–817, at 815.

73. Case C-256/11, *Dereci*, para 68.

74. Reynolds, op. cit. *supra* note 33, 378.

75. Case C-82/16, *K.A.*, paras. 65–69. Also Case C-87/12, *Ymeraga*, EU:C:2013:291, paras. 17 and 38.

cases of financial "reverse dependency"[76] between adults, given the direction of the relationship,[77] denying residence to the TCN would not compel the citizen to relocate outside of the EU. In *K.A.*, the Court did not clarify why, but a reasonable explanation is that although in principle reverse dependency could affect life choices and prompt the citizen to leave the EU to support their adult family member, financial remittances can cross borders, so they do not compel the citizen to do so. Here, the difference with Article 2(2) Directive 2004/38 becomes apparent, as the latter specifically covers pure financial dependency between adults.

Yet, apart from reverse financial dependency among adults, between the high threshold of the family entirely depending on one member's earnings and the mere desirability to live more comfortably with extra resources from the non-EU family member, there is room for nuances: the economic dimension of dependency cannot be so easily dismissed as the Court did in *Dereci.*[78] Indeed, it may be that despite a lower degree of financial dependency, the family counts on the TCN's resources, and thus the expulsion of the latter could significantly affect the family's decision to remain in the Union. In those cases, it is unclear whether the Court would recognize *Ruiz Zambrano* residence. Notably, for minors, the test for financial dependency has loosened, and while the relationship between the non-EU family member and the citizen must be such that the former provides for the latter's material needs,[79] the non-EU relative must not necessarily *entirely* support the Union child.[80] Indeed, in *Chavez-Vilchez*, the TCN mothers were responsible for the day-to-day care of the EU children, but some of the fathers contributed to the material support of the minors too,[81] and this did not hinder the recognition of *Ruiz Zambrano* residence for the mothers. The reason, arguably, is that more than financial dependency was at stake in *Chavez-Vilchez*, which is the question to which we now turn.

76. Opinion in Case C-457/12, *S. and G.*, para 48. It is "reverse dependency" in the context of *Ruiz Zambrano.*

77. Neier, op. cit. *supra* note 8, 563.

78. Guild, Peers and Tomkin, op. cit. *supra* note 17, pp. 69–70. Economic dependency was at stake in all the main proceedings in *Dereci* except one; Opinion of A.G. Mengozzi in Case C-256/11, *Dereci*, EU:C:2011:626, para 5.

79. Opinion of A.G. Pikamäe in Case C-836/18, *Subdelegación del Gobierno en Ciudad Real*, EU:C:2019:1004, para 68.

80. See, in the context of the Directive, Guild, Peers and Tomkin, op. cit. *supra* note 17, p. 45.

81. Case C-133/15, *Chavez-Vilchez*, para 43.

2.3. *Emotional dependency*

The emotional dependency that the Court referred to in *O. and S.* expresses the obvious notion that human relationships stretch beyond legal and financial ties and, therefore, the sphere of emotions and personal connections should also be accounted for.

When it comes to caregivers of minor children – including, of course, *Ruiz Zambrano* cases – financial and legal dependency are but two aspects of the intertwined dimensions of dependency. Notably, in *Zhu and Chen*, the Court stressed that the caregiver has *emotional* and financial responsibility for the child.[82] In the same vein, the Court underlined in *Chavez-Vilchez* that the appraisal of dependency under the *Ruiz Zambrano* doctrine should take place in light of the child's age, their emotional and physical development, and the degree of emotional connection with their caregiver(s). Despite the initial uncertainty and restrictive interpretation in the immediate aftermath of *Ruiz Zambrano*,[83] the emotional attachment also reverberates on the possibility, opened up in *Chavez-Vilchez* and now clearly spelled out in *Subdelegación del Gobierno en Toledo*,[84] to grant Article 20 TFEU residence to more than one caregiver – a point that section 3 will address in greater detail. The fact that one parent financially supports and assumes the care of the EU-citizen child does not exclude other forms of dependency – namely emotional – on the non-EU caregiver.[85] Quite the contrary, the distinctive tie that unites children with their caregivers implies more than material support or legal custody.[86]

Outside the cases of caregivers of minors, however, it should be queried which relationships are covered by emotional dependency, and what degree of emotional connection determines compulsion to leave the EU. Once again, it is useful to draw a comparison with the interpretation of emotional dependence in the law of free movement. As Advocate General Sharpston noted in *S. and G.*, the interpretation of dependency within Directive 2004/38 has focused mainly on material support, but the Court has also recognized other "indicators" of a relationship liable to affect movement choices, such as legal or emotional bonds.[87] When it comes to residence pursuant to Article 10 of Regulation 492/2011, for instance, the caregiver can retain it after the child

82. Case C-200/02, *Zhu and Chen*, para 13.

83. The judgment in *Ruiz Zambrano* essentially only refers to Mr Ruiz Zambrano, despite one reference to the "parents" at para 44. See *infra* section 3 for a more detailed analysis of this point.

84. Joined Cases C-451 & 532/19, *Subdelegación del Gobierno en Toledo*, EU:C:2022:354, para 69.

85. Case C-133/15, *Chavez-Vilchez*, paras. 71–72.

86. Davies, op. cit. *supra* note 46, p. 477; Hyltén-Cavallius, op. cit. *supra* note 6, 411.

87. Opinion in Case C-457/12, *S. and G.*, para 48.

in education has reached the age of majority, if the latter needs their parent's presence and care to complete their studies, in the form of, for example, financial or emotional support.[88] Recently, in a case concerning other family members, the ECJ held that to fall within the scope of Article 3(2) of Directive 2004/38, those TCNs should be financially, physically (when the relative needs the personal care of the Union citizen) or *emotionally* dependent – as members of the Union citizen's household, and this applies to relationships between adults too.[89] The Court stated that genuine emotional dependency occurs when one shares with the citizen "close and stable personal ties".[90] Among the relevant criteria to ascertain that connection, the ruling mentioned the degree of kinship and the length of cohabitation. While the citizen does not have to be inseparable from their family member, the emotional bond should be such that "if the other family member concerned were prevented from being a member of the household of the Union citizen in the host Member State, *at least one of those two persons would be affected*".[91] In other words, the connection must affect to some extent the choices of those involved.

The degree of dependency expected of the extended family member to enjoy a – diminished, but not irrelevant – protection under Directive 2004/38 is quite low. Emotional dependency in that sense *does not fundamentally alter or altogether suppress the choices of the persons involved*. As for those within the inner circle under Article 2(2) of Directive 2004/38, as mentioned above, their dependency is typically understood as material rather than emotional, whereas the Court so far has only recognized the relevance of pure emotional dependency under Article 3(2) of Directive 2004/38.[92] Whilst the latter provision is meant to cover looser family bonds, which is why it does not grant a residence right, family members in the inner circle should *a fortiori* enjoy a higher degree of protection for emotional dependency beyond material support. If Article 3(2) grants a facilitation right to other family members, when they are emotionally dependent on the EU citizen, this broader notion of dependency should apply all the more to those whose family ties to the Union citizen are more protected under Article 2(2), especially considering that family rights are meant to secure the enjoyment of family life in a cross-border dimension.

88. Case C-529/11, *Alarape and Tijani*, EU:C:2013:290, paras. 28–30. Hyltén-Cavallius, op. cit. *supra* note 6, 413.

89. There is no age threshold in Art. 3 of Directive 2004/38 and Case C-22/21, *Minister for Justice and Equality*, concerned two adult cousins.

90. Case C-22/21, *Minister for Justice and Equality*, para 23.

91. Ibid., paras. 27–28 (emphasis added).

92. As previously mentioned, in *Chief Appeals Officer* (pending), A.G. Capeta proposed a more comprehensive notion of dependency that also encompasses the need for "companionship and care". Opinion in Case C-488/21, *Chief Appeals Officer and Others*, para 61.

Conversely, in *Ruiz Zambrano* cases, such a strong-though-not-compelling connection could not be the basis of a right of residence.[93] *Ruiz Zambrano* emotional dependency requires a higher threshold, because *desirability* stands in the way of recognizing genuine but "normal" emotional ties within families as a trigger for Article 20 TFEU.[94] Precisely the exclusion of "normal" emotional bonds not anchored in extreme dependency starkly contrasts with free movement law, where the Court held that the protection of family life is crucial because hindrances to "lead a *normal family life*" would "seriously obstruct" Union citizens' Treaty rights.[95] On several occasions, the Court has ruled out the required degree of dependency for *Ruiz Zambrano* residence between cohabiting partners, spouses, parents and adult children, or between adult siblings.[96] In those cases, emotional ties most likely existed and were liable to affect decisions as to where to live – whether in the EU or outside. Yet emotional dependency under *Ruiz Zambrano* is something more than a loving family that wants to stay together: the substance of rights is not in jeopardy if the family members can live in different countries and, for instance, move to cultivate their relationship.

To obtain *Ruiz Zambrano* residence, it is necessary that there is no alternative option than to follow the family member.[97] For adults, this could be the case for old age individuals or persons with a disability that requires the personal assistance of the family member.[98] In the absence of judgments on disability and dependency in *Ruiz Zambrano* cases, it has been argued that the emotional dimension and the lack of a requirement of cohabitation could allow for an understanding of dependency more consistent with fundamental rights and with a conception of the rights of persons with disabilities centred on independence, autonomy, and participation in society.[99] And yet, the Court's view on dependency between adults seems focussed on the existence of a functional link of total reliance, and not on a broader conception of

93. Adam and Van Elsuwege, "Citizenship rights and the federal balance between the European Union and its Member States: Comment on *Dereci*", 37 EL Rev. (2012), 176–190, at 182.

94. Neier, op. cit. *supra* note 8, 565.

95. Case C-127/08, *Metock*, paras. 57 and 62.

96. Respectively Case C-82/16, *K.A.*; Case C-434/09, *McCarthy*, EU:C:2011:277 and Case C-256/11, *Dereci*; Case C-87/12, *Ymeraga.*

97. Case C-82/16, *K.A.*, para 65.

98. Opinion of A.G. Pikamäe in Case C-836/18, *Subdelegación del Gobierno en Ciudad Real*, para 68.

99. Ferri and Martinico, op. cit. *supra* note 17, 696 and et seq. In the context of Directive 2004/38, see for a broader understanding on dependency: Opinion of A.G. Capeta in Case C-488/21, *Chief Appeals Officer and Others*, para 61.

emotional support that contributes to the removal of obstacles to participation in society with persons with disabilities.[100]

In conclusion, whereas under Directive 2004/38, the degree of dependency required (if required) to trigger rights for family members must be such as to affect the persons involved, though it can be purely financial under Article 2(2) or emotional under Article 3(2),[101] in *Ruiz Zambrano* cases, it seems that – irrespective of the specific form of dependence at stake – the circumstances must result in the impossibility of separation. Hence, whereas for children all types of dependency are generally intertwined in their relationship with their caregivers, for adults, ordinary emotional ties, or some economic reliance on the support of a family member, does not seem enough, just like formal obligations not underpinned by legal dependence. Thus, as Neier underlined, while the judicial formula "legally, financially *or* emotionally dependent" seems to suggest that those dimensions are alternative, it is uncertain whether they are, in fact cumulative,[102] or rather – as is submitted here – their combination must result in the deprivation of the possibility to choose whether to live apart. The way that bond is then assessed is another matter and the subject of the next section.

3. The assessment of dependency in light of fundamental rights

This article has so far illustrated the different dimensions of the relationship of dependence in *Ruiz Zambrano* cases and how they compare to free movement law. We are now going to examine how the dependency nexus that triggers EU law is assessed in *Ruiz Zambrano* cases, highlighting, in particular, the role of fundamental rights.

In the substance of rights doctrine, the question of fundamental rights is rather intricate due to the limited scope of EU law in the area of fundamental rights[103] which demands a balance between protecting fundamental rights and

100. This is unless the fundamental rights of adults gain greater relevance (see *infra* section 4), in particular Art. 26 CFR and Art. 19 of the UN Convention on the Rights of Persons with Disabilities (CRPD) – of which the EU is part – as argued by Ferri and Martinico, op. cit. *supra* note 17, 700–704.

101. With the possible different interpretation put forward *supra*.

102. Neier, op. cit. *supra* note 8, 564–565.

103. Arts. 5 and 6(1) TEU, and Art. 51 CFR. Dubout analysed the discrepancy between the scope of EU law and its competences and argued that fundamental rights are not properly a competence area, but norms on the "*content* of the action" (emphasis in the original). Dubout, "The protection of fundamental rights and the allocation of competences in the EU" in Azoulai (Ed.), *The Question of Competence in the European Union* (OUP, 2014), pp. 195–198 and pp. 201–202.

safeguarding the Member States' powers.[104] *Ruiz Zambrano* residence already raises questions about the scope of Union law because it applies chiefly when there is no cross-border element, in situations where the link with EU law is rather tenuous. Moreover, the *Ruiz Zambrano* doctrine is instrumental to the protection of the substance of citizenship rights and thus any consideration concerning the family member's rights can only follow that rationale.[105] It has been queried whether the substance of EU citizenship incorporates a core of EU fundamental rights, the violation of which triggers per se the application of Union law.[106] This matter falls outside the scope of this article, and yet, the question remains how dependency interacts with fundamental rights when national authorities assess its existence. The emergence of fundamental rights in the examination of dependency, as van Eijken and Phoa put it, is "the story of the chicken and the egg":[107] dependency prompts *Ruiz Zambrano* residence, but it also involves an assessment of inter-individual relationships that, in turn, raises issues of fundamental rights. Remarkably, in *Ruiz Zambrano*, the Court did not mention fundamental rights, despite the question asked by the referring court and the thorough analysis of the matter by Advocate General Sharpston in her Opinion.[108] Nevertheless, the discussion that follows will show that fundamental rights perform an increasingly divergent role in the assessment of dependency for children and adults.

The present contribution, however, does not address the question of the protection that fundamental rights afford once dependency is established, and residence acquired. When Member States intend to restrict existing *Ruiz Zambrano* residence, fundamental rights elicit a proportionality assessment to balance contrasting interests.[109] Indeed, although the "substance of rights"

104. Spaventa, "Should we 'harmonize' fundamental rights in the EU? Some Reflections about minimum standards and fundamental rights protection in the EU composite constitutional system", 55 CML Rev. (2018), 997–1023, at 1005.

105. Hailbronner and 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. (2011), 1253–1270, at 1262; van Eijken and Phoa, "The scope of Article 20 TFEU clarified in *Chavez-Vilchez*: Are the fundamental rights of minor EU citizens coming of age?", 43 EL Rev. (2018), 949–970, at 965.

106. Many argued that that question is answerable in the negative. See, among others, Reynolds, op. cit. *supra* note 33, 382–383; Lenaerts and Gutiérrez-Fons, "Epilogue on EU citizenship: Hopes and fears" in Kochenov, op. cit. *supra* note 46; Smyth, "A turn towards fundamental rights or just a swerve? The jurisprudence of the CJEU on family reunification for static Union citizens and third country national immigrants", 33 *Journal of Immigration Asylum and Nationality Law* (2019), 283–301, at 288.

107. Van Eijken and Phoa, op. cit. *supra* note 105, at 956.

108. Case C-34/09*, Ruiz Zambrano*, EU:C:2011:124, para 35; and Opinion of A.G. Sharpston in Case C-34/09, *Ruiz Zambrano*, EU:C:2010:560, paras. 82–84 and 151–177.

109. Kroeze, "The substance of rights: New pieces of the *Ruiz Zambrano* puzzle", 44 EL Rev. (2019), 238–256, at 251.

seems to evoke a core of absolute protection, the residence right rooted in dependency is not absolute, just like free movement rights.[110] Member States can limit rights based on Article 20 TFEU to pursue legitimate objectives, such as safeguarding public policy or controlling immigration. Nevertheless, since – given dependency – the situation falls within the scope of EU law,[111] restrictions should be interpreted narrowly, and those public interests must be balanced against countervailing fundamental rights.[112]

3.1. *Revolution and fine-tuning: Dependency for minor EU citizens*

To better understand the backdrop of the evolution of children's rights under *Ruiz Zambrano*, it should be recalled that when the case reached the Court, the Ruiz Zambrano family had resided for ten years in Belgium in a legal limbo: the parents did not have the right to asylum, but Belgium could not expel them; besides, they could not work regularly or receive unemployment benefits.[113] Traditionally the Court would have required a cross-border element, for instance moving to another Member State, and invoke *Zhu and Chen* residence.[114] Yet, that would have entailed the relocation of the whole family to another Member State, despite the absence of any link,[115] and thus the disruption of the children's social and family environment of upbringing. In a ruling known for its brevity,[116] the Court decided to find a different way to

110. Van den Brink, "Is it time to abolish the substance of EU citizenship rights test?", 23 *European Journal of Migration and Law* (2021), 13–28, at 19–22.

111. Opinion in Case C-457/12, *S. and G.*, para 62. Smyth, op. cit. *supra* note 106, 288.

112. Case C-165/14, *Rendón Marín*, paras. 81–87; Case C-304/14, *C.S.*, EU:C:2016:674, paras. 36–48. These rulings exported to *Ruiz Zambrano* residence the principles established in Arts. 27 et seq. Directive 2004/38 concerning expulsion based on public policy and public security. Van Eijken and Phoa, op. cit. *supra* note 105, 959.

113. Case C-34/09, *Ruiz Zambrano*, paras. 15 and 26.

114. Provided that, as A.G. Sharpston underlined with reference to *Zhu and Chen* residence, they had "good legal advice". A.G. Sharpston also highlighted the absurdity of a movement requirement in situations like that of the Ruiz Zambrano family. See Opinion in Case C-3 4/09, *Ruiz Zambrano*, respectively paras. 78 and 86. Reynolds convincingly observed the ruling's failure to consider the possibility of movement in *Ruiz Zambrano* while insisting on that connection in other cases, created an arbitrary distinction with judgments as *McCarthy* and *Iida*, based on the (unexplained) assumption that the Ruiz Zambrano family could not move, and the latter could (and/or did). Reynolds, op. cit. *supra* note 33, 390–392.

115. Which did not prevent the Court, in *Alokpa*, holding that Art. 20 TFEU residence does not ordinarily accrue in a host Member State to minor EU citizens who lack sufficient resources, since they can move to their home State. The ruling in *Rendón Marín* nuanced that statement, allowing *Ruiz Zambrano* to apply in the host State if the EU citizen does not have any link to their home State. Case C-86/12, *Alokpa*, EU:C:2013:645, paras. 34–35; and Case C-165/14, *Rendón Marín*, para 79. See Hyltén-Cavallius, op. cit. *supra* note 6, 419–420.

116. And obscurity, despite its constitutional significance: Nic Shuibhne, "Seven questions for seven paragraphs", 36 EL Rev. (2011), 161–162.

protect the Ruiz Zambrano children's connection with their place of birth and the stability of their residence, by attaching the derived residence for the parents to the substance of the children's citizenship rights.

Nevertheless, not long after the judgment in *Ruiz Zambrano*, the ECJ seemed to step back.[117] The case *Dereci* concerned several families in different situations, one of which (the Dereci family) was composed of EU-citizen children with an EU-citizen parent and a TCN one.[118] The Court denied that the protection of the right to family life and unity could trigger the substance of rights doctrine, and excluded that fundamental rights could partake in the examination of dependency.[119] Had EU fundamental rights applied irrespective of dependency, they could have arguably protected the unity of the family and laid the basis for an EU right to reside for the family member.[120] The ruling, instead, concluded that it was necessary to establish dependency first, and only insofar as dependency triggered the scope of EU law, could EU fundamental rights apply. Fundamental rights could only receive protection within their pertinent legal framework and in situations that due to the lack of dependency are not subject to EU law, only the ECHR and

117. Kochenov argued that the Court did not retract from the *Ruiz Zambrano* doctrine, but rather excluded that the substance of rights was at stake in *Dereci* (and *McCarthy*). Kochenov, "The right to have *what* rights? EU citizenship in need of clarification", 19 ELJ (2013), 502–516, at 509. The argument put forward here is slightly different, as the focus is not on what rights are at stake in *Ruiz Zambrano* doctrine, but rather what level of dependency is necessary to trigger EU law and why.

118. Opinion of A.G. Mengozzi in Case C-256/11, *Dereci*, para 5.

119. Case C-256/11, *Dereci*, paras. 68–72. See also Reynolds, op. cit. *supra* note 33, 383–384.

120. Smyth, op. cit. *supra* note 106, 289–291. On the role of fundamental rights in protecting the unity of the family, Art. 8 ECHR protects families and private life beyond dependency – with the caveat that relationships between adult children and their parents only constitute family life for immigration purposes when there is some special form of dependency (see ECtHR, *Ezzouhdi* v. *France*, Appl. No. 47160/99, judgment of 13 Feb. 2001, para 34). Whereas that provision does not protect the right of non-nationals to decide where to live as a family, and States maintain a margin of appreciation (ECtHR, *Abdulaziz, Cabales and Balkandali* v. *the UK*, Appl. Nos. 9214/80; 9473/81; 9474/81, judgment of 28 May 1985, para 68), it requires a proportionality assessment, to evaluate the link with the country of origin (ECtHR, *Jeunesse* v. *The Netherlands*, Appl. No. 12738/10, judgment of 3 Oct. 2014, paras. 116–117) and the implications of decisions on residence on the claimants' family circumstances (among others, ECtHR, *Boultif* v. *Switzerland*, Appl. No. 54273/00, judgment of 14 Jan. 2000, paras. 46–48). When it comes to EU law, considering that the *Ruiz Zambrano* doctrine precisely safeguards the link of EU citizens with the Union territory, the protection of the right to family life under EU law could have led to different results in *Dereci*. This goes to the core of the problem of the application of EU fundamental rights when the scope of EU law is not (yet) triggered. See, on the different appraisal of fundamental rights for families, Raucea, "Fundamental rights: The missing pieces of European citizenship", 14 GLJ (2013), 2021–2040, at 2034–2035. On a proposal to apply fundamental rights to the assessment of dependency, albeit in a more limited way, see *infra* section 4.2.

national fundamental rights are potentially relevant.[121] The right to family life, therefore, was seemingly irrelevant in the assessment of dependency.[122]

Initially, that narrow interpretation of dependency ties – meant to delimit the implications of *Ruiz Zambrano* – also resulted in the need for a *direct* relationship of dependency between the TCN claimant and the EU citizen.[123] That requirement culminated in the Court's wariness to recognize *Ruiz Zambrano* residence to the TCN stepfathers of EU-citizen children within reconstituted families.[124] In *O. and S.*, the claimants were the TCN spouses of TCN sponsors with whom they had TCN children; but the sponsors, who had permanent residence in the EU, also had EU-citizen children from previous marriages. The judgment acknowledged that denial of *Ruiz Zambrano* residence to the stepfathers could impose a choice between leaving the Union to keep the families together – thus severing the ties between the EU-citizen fathers and their EU-citizen children – or remaining in the Union without the non-EU stepfathers – hence obstructing the bond between the TCN fathers, their children and the EU-citizen stepchildren.[125] Yet the Court seemingly discounted that forced choice as "mere" desirability.[126] The EU-citizen children could remain in the Union with their non-EU mothers, who had permanent residence: the compulsion to leave would not stem from the denial of residence to the stepfathers, but from the choice of the non-EU mothers.[127] In those first post-*Ruiz Zambrano* cases, the Court neglected the needs of complex family structures and took the presence of an EU-citizen parent or a TCN with permanent residence as a sufficient safeguard against the risk of leaving the Union territory, if the family did not depend on the new non-EU spouses, but aspired to remain united. The ECJ, thus, accepted that one parent with stable residence could prevent the recognition of *Ruiz Zambrano* residence to the non-EU parent, dismissing the importance for a child to entertain a relationship with both parents.[128]

121. Case C-256/11, *Dereci*, paras. 69 and 72.

122. Van Eijken and Phoa, op. cit. *supra* note 105, 956–957; Kroeze, op. cit. *supra* note 109, 251–252.

123. Joined Cases C-356 & 357/11, *O. and S.*, para 56.

124. Ibid., paras. 57–58.

125. Ibid., para 51.

126. Ibid., para 52.

127. Opinion in Joined Cases C-356 & 357/11, *O. and S.*, EU:C:2011:566, paras. 42–43. A.G. Bot described the choice of keeping the families together as dependent "on the whims and vagaries of his mother's married life": a sexist remark that denotes a rather traditional conception of the family; see para 52.

128. Reynolds, op. cit. *supra* note 33, 390. On this narrow view of caregiving, i.e. identifying the one person that the child cannot be separated from, see also Hyltén-Cavallius, op. cit. *supra* note 6, 416. A.G. Mengozzi underlined that issue; Opinion in Case C-256/11, *Dereci*, paras. 45–46.

Despite the continued relevance of the distinction between dependence and desirability, the restrictive approach to the relationship of dependency featured in *Dereci* and in *O. and S*. has faded. The *Dereci* test meant that fundamental rights could only be relevant if the situation already fell within the scope of EU law, i.e. after dependency is ascertained. As convincingly noted in the literature,[129] the ruling in *Chavez-Vilchez* departed from that test without much explanation, thus bringing fundamental rights into the assessment of dependency itself, as the Court held that:

> "it is important to determine . . . whether there is in fact a relationship of dependency between the child and the third-country national parent. *As part of that assessment*, the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognized in Article 24(2) of that charter."[130]

That finding is an instruction to conduct a fundamental rights compliant assessment of dependency. Just as the Court reasoned in *S.M.* for the other family members under Directive 2004/38, also in *Chavez-Vilchez*, fundamental rights shed light on the evaluation of the dependency nexus. However, for relatives under Article 3(2) of Directive 2004/38 Union law already applies because the EU citizens are exercising their free movement rights, whereas, under Article 20 TFEU, it is dependency that brings the situation within the ambit of EU law. It has therefore been suggested that the *Chavez-Vilchez* doctrine risks circumventing Article 51(2) of CFR by expanding the scope of EU law, as it conflates the assessment of dependency with the possible violation of fundamental rights.[131] Indeed, while in some cases fundamental rights distinctly shed light on the relationship of dependency, for instance, the child's best interest presumably excludes dependency on a parent who cannot have contact with the minor,[132] in other instances, family life, read in light of Article 24(2) of the Charter, and dependency overlap – e.g. when both parents are the caregivers.[133]

129. Van Eijken and Phoa, op. cit. *supra* note 105, 955–958; Neier, op. cit. *supra* note 8, 566; Hyltén-Cavallius, op. cit. *supra* note 6, 417.

130. Case C-133/15, *Chavez-Vilchez*, para 70 (emphasis added).

131. Van Eijken and Phoa, op. cit. *supra* note 105, 959 and 969; Snell, "Do fundamental rights determine the scope of EU law?", 43 EL Rev. (2018), 475–476. See, for a different perspective, Opinion in Case C-457/12, *S. and G*., para 63.

132. See Opinion of A.G. Sharpston in Case C-82/16, *K.A*., para 78.

133. Joined Cases C-451 & 532/19, *Subdelegación del Gobierno en Toledo*, para 69.

It is submitted here that despite the difficulties in drawing a clear boundary between the appraisal of dependency and the risk of violating the fundamental rights of children, the former remains the decisive question, aimed at gauging whether the child would be compelled to leave taking into account not solely who pays for their food, but a more comprehensive evaluation of their needs. Notably, dependency is a matter of Union law, since it constitutes the tie with Union law, and thus, leaving its definition to the Member States would undermine the uniformity of the scope of EU law. This not only means that the ECJ has the power to interpret and define the criteria to assess dependency,[134] but that it is also constitutionally fitting that dependency deserves a fundamental rights compliant assessment.[135]

Commendably, the involvement of fundamental rights in the assessment of dependency has laid the ground for overruling the mono-parental perspective stemming from *Dereci*. In *Ruiz Zambrano*, the Court referred to the *parents* in the plural form, without describing them as primary or secondary caregivers,[136] and yet, it was necessary to wait until *Chavez-Vilchez* for the overt acknowledgement that for minors it is essential to cultivate a relationship with both caregivers.[137] The referring court in the *Chavez-Vilchez* case enquired about the Dutch authorities' practice to deny *Ruiz Zambrano* residence in cases of availability of the EU parent, except when that parent was unable to take actual responsibility for the child.[138] Consequently, whenever an EU-citizen parent was theoretically capable of assuming custody of the minor, the TCN could be easily "disposed of". Instead, the Grand Chamber ruled that children may be dependent on both parents, or on the non-EU caregiver, even if the other parent "is actually able and willing to assume sole responsibility for the primary day-to-day care of the child", which remains anyway a relevant element in the appraisal of dependency.[139] Arguably, it follows that there is no need for the TCN to be the primary or sole carer. They may be the secondary caregiver and still, an evaluation of dependency is warranted in light of individual circumstances.[140] True, even after *Chavez-Vilchez*, dependency is still the essence of *Ruiz Zambrano*, rather than

134. Spaventa, "Earned citizenship – Understanding union citizenship through its scope" in Kochenov, op. cit. *supra* note 46, p. 213.

135. See, however, on the risk of circularity of the reasoning on fundamental rights, Snell, op. cit. *supra* note 131, 476.

136. Case C-34/09, *Ruiz Zambrano*, para 44. Hyltén-Cavallius, op. cit. *supra* note 6, 415.

137. Case C-133/15, *Chavez-Vilchez*, paras. 70–71. Strangely enough, the Court has yet to refer to Art. 24(3) CFR that protects the right of the child "to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests".

138. Case C-133/15, *Chavez-Vilchez*, paras. 11 and 50.

139. Case C-133/15, *Chavez-Vilchez*, para 71.

140. Hyltén-Cavallius, op. cit. *supra* note 6, 418.

the protection of the family in light of the best interest of the child,[141] but it now encompasses a wider evaluation of emotional ties, considering the development and age of the child.

This is in line with a broader trend to overcome a simplistic vision of care relationships that causes unsatisfactory analyses of family arrangements. In free movement law too, the case law on primary carers appears ready to contemplate the possibility that more than one caregiver may enjoy residence. Indeed, in *Jobcenter Krefeld*, concerning Article 10 residence, the Court referred to the *parents* who are primary carers, leaving the door ajar for recognition of both caregivers' residence,[142] all the more so given that the fundamental right to family life applies, since the situation falls within the scope of EU law.

Still, even after *Chavez-Vilchez*, the practice has been inconsistent. Research has shown that some Member States presume dependency between children and both parents, while others exclude dependency when the caregiver is deemed "marginal".[143] The question should now be settled for families living together, since in *Subdelegación del Gobierno en Toledo*, the Court rejected the notion that a child could easily do without their non-EU cohabiting parent, holding that:

> "where the Union citizen minor *lives with both parents on a stable basis* and where, therefore, the care of that child and the legal, emotional and financial responsibility in relation to that child are shared on a daily basis by those two parents, there is a rebuttable presumption that there is a relationship of dependency between that Union citizen minor and his or her parent who is a third-country national".[144]

That *rebuttable presumption*, which hinges on the child's interest in maintaining a relationship with both parents,[145] does not imply that living

141. For a critical appraisal, see Staiano, "Derivative residence rights for parents of Union citizen children under Article 20 TFEU: *Chavez-Vilchez*", 55 CML Rev. (2018), 225–241, at 233.

142. Case C-181/19, *Jobcenter Krefeld*, EU:C:2020:794, paras. 36–37. In *Baumbast*, A.G. Geelhoed denied that the parent who is not the primary carer could enjoy residence, as EU law does not protect the right to live as a family in a certain State; Opinion in Case C-413/99, *Baumbast and R*, EU:C:2001:385, para 125. See O'Brien, "Case C-310/08, *London Borough of Harrow* v. *Nimco Hassan Ibrahim and Secretary of State for the Home Department*, Judgment of the Court (Grand Chamber) of 23 February 2010", 48 CML Rev. (2011), 203–225, at 213 and footnote 50.

143. Migration Law Clinic – VU University Amsterdam, cited *supra* note 20, 11–16.

144. Joined Cases C-451 & 532/19, *Subdelegación del Gobierno en Toledo*, para 69 (emphasis added).

145. Ibid., para 69, which refers to paras. 65–67 on Art. 7 and Art. 24(2) CFR in the assessment of dependency. Frasca and Carlier, "The best interests of the child in ECJ asylum and

apart disqualifies dependency since the evaluation of family circumstances in light of fundamental rights may prove that the child depends on the parent with whom they do not live.[146]

At least procedurally, anyway, that presumption is an advantage for cohabiting caregivers, as it reduces the burden of proof when claiming *Ruiz Zambrano* residence. In all other cases, the TCN who is demanding family reunification under Article 20 TFEU must provide evidence of dependency and national authorities are not obliged to carry out the assessment *ex officio*.[147] Nevertheless, the distribution of the burden of proof cannot deprive Article 20 TFEU of its useful effect[148] and does not relieve national authorities from the duty to examine thoroughly the personal circumstances of the family, based on the evidence submitted by the non-EU citizen.[149] Concerning these procedural aspects, despite the lofty protection of minors' rights in *Ruiz Zambrano*, the Court has yet to stress the importance of the children's right to be heard and speak their views on their ties with their family and social environment, consistently with their maturity, development, and vulnerabilities.[150]

The ruling in *Subdelegación del Gobierno en Toledo* shows increasing attention to the children's net of connections with their family context rather than on the direct dependency nexus between the EU citizen and the TCN claimant.[151] When it comes to the residence of the non-EU sibling of an underage Union citizen, the dependency of both children on their parents warrants residence for the non-EU child, despite the lack of direct dependency between the siblings.[152] Should the national authorities deny residence to the TCN child, the parents would have to leave the Union with them and bring the EU minor along. That judgment is also a step forward in recognizing that

migration case law: Towards a safeguard principle for the genuine enjoyment of the substance of children's rights?", 60 CML Rev. (2023), 345–390, at 379.

146. Case C-82/16, *K.A.*, para 76. See also Migration Law Clinic – VU University Amsterdam, cited *supra* note 20, 15–16.

147. In *Chavez-Vilchez*, A.G. Szpunar argued for an *ex officio* assessment; Opinion in Case C-133/15, *Chavez-Vilchez*, EU:C:2016:659, para 108. See van Eijken and Phoa, op. cit. *supra* note 105, 966.

148. Case C-133/15, *Chavez-Vilchez*, para 76.

149. It is unclear how the burden of proof on the TCN concurs with the duty on national authorities to duly assess the situation. Staiano, op. cit. *supra* note 141, 237–238.

150. Art. 24(1) CFR. Van Eijken and Phoa, op. cit. *supra* note 105, 964. A.G. de la Tour emphasized that a minor EU citizen who has always lived outside the EU should be heard about the decision of moving to the EU; Opinion in Case C-459/20, *Staatssecretaris van Justitie en Veiligheid*, EU:C:2022:475, para 59. In the context of Art. 8 ECHR, see ECtHR, *N.Ts. and Others* v. *Georgia*, Appl. No. 71776/12, judgment of 2 Feb. 2016, para 72.

151. Unlike Joined Cases C-356 & 357/11, *O. and S.*, para 56.

152. The scholarship had already put this hypothesis forward; see Guild, Peers and Tomkin, op. cit. *supra* note 17, p. 69.

dependency is bidirectional, as the Court alluded to "the relation of dependency between them",[153] referring to the bond between the non-EU mother and the non-EU child who was claiming residence. As free movement shows, the fate of the dependent family member's residence affects the EU citizen's life choices.[154] By valuing the reverse and "indirect" dependency,[155] *Subdelegación del Gobierno en Toledo* acknowledged the existence of a network of family ties, but it did not broaden the concept of dependence. It merely confirmed that the caregiver-child relationship has a special nature, whereby, even if the former does not, strictly speaking, *depend* on the child, the latter's reliance on the caregiver does not permit separation.

Given the generous protection of the link between carers and their dependent children, it should be queried what happens to *Ruiz Zambrano* residence when children grow up and become independent adults. The functional nature of Article 20 TFEU residence should lead to thinking that the right to reside terminates when dependency ends.[156] The Court has held that *Zhu and Chen* and Article 10 residence rights are inherently temporary, since the primary carer's residence hinges on the relationship of dependence.[157] In particular, residence under Article 10 of Regulation 492/2011 cannot lead to permanent residence under Article 16 of Directive 2004/38,[158] and ends when

153. Joined Cases C-451 & 532/19, *Subdelegación del Gobierno en Toledo*, para 81.

154. In free movement, this is true for adults too; Case C-22/21, *Minister for Justice and Equality,* para 27.

155. Opinion of A.G. Pikamäe in Case C-451/19, *Subdelegación del Gobierno en Toledo*, EU:C:2022:24, para 117.

156. Kroeze, op. cit. *supra* note 109, 249 et seq. Under Directive 2004/38, the relationship of financial dependency should be assessed at the time of the application to join the Union citizen, therefore financial developments such as finding a job (under Art. 23 Directive 2004/38) should be irrelevant; see Case C-423/12, *Reyes*, paras. 30–32; and Case C-1/05, *Jia*, para 37. Even receiving social assistance thanks to equal treatment cannot have bearing on the status of dependency; see Case 316/85, *Lebon*, para 20. However, on the possibility for Member States to limit access to welfare benefits for family members of economically active citizens based on the notion that social assistance would bring dependency to an end, see Case C-488/21, *Chief Appeals Officer and Others*, pending. See summary of the preliminary reference, available at <curia.europa.eu/juris/showPdf.jsf?text=&docid=246901&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=7262224> (last accessed 22 July 2023). A.G. Capeta argued that dependency is a requirement for entry and also for continued lawful residence. Nevertheless, dependency must be interpreted broadly in free movement law and Member States cannot deny social assistance to the family member of a mobile worker. Opinion in Case C-488/21, *Chief Appeals Officer and Others*, paras. 42–50, 52–65, 83, and 146.

157. Case C-200/02, *Zhu and Chen*, para 46. However the Court held that the caregiver's right to reside is "indefinite" and not of definite duration. See also Case C-165/14, *Rendón Marín*, para 50.

158. Case C-529/11, *Alarape and Tijani*, paras. 35–36, 38, 40–42 and 47. In *Zhu and Chen* situations, permanent residence under Art. 16 Directive 2004/38 can accrue to the child who resides lawfully, whereas primary carers should not get permanent residence as they do not reside pursuant to Directive 2004/38.

the child no longer needs "financial or emotional support . . . in order to be able to continue and to complete [their] education"[159] and, at the latest, when their education terminates.[160] Equally, *Ruiz Zambrano* residence, which is also granted "per necessity"[161] to ensure the effectiveness of the rights of the Union citizen should end once the dependency bond is over. Thereafter, a right to reside could stem from national or European law other than Article 20 TFEU.[162] As the Court recently confirmed in *E.K.*, the non-EU family member can rely on Directive of 2003/109 on long-term residence for TCNs after dependency is over.[163] Since those TCNs' rights under *Ruiz Zambrano* are "granted solely for the benefit of the Union citizen",[164] the ruling in *E.K.* is of paramount importance to ensure the stability of the non-EU family member's residence in a non-instrumental way, especially considering that the assessment of dependency is significantly harder for relationships between adults, as we will see in the following section.

3.2. *Countermove and adjustment: Dependency for adult EU citizens*

In the immediate aftermath of *Ruiz Zambrano*, the Court was inclined to set strict limits to the applicability of the substance of rights doctrine, especially to relationships between adults. In *McCarthy*, decided two months after *Ruiz Zambrano*, a dual Irish-British national residing in the UK invoked Directive 2004/38 to claim a residence right for her Jamaican husband. The ECJ held that the situation fell outside the scope of Directive 2004/38 and that Article 20 TFEU could not apply either since Ms McCarthy enjoyed stable and unconditional residence in her home State, so she would not be forced to leave it following the departure of her husband.[165] Remarkably, the Ruiz Zambrano children too had an unconditional right to reside, but whereas in *Ruiz Zambrano* the Court did not even mention it, that element was pivotal in *McCarthy*.[166] Indeed, the purpose of residence pursuant to Article 20 TFEU is

159. Case C-529/11, *Alarape and Tijani*, para 30.

160. Ibid., paras. 29–30 and 40.

161. Hyltén-Cavallius, op. cit. *supra* note 6, 412.

162. Staiano, op. cit. *supra* note 141, 232 and 247; Kroeze, op. cit. *supra* note 109, 249.

163. Case C-624/20, *E.K.*, paras. 41 and 44–47. A.G. de la Tour argued that the non-autonomous nature of *Ruiz Zambrano* residence makes it inherently temporary and thus bars the application of Directive 2003/109. Opinion in Case C-624/20, *E.K.*, EU:C:2022:194, para 70.

164. Ibid., para 54.

165. Case C-434/09, *McCarthy*, paras. 48–50. Van Elsuwege, "Court of Justice of the European Union European Union citizenship and the purely internal rule revisited decision of 5 May 2011, Case C-434/09 *Shirley McCarthy* v. *Secretary of State for the Home Department*", 7 EuConst (2011) 308–324, at 314.

166. Ibid., 319.

to protect Union citizens in cases where *legally they can* reside, but *in practice* the exercise of their rights "could not be disconnected from"[167] the TCN's residence. In *McCarthy*, the Court did not delve into the concept of dependency, but held that there was no element suggesting that Ms McCarthy was so dependent on her spouse to be forced to leave the territory of the Union. *Dereci* continued along the same path: the unity of families composed of adults was rather a question of desirability.[168] As a result, *Ruiz Zambrano* residence seemed only intended to protect minors, and that spouses/partners and other adult family members would not benefit from the residence under Article 20 TFEU, because their deportation does not endanger the substance of rights, but a rather more "superficial" desire to keep the family together in the Union.[169]

In *McCarthy* and *Dereci*,[170] the Court did not openly explain the logic of such a closure, which became clear later in *K.A.*. While in principle *Ruiz Zambrano* residence is liable to apply irrespective of age, the compelling dependency relationship that underlies the substance of rights doctrine must be such that *no separation can occur*, and adults ordinarily can live separate and independent lives from their loved ones. Hence, in *K.A.*, the Court ruled out inseparability for reverse financial dependency,[171] then, with no further explanation, denied that there could be "dependency of any kind" between the claimants who were cohabiting partners.[172] Not only did the Grand Chamber conclude that there was nothing to suggest that the degree of dependency necessary to trigger *Ruiz Zambrano* existed between those adults, unlike Advocate General Sharpston's Opinion,[173] it all but ignored the fundamental rights of adults in evaluating dependency. And it is not that the Court wanted to move away from the *Chavez-Vilchez* principles: for children, the assessment remained the same including their right to family life in light of Article 24(2) CFR.[174]

Despite the dismissive approach to the fundamental rights of adults, the *Ruiz Zambrano* doctrine has significant procedural implications for them. The possibility that dependency occurs precludes rules and practices that hinder

167. Ibid.

168. Case C-256/11, *Dereci*, para 68.

169. Hyltén-Cavallius, op. cit. *supra* note 6, 418.

170. In *Ymeraga*, the Court held that the relationship between the Union citizen and his parents and adult brother could not establish a finding of dependency such to trigger the substance of rights doctrine. See Case C-87/12, *Ymeraga*, paras. 38–39.

171. Case C-82/16, *K.A.*, paras. 67–68.

172. Ibid., paras. 66 and 69. Interestingly, not only did the Court exclude that there could be dependency in such a degree to warrant *Ruiz Zambrano* residence, but excluded *any* form of dependency.

173. Opinion in Case C-82/16, *K.A*., para 76.

174. Case C-82/16, *K.A.*, compare paras. 66–69 and 70–71.

the evaluation of family ties through the lenses of dependency. In *K.A.*, the national court referred a question on the Belgian authorities' practice of refusing to examine family reunification claims under Article 20 TFEU when submitted by a TCN subject to an entry ban. Those non-EU citizens had to leave the country (and the EU altogether), apply for the withdrawal or suspension of the entry ban, and only then apply for residence. The Grand Chamber held that when a TCN is illegally staying in the territory of the Member State, having violated an order to leave that territory, national authorities "cannot refuse to examine [the] application [for family reunification] solely on the ground that the third-country national is the subject of a ban on entering that Member State".[175] Instead, they are obliged to assess whether dependency exists. If it does, Member States must contemplate withdrawing or suspending the entry ban. Otherwise, the dependent EU citizen may be forced to leave the Union for an indefinite period before the ban is suspended or withdrawn and this risks depriving Article 20 TFEU of its useful effect.[176] In *Subdelegación del Gobierno en Ciudad Real,* the Court held that Member States cannot automatically reject applications for residence under Article 20 TFEU, because the Union citizen does not have sufficient resources for family reunification. Such a practice hinders the examination of dependency and therefore puts the EU citizen at risk of being forced out of the Union when dependency exists.[177] This line of case law demonstrates that for adults Article 20 TFEU entails, at the very least, a procedural obligation to assess whether dependency might trigger EU law.

That procedural obligation notwithstanding, the narrow notion of dependency as inseparability, rather than multifaceted family relationships,[178] is oblivious to other interdependency ties within families composed of adults and their fundamental rights. Of course, for children, the bond with their caregivers is vital, and the effects of severing those relationships are much harsher than for adults. Yet, families also provide for mutual run-of-the-mill assistance and such an "ordinary" – emotional – dependency may also characterize couples without children.[179] Whereas understandably, the obligation to live together for a married couple is not enough to establish dependency, living together and the marital obligation to do so are the expression of the commitment to reciprocal support in case of need, due to the choice of forming a family unit willing to remain together.[180] Hence, while

175. Ibid., para 57.
176. Ibid., paras. 56–58.
177. Case C-836/18, *Subdelegación del Gobierno en Ciudad Real*, para 53.
178. On this mono-dimensional vision of the family see Staiano, op. cit. *supra* note 141, 235.
179. Neier, op. cit. *supra* note 8, 565.
180. Davies, op. cit. *supra* note 46, p. 486.

separation is usually possible among adults, family relationships impose some degree of constraint on the choice as to whether to leave the Union;[181] and yet, the Court has consistently dismissed that possibility. Strikingly, the case law, in making those assumptions about whom the citizen needs in order not to be coerced or strongly inclined to leave,[182] all but ignores a fundamental rights compliant evaluation of dependency between adults.

4. Axes of divergence

The previous sections have shown that there are several axes along which dependency diverges in EU citizenship law: on the one side, between free movement and *Ruiz Zambrano* cases, and on the other side, between the relevance of fundamental rights for adults and underage children. This section seeks to explain those divergences and critically analyse them, to understand their consistency within the legal framework of EU citizenship.

4.1. *Different objectives and jurisdictional connections: Free movement and* Ruiz Zambrano

First, the question arises as to why the case law identified dependency as a trigger for Article 20 TFEU residence. Since the *Ruiz Zambrano* doctrine lies at the outer boundaries of the scope of EU law, it should remain a last resort tool to protect the substance of rights when it is in exceptional jeopardy.[183] Such a danger only occurs when the connection with the EU territory risks being *involuntarily* severed, which would undermine Union citizenship itself even without formal withdrawal of nationality.[184] The involuntary character of the loss of rights is key, as voluntary forfeiture of rights would not need protection against State action.[185] Against this background, dependency is particularly suitable as an indication that the substance of rights is in danger as it entails the absence of choice as to whether to follow the person on whom one

181. In free movement law, A.G. Capeta hinted to this in her Opinion in *Chief Appeals Officer* considering that in cases of reversed emotional and physical dependency of the TCN parent, an adult mobile EU citizen could even be compelled to leave the Union; Opinion in Case C-488/21, *Chief Appeals Officer and Others*, para 61.

182. Reynolds, op. cit. *supra* note 33, 390; Spaventa, op. cit. *supra* note 134, p. 213.

183. Dubout, op. cit. *supra* note 103, p. 202.

184. Case C-34/09, *Ruiz Zambrano*, paras. 42–43. Lenaerts and Gutiérrez-Fons, op. cit. *supra* note 106, p. 766.

185. It would be unlike a liberal polity to compel citizens to retain their nationality or links with the territory or State. Bauböck and Paskalev, "Cutting genuine links: A normative analysis of citizenship deprivation", 30 *Georgetown Immigration Law Journal* (2015), 47–104, at 56 and 66.

depends,[186] an extremely high human cost of separation[187] – that limits the choice whether to leave the EU or not to almost nihil – and an element of financial, personal or legal support.[188]

In comparison with those particularly compelling features of dependency in *Ruiz Zambrano* cases, free movement law factors in a variety of family bonds, including relationships where dependency is not required at all. In traditional cases of movement to another Member State, the goal of family rights is to avoid dividing families so that movement is unconstrained by the choice between family life and exercise of Treaty rights.[189] What is more, free movement law protects family life also in cases that transcend residence in the host State, where the stake is not so much movement choices, but rather the protection of family life in itself.[190] As is known, in *Carpenter*, the Court held that the occasional cross-border provision of services warrants residence for the spouse in the home State of the Union citizen because denying them residence would restrict free movement and violate fundamental rights.[191] Member States also have to grant residence to family members of "circular migrants" returning to their home State, to safeguard the family life that citizens have established while moving.[192] As a result, given the cross-border element, in all those situations, respect for family life is guaranteed as a matter of EU law.

This is not the case for residence under Article 20 TFEU. As Davies underlined, "*Ruiz Zambrano* is not an objection to [S]tates splitting families at all – it is a judgment objecting to the consequences for a particular individual

186. See, for the analysis of this point, Opinion of A.G. Bot in Case C-356/11, *O. and S.*, para 44.

187. Davies, op. cit. *supra* note 46, p. 476.

188. This transpires from the way A.G. Mengozzi spoke of dependency in Opinion in Case C-256/11, *Dereci*, paras. 47–48.

189. Case C-127/08, *Metock*, para 89. See for a comprehensive development on this, Opinion in Case C-457/12, *S. and G.*, paras. 89–91.

190. Tryfonidou, "Reverse discrimination in purely internal situations: An incongruity in a citizens' Europe", 35 LIEI (2008), 43–67, at 51–52. The author convincingly argued that *Jia* aimed at extending family reunification rights rather than ensuring the exercise of cross-border economic activity and that both *Jia* and *Carpenter* relied on a functional free movement argument only nominally, whereas the real objective was to secure family reunification.

191. Case C-60/00, *Carpenter*, paras. 29–30 and 39–43. In *S. and G.*, the ECJ emphasized that the *desirability* of family childcare is not sufficient to warrant a right to reside for the grandparents in *Carpenter* situations; Case C-457/12, *S. and G.,* EU:C:2014:136, para 43. See, for a critical appraisal, Spaventa op. cit. *supra* note 25, 758, 767–768 and 773.

192. Case C-370/90, *Singh*, paras. 19–21. In *O. and B.*, the Court held that Directive 2004 /38 applies by analogy to circular migrants and their family members, who can reside in the home State under the same requirements that the Directive foresees for residence in the host State; Case C-456/12, *O. and B.*, para 50.

of the fact that families sometimes will not split."[193] However, that difference cannot be explained by the different bonds between family members or the extent to which those bonds affect the citizen's decisions concerning relocation. In *O. and B*., the Court stressed the risk that free movement would be deterred if families were prevented from joining the circular migrant in the latter's State of nationality.[194] If this functional reasoning were the rationale for the rights of circular migrants, the comparison with Article 20 TFEU residence for adults would show an inconsistency:[195] the residence of the same family member in the same State would at once fundamentally affect the citizen's intra-EU movement choices if the citizen has moved – even for just four months[196] – and not fundamentally affect the choice to leave the Union if the citizen has not moved.[197]

Such a discrepancy is better explained if we consider the functional free movement argument as a jurisdictional trigger, whilst the actual aim is to protect family life. Indeed, free movement is a fundamental Treaty right which requires a broad interpretation,[198] including the derivative rights of family members that affect the conditions of exercise of free movement rights.[199] When, thanks to a transnational element, the situation is within EU law jurisdiction, the Charter can apply,[200] thus even when the link with movement is rather tenuous, it enables the protection of family unity as a matter of EU law.[201] The applicability of EU fundamental rights, in turn, warrants the protection of a lower degree of dependency or of family relationships that do not need to satisfy a requirement of dependency altogether, covering also what in *Ruiz Zambrano* cases would be the "mere desirability" of keeping the family together. Yet, free movement in those instances is rather a tool to shield family ties when Member States' action could interfere, than an end in itself. It is one thing to say that the citizen would be discouraged to move should they imagine that if they fall in love and form a family abroad they would not be able to bring their family members back. It is another thing to say that derived

193. Davies, op. cit. *supra* note 46, p. 477.

194. Case C-456/12, *O. and B*., paras. 46–47 and 49.

195. Davies, op. cit. *supra* note 46, p. 482.

196. Family rights accrue to circular migrants only if the residence in the host State has been "sufficiently genuine so as to enable that citizen to create or strengthen family life". Medium-term residence, pursuant to Art. 7 Directive 2004/38 is "in principle" evidence of genuine residence; Case C-456/12, *O. and B*., paras. 50–53.

197. Reynolds, op. cit. *supra* note 33, 390.

198. Among others, Case 316/85, *Lebon*, para 23; Case C-1/05, *Jia*, para 36.

199. Case C-60/00, *Carpenter*, para 39.

200. Dubout, op. cit. *supra* note 103, p. 200; Dougan, "Judicial review of Member State action under the general principles and the Charter: Defining the scope of Union law", 52 CML Rev. (2015), 1201–1245, at 1216.

201. Kroeze, op. cit. *supra* note 109, 251.

movement-related rights for family members are meant to safeguard the fundamental right to family life and the exercise of Treaty rights in dignity.[202]

Conversely, Article 20 TFEU residence protects the tie to the territory of the Union that is mediated by the link to the territory of the Member State of nationality. This is a matter primarily for national law and EU law can only intervene in extreme cases EU law should intervene when the connection with the EU territory and what it represents in terms of values and rights is imperilled.[203] It is thus clear that the goals of derived family rights in free movement and *Ruiz Zambrano* cases diverge: the latter does not aim to protect family life via the cross-border dimension, and therefore it is not triggered by limitations of the related fundamental right. In such cases, it is the interference with the core of citizenship rights that prompts the application of EU law (and ensuing rights for TCNs) and that interference is the consequence of the link of dependency.[204] The latter, in free movement, is merely the condition to exercise rights that are already under the scope of EU law thanks to the transnational dimension.

Remarkably, the Court has repeatedly held that the Article 20 TFEU residence right has an "intrinsic connection with the freedom of movement of a Union citizen".[205] Hence, one may wonder whether the discrepancy between the level of protection of family relationships in *Ruiz Zambrano* cases and in free movement law is defensible at all.[206] Arguably, that intrinsic connection means that a situation falls within the scope of EU law either when there is a cross-border element or when, due to dependency, the citizen is at risk of forced departure from the Union, preventing intra-EU movement altogether.[207] In the latter scenario, dependency, hence the assessment of

202. Recital 5 Directive 2004/38. Yet, the Court seldom develops further its reasoning on fundamental rights in free movement cases. See Costello, "*Metock*: Free movement and 'normal family life' in the Union", 46 CML Rev. (2009), 587–622, at 612; Ward and MacLennan, "Citizenship and incremental convergence with fundamental rights?", 78 CLJ (2019), 283–286; Kroeze, op. cit. *supra* note 109, 253–254. Despite the reticence of the Court in analysing fundamental family rights in a principled way, A.G. Sharpston also read cases such as *Carpenter* and *Metock* as the expression of the will to give prevalence to fundamental rights, even over legal certainty and a consistent approach to the cross-border link; Opinion in Case C-34/09, *Ruiz Zambrano*, para 141.

203. Opinion of A.G. Mengozzi in Case C-256/11, *Dereci*, para 39. See for a thought-provoking analysis of the protection of the link with the EU territory as a space of shared values and rights, Azoulai, "Transfiguring European citizenship: From Member State territory to Union territory" in Kochenov, op. cit. *supra* note 46.

204. Van Eijken and Phoa, op. cit. *supra* note 105, 965.

205. Case C-40/11, *Iida*, para 72.

206. My gratitude to the reviewers for making me reflect more on this point.

207. Reynolds argued that the intrinsic connection lies in the last resort nature of the *Ruiz Zambrano* test: when EU citizens cannot activate movement, the substance of rights test intervenes to prevent the Union citizen from leaving the EU. The author then convincingly criticized

family bonds, is what shifts the situation within the scope of Union law. In turn, this heightens the threshold for gauging the degree of compulsion to leave, because it is not a matter of adding the protection of fundamental rights to situations that already fall within the scope of EU law, but rather a matter of attracting those situations within EU law, which can only happen, according to the Court, in exceptional circumstances.

Framed in those terms, the disparate breadth of family protection in free movement and *Ruiz Zambrano* is warranted in light of the limited scope of Union law, which prevents the applicability of the general principles and the Charter when a situation falls outside the scope of EU law. In constitutional terms, the exceptional nature of rights not anchored to cross-border elements ensures greater respect for the federal balance and the autonomy of Member States.[208] Still, despite that constitutional justification, the ensuing variance in the degree of dependency required engenders inevitable distortions. Article 20 TFEU residence ends up excluding family connections that are protected under free movement law,[209] raising the obvious problem of reverse discrimination, all the more so in comparison with those who also invoke family rights in the home State. The gap between dependency as the risk of deprivation of citizenship rights and a much lower degree of emotional ties inherent to family relationships compels citizens to activate EU law through movement, even artificially so.[210]

the Court's clinging to this intrinsic connection because of the arbitrariness it creates in assuming facility of movement in some situations and not others. Reynolds, op. cit. *supra* note 33, 390 et seq. While this article does not analyse what that intrinsic connection is, and the standpoint taken here is slightly different, the conclusion converges: that the issue lies in the extremely high threshold for activating the substance of rights test. For Reynolds, the solution is detaching the cross-border test from the substance of rights. The present article argues that the solution is to recognize what the dependency test protects, that is not having to face a forced choice, as the next sub-section will illustrate.

208. Adam and Van Elsuwege, op. cit. *supra* note 93; Nic Shuibhne, "Recasting EU citizenship as federal citizenship: What are the implications for the citizen when the polity bargain is privileged?" in Kochenov, op. cit. *supra* note 46; Davies, op. cit. *supra* note 46, pp. 482–483; Thym, "Frontiers of EU citizenship: Three trajectories and their methodological limitations" in Kochenov op. cit. *supra* note 46, pp. 720–722; Lenaerts and Gutiérrez-Fons, op. cit. *supra* note 106.

209. Kroeze, op. cit. *supra* note 109, 245.

210. Van Eijken and de Vries, "A new route into the promised land? Being a European citizen after *Ruiz Zambrano*", 36 EL Rev. (2011), 704–721, at 718; Reynolds, op. cit. *supra* note 33, 391. See also Opinion of A.G. Sharpston in Case C-34/09, *Ruiz Zambrano*, para 167.

4.2. *Diverging roles of fundamental rights in dependency: Children and adults*

Now that the different aims and jurisdictional connection of family rights in free movement and *Ruiz Zambrano* cases have been explained, the question remains what the justification is for the divergent approaches to the assessment of dependency for children and adults. The rationale for *Ruiz Zambrano* residence is to protect citizens' life *in the EU*.[211] This is especially significant for underage children, who cannot choose whether to follow their caregivers to a third country,[212] and do not have the agency to decide autonomously to move to trigger the application of EU law. It is hence crucial to safeguard their bond with the Union, as a physical territory and as a space of shared values and rights,[213] when they risk losing that bond for reasons they cannot control. Conversely, and this is what seems to transpire from the case law on adults, the latter have the *independence* to take a decision on movement. In principle, not only do adults have the possibility to move to activate EU law, but they can also decide autonomously to come back to the EU if they move to a third country. Nevertheless, such an explanation does not take into account the practical difficulties that adults may face in moving[214] and the artificiality of being compelled to move to trigger EU law. Presuming that all adult EU citizens can move merely because that right is granted to them overlooks the practical difficulties that they may encounter, financially or personally.[215] For instance, in *McCarthy*, the ECJ found that the denial of residence to Ms McCarthy's husband did not hinder the exercise of her free movement rights, therefore her situation was purely internal.[216] Despite the traditional broad notion of restriction to free movement,[217] the practical impediments to the movement of Ms McCarthy, such as the fact that she had three children and was the caregiver of her son with a disability, were

211. Staiano, op. cit. *supra* note 141, 236.

212. Opinion of A.G. Mengozzi in Case C-221/17, *Tjebbes*, EU:C:2018:572, paras. 133–137.

213. Azoulai, op. cit. *supra* note 203, p. 181.

214. Nic Shuibhne, op. cit. *supra* note 13, 377.

215. Ibid., 370–371; Reynolds, op. cit. *supra* note 33, 388–389.

216. Case C-434/09, *McCarthy*, paras. 53–55.

217. See Case C-60/00, *Carpenter*, paras. 37 and 39. Tryfonidou, op. cit. *supra* note 190, 50–51. On how domestic rules on surnames may impede movement. See Case C-148/02, *Garcia Avello*, EU:C:2003:539; and Case C-353/06, *Grunkin and Paul*, EU:C:2008:559, paras. 27–28 and 36. For a critique of the inconsistencies between *McCarthy* and *Carpenter* and *Garcia Avello*, see Van Elsuwege, op. cit. *supra* note 165, 317–318; Nic Shuibhne, op. cit. *supra* note 13, 370–371; Reynolds, op. cit. *supra* note 33, 386 and 390; Guild, Peers and Tomkin, op. cit. *supra* note 17, pp. 50–51.

irrelevant in the eyes of the Court.[218] Whereas the right to move across EU Member States is granted to every Union citizen directly by Article 21 TFEU, it is well known that the actual exercise of that right is far from universal due to the conditions required by secondary law.[219]

Beyond the different autonomy in movement decisions and the need to protect the link with the Union territory,[220] it should be queried whether the enhanced protection for minors also reflects the stronger attachment to the social and family environment in the place where the child lives. When growing up the "geographical" dimension of one's environment widens,[221] whilst the disruption of those ties may have a disproportionate impact on the child's development.[222] Some clarification on the interplay between the substance of rights and the protection of the children's connection with their place of residence – understood as the social environment of upbringing – comes from a recently decided case on the claim to *Ruiz Zambrano* residence for the non-EU mother of an EU citizen who was born and has always lived in a third country.[223] In this case, the father was a Dutch national living in the Netherlands and the mother – who had legal custody of the child – was a Thai national. After having lived in the Netherlands for an extended period separately from the child, who in the meanwhile had always lived in Thailand, the mother was expelled from the Netherlands for lack of residence right. Even if the child had always resided in a third country, the Court held that Article 20 TFEU warrants admission to the EU.[224] Indeed, the stake may well be the future exercise of existing citizenship rights[225] and the bond with the

218. Nic Shuibhne, op. cit. *supra* note 13, 370.

219. The limitedness of the right to move due to the residence requirements and to the restrictive interpretation of the Court in recent years is outside the scope of this contribution. See, among others, O'Brien, "Civis capitalist sum: Class as the new guiding principle of EU free movement rights", 53 CML Rev. (2016), 937–977; Spaventa, op. cit. *supra* note 134.

220. Kroeze, op. cit. *supra* note 109, 255.

221. Azoulai, op. cit. *supra* note 203, p. 190.

222. That concern, for instance, emerges in the case law of the ECtHR on the best interest of the child. See Appl. No. 12738/10, *Jeunesse* v. *The Netherlands*, cited *supra* note 120, para 119, and also in the Opinion of A.G. de la Tour in Case C-459/20, *Staatssecretaris van Justitie en Veiligheid*, para 49. See also Staiano, op. cit. *supra* note 141, 235.

223. Opinion in Case C-459/20, *Staatssecretaris van Justitie en Veiligheid*, paras. 6–13.

224. Case C-459/20, *Staatssecretaris van Justitie en Veiligheid*, paras. 30–31. This is the first time the Court deals with access to the Union rather than departure. But arguably, it still holds true what Nic Shuibhne underlined that "the Court . . . still does not speak of a positive right to live in the Union territory, . . . it prefers a negative casting of the right not to be forced to leave it" – now with the addition of a right not to be prevented from residing in the EU; Nic Shuibhne, op. cit. *supra* note 13, 366.

225. Case C-459/20, *Staatssecretaris van Justitie en Veiligheid*, paras. 23 and 30. Especially free movement, the most prominent EU citizenship right. Opinion of A.G. Sharpston in

Union territory, even when still to be formed.[226] Yet, concerning the relevance of the link with the context of upbringing, Advocate General de la Tour underlined that the analysis should be particularly mindful of the impact of relocation on the child's social, cultural, and family environment,[227] balancing the minor's interest in maintaining a connection with their social and family context in a third country with the protection of the link with the Union.[228] Conversely, the Court held that the child's best interest only plays a role in the assessment of dependency and cannot be used to deny a residence permit to the family member. Not only would this entail a substitution of the parental authority's assessment as to the family's life project, but it would surreptitiously make the protection of the link with the EU territory and the substance of rights on the additional condition that the exercise of citizenship rights is in the interest of the EU citizen.[229] Such a finding shows that *Ruiz Zambrano* may, among other things, have the effect of protecting the children's bond with their social and family context of residence, but the core of that doctrine remains safeguarding the possibility to live in the EU and exercise one's citizenship rights. That possibility, in the case of children, is primarily a question of leaving the parents the choice to live in the EU, since the children depend on them, and they should be the primary assessors of the family and children's best interest.

In any case, neither the protection of the link with the place of residence, nor agency and autonomy, explain why for children dependency is assessed through the lens of the fundamental right to family life in light of the child's best interest, whereas the Court does not require a fundamental rights compliant appraisal of dependency for adults.[230] It should be recalled that dependency is a matter of Union law, and this clarifies why fundamental rights apply to the assessment of the dependence nexus for children and at the same time sheds light on the inconsistency of the absence of reference to the fundamental rights of adults.

This is not to say that any possible violation of fundamental rights or the personal connections that one has developed in the Member State, or the

Case C-34/09, *Ruiz Zambrano*, para 80; Nic Shuibhne, op. cit. *supra* note 13, 365 and footnote no. 60; Davies, op. cit. *supra* note 46, p. 470; van Eijken and de Vries, op. cit. *supra* note 210, 712.

226. National authorities have to make a prognostic assessment of the impact of denial of right of residence on the effective enjoyment of the substance of rights for the EU citizens. Case C-459/20, *Staatssecretaris van Justitie en Veiligheid*, para 53.

227. Opinion in Case C-459/20, *Staatssecretaris van Justitie en Veiligheid,* paras. 49 and 55.

228. Ibid., para 64.

229. Case C-459/20, *Staatssecretaris van Justitie en Veiligheid*, paras. 40–44.

230. A.G. Sharpston in *K.A.* analysed adults' rights in light of fundamental rights, whereas the Court did not; Opinion in Case C-82/16, *K.A*., paras. 60–67.

possibility to settle there as a family, should trigger the application of EU law,[231] regardless of the engagement of the substance of rights or a cross-border element. That move would violate the allocation of competences and impinge on Member States' powers. Rather, fundamental rights should illuminate the examination of dependency and the intensity of the connection between the EU adult citizen and the TCN family member, since for adults, too, dependence is a matter of Union law. Requiring an examination of dependence in light of family life, as *Chavez-Vilchez* demanded for children, means that is necessary to assess the intensity of the personal bond with the family member to see whether the choice to follow the TCN family member would be significantly affected[232] and how close that reduced choice is to involuntary departure, which is the result of dependency. This would also bring the assessment of dependency more in line with the personal scope of the right to family life under Article 8 ECHR, which is not limited to families with minor children.[233]

Such a changed approach would reflect the notion that dependency is not binary, absolute inseparability, but rather a range within which the closer the connection the greater the compulsion in the choice as to where to live, to check how much the separation from the family member limits the choice of remaining in the EU. That dependency is a continuum also means that a proportionality assessment should apply to adults too. Although the Court did not mention proportionality in *Chavez-Vilchez*, the consideration of the child's fundamental rights may be interpreted as a way to incorporate the proportionality test in the evaluation of dependency,[234] to examine how disproportionate the consequences of separation would be given the link between the citizen and their caregiver. The same could occur for adults if their

231. Opinion of A.G. Sharpston in Case C-34/09, *Ruiz Zambrano*, para 176.

232. The language of "substantial harm" was used in the Opinion of A.G. Trstenjak in Case C-40/11, *Iida*, EU:C:2012:296, para 62. See also Reynolds, op. cit. *supra* note 33, 379 and 390.

233. Indeed, the established case law of the ECtHR considers that family life covers all situations where there is de facto a family, not limited to marriage or to couples with children. See ECtHR, *Van der Heijden* v. *the Netherlands*, Appl. No. 42857/05, judgment of 3 April 2012, para 50. Grabenwarter, "Article 8: Right to family life" in Grabenwarter, *European Convention on Human Rights: Commentary* (Bloomsbury, 2013), p. 193. To be clear, that assessment would not be an assessment of fundamental rights infringements, but would still focus on the degree of compulsion to leave.

234. Staiano, op. cit. *supra* note 141, 236. Van Eijken and Phoa noted that in *Chavez-Vilchez*, the Court did not technically balance, unlike the A.G. (Opinion of A.G. Szpunar in Case C-133/15, *Chavez-Vilchez*, para 96). The same authors also hypothesized that balancing is incorporated within the substance of rights test, but in *Chavez-Vilchez* that did not emerge. Van Eijken and Phoa, op. cit. *supra* note 105, 960.

fundamental rights were to shed light on the dependency nexus[235] taking into account the personal circumstances of the claimants – that is the true core of proportionality.[236]

The Court has already held in *K.A.* and *Subdelegación del Gobierno en Ciudad Real* that the existence of a family relationship calls for the evaluation of possible dependency. It is submitted that the criteria to assess dependency, hence to gauge whether the application of the measure would substantially affect the possibility to remain in the EU and to balance such a risk with Member States' interests could be, *mutatis mutandis*, those that the Court identified in *Tjebbes*.[237] In that ruling, the Court held that in depriving citizens who live in third countries of their nationality, Member States should take into account the severity of the consequences on the family and professional life of the person concerned.[238] Likewise, when verifying the premisses for *Ruiz Zambrano* residence, national authorities should ascertain whether denial of residence to the TCN is liable to have a disproportionate impact on the Union citizen in their specific circumstances, even when they could survive separately from their non-EU relative. Although the compulsion to leave would not stem directly from the State measure, the EU citizen may be forced to choose to relocate outside of the Union. That choice is constrained, for instance, when the non-EU relative has to move to an unsafe country or a place from where travelling to the Union is extremely difficult. Even for adults, between "mere", irrelevant desirability and dependency, there is scope for proportionality to ensure that one does not have to face the tough alternative between remaining in the EU and maintaining essential personal relationships.

This solution would lead to an expansion of the scope of *Ruiz Zambrano* residence, a different understanding of dependency for adults and possibly a rather personalized and unpredictable application of the law.[239] However, that

235. Ferri and Martinico argued that the inclusion of fundamental rights in the appraisal of dependency for adults too, would allow to take into account the ties between adults with disabilities and their family members. Ferri and Martinico, op. cit. *supra* note 17, 704.

236. Spaventa, "Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects", 45 CML Rev. (2008), 13–45, at 42–43.

237. Case C-221/17, *Tjebbes*, EU:C:2019:189. The test, in *Tjebbes*, was proportionality *in concreto*; see van Eijken, "Tjebbes in Wonderland: On European citizenship, nationality and fundamental rights: ECJ 12 March 2019, Case C-221/17, *M.G. Tjebbes and Others* v. *Minister van Buitenlandse Zaken*, ECLI:EU:C:2019:189", 15 EuConst (2019), 714–730, at 724–725. For a critical outlook on *Tjebbes*, see van den Brink, "Bold, but without justification? *Tjebbes*", 4 *European Papers* (2019), 409–415, at 415.

238. Case C-221/17, *Tjebbes*, para 44.

239. Immigration authorities already have to handle family law in all family reunification cases. It should be queried whether they have the instruments to make the intrusive enquiries of life circumstances that the appraisal of the dependency in light of fundamental rights nexus

thorough proportionality assessment already applies to the loss of nationality, which shares the same rationale as *Ruiz Zambrano*, i.e. protecting the substance of rights when it is endangered *in law* or *in fact*.[240] Moreover, this new understanding would not jeopardize the federal balance more than what already happens in cases concerning children or when artificial linkages to free movement equally encroach on national immigration competences. The legal framework would gain consistency and transparency CONSIDERING that dependency, as a matter of EU law, should be in compliance with fundamental rights in all cases.

5. Conclusions

More than ten years have passed since the *Ruiz Zambrano* case, and on the one side, its constitutional significance for the concept of EU citizenship and the scope of Union law has become manifest. On the other side, and in more pragmatic terms, *Ruiz Zambrano* constitutes a valuable tool for non-EU citizens to obtain lawful residence in a Member State under EU law, even when domestic law does not allow it. Against this background, dependency is both a concept of great constitutional relevance, as it determines the application of EU law, and a factual circumstance with notable practical implications in family reunification cases.

Dependency can morph into different shapes – legal, material, or emotional – but regardless of the specific dimension engaged, the combination of the three must result in inseparability between the TCN and the EU citizen. The personal bond of support and reliance between the family members has to be such as to cause the suppression of the choice as to whether to relocate outside of the Union with the non-EU family member. In this sense, a binary picture of family relationships emerges from *Ruiz Zambrano* cases, where no account is taken of the possibility that family structures constitute a net of interdependencies. Conversely, the required degree of dependency is much lower in free movement (if required at all) and this is due to the jurisdictional scope of EU law and the different aims of family rights in free movement and *Ruiz Zambrano*: such a discrepancy makes movement still necessary to activate the jurisdictional link and fill the gaps.

A stark divergence also exists between the assessment of dependency for minors, conducted in light of the fundamental right to family life and the best interest of the child, and for adults. For families with children, *Ruiz Zambrano*

entails. Davies, op. cit. *supra* note 46, p. 468; van Eijken and Phoa, op. cit. *supra* note 105, 966–967; Kroeze, op. cit. *supra* note 109, 245.

240. Lenaerts and Gutiérrez-Fons, op. cit. *supra* note 106, p. 761.

ended up being an adequate solution to obtain some residence stability,[241] especially since the Court has become more receptive to the specificities of minors' ties with their caregivers. It is submitted here that a fundamental rights compliant appraisal of dependency should apply to adults too. While feasible in constitutional terms, the notion of dependency for adults would morph into a test of substantial impact on the life choices of the EU citizen with implications in terms of legal certainty and administrative difficulties in applying Union law. Such a dependency test, although consequential in a limited set of particularly difficult circumstances, could virtually apply to all adults,[242] thus significantly broadening the scope of EU law. Whilst *Ruiz Zambrano* already caused political anxiety[243] and the polarizing and toxic nature of the immigration debate[244] may engender the risk of a backlash against a more generous approach, this article has nonetheless shown the need for a more consistent legal test of dependency hinging on fundamental rights, also in the case of adults.

241. See, however, De Jong and De Hart, "Divided families and devalued citizens: Money matters in mixed-status families in the Netherlands" in de Lange, Maas and Schrauwen (Eds.), *Money Matters in Migration: Policy, Participation, and Citizenship* (Cambridge University Press, 2021), p. 313.

242. Van Eijken and Phoa, op. cit. *supra* note 105, 960.

243. Solanke, op. cit. *supra* note 27, 108–109.

244. Strumia, "European citizenship and EU immigration: A demoi-cratic bridge between the third country nationals' right to belong and the Member States' power to exclude: European citizenship and EU immigration", 22 ELJ (2016), 417–447, at 445.