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INTERNAL MOBILITY & UNION CITIZENSHIP: THE SOLE TRIGGERS FOR THE NON-EU SPOUSES' ACQUISITION OF RESIDENCE RIGHTS

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Non-EU spouses of a national of a Member State have the right to reside legally in another Member State together with the Union citizen as provided by art 21 TFEU and Directive 2004/38. However, both the directive and art 21 TFEU are not applicable to situations where a Union citizen has not made use of his/her right of freedom of movement. This was clearly formulated in a judgement decided by the Court of Justice of the EU on 5th May 2011. The case clarifies the personal scope of Directive 2004/38 and art 21 TFEU. It involves a British/Irish national (Mrs McCarthy) who was born in the UK and always lived there. Following her marriage to a TCN, Mrs McCarthy applied for an Irish passport for the first time. Once obtained, as an Irish national, she asked for a residence permit to base her residence in the United Kingdom on rights associated with European citizenship. Consequently, her husband applied for a residence document as the spouse of a Union citizen. Both applications were refused on the ground that Mrs McCarthy could not base her residence on European Union law and invoke that law to regularise the residence of her spouse, since she had never exercised her right to move and reside in Member States other than the United Kingdom.

The Supreme Court of the United Kingdom, before which the case was brought, raised the question, as reformulated by the Court of Justice of the EU *'whether Article 3(1) of Directive 2004/38 or Article 21 TFEU is applicable to the situation of a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State*'. (para 26)
In other words, the Supreme Court sought some advice on whether Mrs McCarthy could invoke the rules of European Union law designed to facilitate the movement of persons within the territory of the Member States as a beneficiary of Directive 2004/38 or article 21 TFEU.

In relation to the first part of the question, on whether Mrs McCarthy was a beneficiary of art 3(1) of Dir 2004/38, the CJEU provided a negative reply. Thus, Mrs McCarthy was not to be assisted by free movement rights, and the fact that she was a dual UK/Irish national was not relevant.
This, of course, impacted on the situation of Mr McCarthy as a Jamaican national. The Court observed: *'Since a Union citizen such as Mrs McCarthy is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, her spouse is not covered by that concept either, given that the rights conferred by that directive on the family members of a beneficiary of that directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family'* (citing Case C-243/91 Belgian State v Noushin Taghavi, para 7 and Case C-291/05 Minister voor Vreemdelingenzaken en Integratie v R.N.G. Eind, para 23).

The second part of the question relates to the application of art 21 TFEU. The Court considered the right of EU citizens to move and reside freely within the EU under that article. Anyone, including Mrs McCarthy, could rely upon art 21 TFEU against the State of origin if the latter breaches art 21 TFEU. According to para 49 of the judgement, the test for determining the breach is whether "*the national measure at issue has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Art 21 TFEU*." On the application of such a test, the Court

concluded that the failure to take into account the Irish nationality of Mrs McCarthy did not affect her right of residence in the UK or her right to move and freely reside in another Member State or any other rights attached to her Union citizenship.
Thus, the Court distinguishes the facts in this case from those in the recent case of Ruiz Zambrano, concerning a national who did not exercise his mobility but was at risk of having to leave the EU. It also distinguishes from the earlier case of Garcia Avello, concerning an application to change the surname of the children of a Spanish national and a Belgian citizen who were dual Belgian and Spanish nationals.

The McCarthy case limited the potentially wide-ranging ramifications of the Zambrano judgment which opened up a lot of possibilities based on Union citizenship rights. Having excluded the application of Art 21 TFEU to Mrs McCarthy, the Court proceeded to identify just two situations in which art 21 might assist.
The first, when it allowed for a possible exception where the citizen is at risk of measures that could deprive him or her of *'the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen...*' This proviso, given the way it is formulated, must be of a particular concern because it seems to be an unnecessary attempt to constrain the growing importance of Union citizenship as a basis for assisting in future residence cases. The court fails to address the potential impact of the measures in question on Mrs McCarthy's wider EU citizenship rights. This stands very much in contrast with the rather more proactive approach taken in Zambrano.

The second proviso was where measures could impede the exercise of the right of free movement and residence within the territory of the Member States.

The Advocate General Kokott and the Court in this case did not consider that the circumstances of Mrs McCarthy provided the 'right context' for a more detailed examination of citizenship issues - particularly with regard to the scope for reverse discrimination, i.e. discrimination by Member States against their own nationals. The Advocate General’s consideration

was that a 'static' Union citizen such as Mrs McCarthy was not discriminated against at all compared with 'mobile' Union citizens (paras 41-43 of his Opinion). Even as a 'mobile' Union citizen, she would have failed to derive a right of residence from EU law as identified by para 44 because she was not economically self sufficient, not being in work, or having sufficient resources for herself and her family, and was in receipt of State benefits.

Thus, it is not clear whether the real issue of this case is the mobility issue or the self sufficiency element. It is perplexing that Mr McCarthy may live lawfully in another Member State together with his spouse, but not in the UK. The issue of the reverse discrimination is not addressed, and it is also unclear what the scope of the other rights associated with the status of Union citizen, over and above their mobility rights, might be. Does this mean that an EU citizen who has never exercised his/her mobility cannot rely upon the family reunification rights as they are attached only to the exercise of free movement? This case fails to address this issue. The Charter of Fundamental Rights of the EU is not evoked to determine clearly the content of EU citizenship rights not associated with free movement. EU citizenship per se does not bring with it the liberal rights to family reunification, as these remain associated with intra-community mobility.