

2011

Union Citezenship: Impact, Influences and Challenges to Irish Immigration Laws.

Ewaen Fred Ogieriakhi
Technological University Dublin

Follow this and additional works at: <https://arrow.tudublin.ie/aaschssldis>



Part of the [European Law Commons](#), and the [Social and Behavioral Sciences Commons](#)

Recommended Citation

Ogieriakhi, E.F.: Union Citezenship: Impact, Influences and Challenges to Irish Immigration Laws. Masters Dissertation. Technological University Dublin, 2011.

This Dissertation is brought to you for free and open access by the Social Sciences at ARROW@TU Dublin. It has been accepted for inclusion in Dissertations by an authorized administrator of ARROW@TU Dublin. For more information, please contact arrow.admin@tudublin.ie, aisling.coyne@tudublin.ie.



This work is licensed under a [Creative Commons Attribution-Noncommercial-Share Alike 4.0 License](#)

School of Social Sciences and law

Dissertations

Dublin institute of Technology	Year	2011
--------------------------------	------	------

UNION CITIZENSHIP: IMPACT, INFLUENCES AND
CHALLENGES TO IRISH IMMIGRATION LAWS

Ewaen Fred Ogieriakhi

Supervisor-Elaine Fahey

UNION CITIZENSHIP: IMPACT, INFLUENCES AND
CHALLENGES TO IRISH IMMIGRATION LAWS

Ewaen Fred Ogieriakhi

Diploma in Social Work, University of Benin, Benin-city,
Edo-State, Nigeria (1994), Bachelor of Laws (LL.B) (Hons)
Open University of England and Wales (2004), Post-
graduate Diploma in Legal studies, Dublin Institute of
Technology (2010).

MA in Law

Dublin Institute of Technology
School of Social Sciences and Law

Supervisor-Elaine Fahey

ABSTRACT

The objective of this thesis firstly, is to attempt to explore the impact, influences and challenges that European Union citizenship rules and the adoption of the Citizens Rights Directive has on the right of Union citizens and their family members to reside in Ireland. The thesis examines the shift from “Market Citizenship”- from having adequate financial resources and sickness health insurance for the acquisition of right of residence to now recognizing right of residence for economically inactive persons.¹ The thesis assesses the impact of the relevant Treaty provisions on Free movement of Persons and the case laws of the Court of Justice on Irish Immigration laws. Secondly, the thesis apply the relevant Union citizenship rules pre and post *Zambrano* to the plight of Irish born children and adult married to Third Country nationals in immigration cases in the State. It attempts to establish a resolve to the difficulties adult Irish Citizens have seeking family reunification right for family members either under domestic or European Union law in the State.² Thirdly, the thesis considers the impact, influences and challenges that Union citizenship rules has also on nationals from other Member States residing in Ireland on the basis of Treaty rights in immigration cases and examine the extent of the Compatibility of specific provisions in the Irish measure implementing the Citizens Rights Directive 2004/38/EC and with the survey analysis to make recommendations for amendment to specific laws and policies in the three areas of concern.³

¹Starup and Elsmore, “Taking a logical step forward? Comment on *Ibrahim* and *Teixeira*”, (2010) 35(4) *European Law Review* 571-588.

²Case C-34/09 *Gerarado Ruiz Zambrano v. Office national de l’ employ (ONEm)* [2011]E.C.R. 0

³Chalmers, “The secret delivery of Justice”, (2008) 33 (6) *European Law Review* 773-774.

This thesis is submitted in part-fulfilment of the requirements of the M.A. in law of the Dublin Institute of Technology.

AUTHORS DECLARATION

I hereby certify that this thesis, which I submit for examination for the award of _____, is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

This thesis was prepared according to the regulations for postgraduate study by research of the Dublin Institute of Technology and has not been submitted in whole or in part for an award in any other Institute or University.

The work reported on in this thesis conforms to the principles and requirements of the Institute's guidelines for ethics in research.

The Institute has permission to keep, to lend or to copy this thesis in whole or in part, on condition that any such use of the material of the thesis be duly acknowledged.

Signature _____

Name _____

Date _____

ACKNOWLEDGMENTS

I would like to begin by thanking the Department of legal studies in Dublin Institute of Technology for providing me with the opportunity to extend my education and for all the teaching and assistance they have provided me with over the last 2 years.

I would like to give a special mention to Dr. Elaine Fahey for taking the time to assist and guide me during this project and also for providing help whenever I requested it.

UNION CITIZENSHIP: IMPACT, INFLUENCES AND CHALLENGES TO IRISH IMMIGRATION LAWS.

Table of contents.

I. Table of Contents.....	1-2
II. CHAPTER ONE	
1.1 Introductory issues.....	3-4
1.2 European Citizens’ initiative.....	4-5
1.3 Right to move and reside Freely.....	5-8
1.4 Students’ Right in Union Citizenship case law.....	9-11
1.5 Citizenship Caselaw: economically inactive persons and job seekers.....	11-18
1.6 The original fragmentary secondary legislation.....	19-20
1.7 Methodology and Literature review.....	21
III. CHAPTER TWO	
2.1 Introductory Issues.....	22-23
2.2 Rights of Irish child in immigration law in Ireland: Pre Zambrano.....	24-28
2.3 Constitutional Rights Limited: Baby is a Ticket to stay in Ireland.....	29-32
2.4 European Union Citizenship: Strength in purely internal situation.....	32-34
2.5 Irish Children and non-national parents: Post citizenship Referendum.....	35-37
2.6 Irish Immigration Law: Post Zambrano.....	38-39
2.7 Union Citizenship: Residency Rights for adult Irish citizens.....	39-42
IV. CHAPTER THREE	
3.1 Introduction Issues.....	43-44

3.2	Legal effect of Directive 2004/38/EC and The European Communities (Free Movement of Persons) Regulation 2006 (S.I.No. 656 of 2006).....	45
3.3	Article 3.1 of the Citizens Rights Directive 2004/38/EC.....	45
3.4	The regulation 3.2 of the Irish regulations of 2006.....	46
3.5	The requirement of prior lawful residence of another Member State.....	46-48
3.6	Relationship Between Regulation 3.2 and Metock.....	49-52
3.7	Right of residence by family members in the event of Death or departure of the Union Citizen: Article 12.3.....	53
3.8	Regulation 9.3 of the Regulation of 2006.....	53-54
3.9	Article 16.1 and 16.2-Right of permanent residence	54
4.1	Regulation 12.1 of the regulation of 2006.....	54
4.2	Legal analysis to regulation 12.1 of the regulation of 2006.....	55
4.3	permanent residence card for family members who are not nationals of a member State: Article 20.....	56
4.4	Regulation 16.2 and schedule 6 of the Regulations of 2006.....	56-57
4.5	personal comment and key issue.....	57
4.6	References/Bibliography.....	58-70
4.7	Appendices.....	71
4.8	Copy of Survey Questionnaire.....	72-76
4.9	Analyzing Questionnaire results.....	77-82
5.1	Survey analysis: letters and face to face interview.....	83-88
5.2	Recommendations on the key issues of the thesis.....	89-92

CHAPTER ONE

1.1 INTRODUCTORY ISSUES

¹This chapter explore and investigate the concept of Union citizenship and raises questions of the implications and affects of Union citizenship Treaty provisions to the right of Free movement of Union Citizens and their family members and how the Treaty provision on Citizenship and case laws of the Court of Justice has altered the concept of free movement of persons which includes workers, job seekers and students from “Market Citizenship” to the recognition of right of residence for economically inactive persons often irrespective of cross-border element¹ and how these jurisprudences have changed the way Member State like Ireland perceive and regard the right of Union citizens and their family members .It set out the right of students,² workers and job seekers and the

¹Horspool and Humphreys, *Core Text Series European Union Law* (Oxford, 2010) at 444-469; Craig and De Burca, *EU Law, Text cases and materials* (Oxford, 4th ed., 2008) at 743-757 and 847-858; Barnard, *The substantive Law of the EU: The four Freedoms* (Oxford, 3rd ed., 2010) at 410-416 and 418-432; Foster, *Blackstone’s statutes EU Treaties & Legislation* (Oxford, 20th ed., 2009-2010) at 2-13, 189 and 202; Toner, (2006) 20(3) *Journal of Asylum and Nationality Law* at 158-178; Article 21(1) TFEU (ex. Art. 18(1) EC); Chalmers, Hadjiemmanuil, Monti and Tomkins, *European Union Law, Text and Materials* (Cambridge, 2005) at 561-566; Steiner, Woods and Twigg-Flesner, *EU Law* (Oxford, 9th ed., 2006) at 407-445; Kaczorowska, *European Union Law* (Routledge-Cavendish, 2007) at 612-640; Tryfonidou, “In search of the aim of the EC Free movement of persons provisions: Has the Court of Justice missed the points?,” (2009) 46 *Common Market Law Review* 1591-1620.

²Case C-85/96 *Maria Martinez Sala v. Freistaat Batern* [1998] E.C.R. 1-2691; Barnard, *The substantive Law of the EU: The four Freedoms* (Oxford, 2nd ed., 2007) at 431-441; Case C-456/02 *Trojani* (2004) E.C.R. 1-7573; Craig and De Burca, *EU Law, Text cases and materials* (Oxford, 4th ed., 2008) at 858- 860; Speventa, “From Gebhard to Carpenter: Towards a (non-) economic European constitution,” (2004) *Common Market Law Review* 743, 768; Currie, *The Transformation of Union Citizenship* in M. Dougan and Currie, *50 years of the European Treaties: Looking Back and Thinking Forward* (Oxford: Hart, 2009) at 365-392; Hailbronner, “Union citizenship and access to social benefits,” (2005) 24(5) *Common Market Law Review* 1245-1267.

impact of the Courts jurisprudence on the rights of such citizens.³ It also set out the original fragmentary secondary legislation which regulated the free movement of persons before the concept of Union citizenship and the Citizens Rights Directive were introduced.⁴ Finally, it set out the methodology and literature review for the survey and thesis generally.

1.2 EUROPEAN CITIZENS' INITIATIVE

²Established in 1993, citizenship of the European Union is a new concept with rights enshrined under the Treaty on the functioning of the European Union (Part Two, Article 18-25 TFEU, ex Article 12-22EC). Citizenship of the European Union is dependent upon nationality of a Member State. Union citizenship is therefore a different concept devolving from a state. The original citizenship provisions set out in Article 8EC stated : 'Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby'. The Treaty of Amsterdam to avoid confusion, added 'Citizenship of the Union shall compliment and not replace national Citizenship. Part Two of the Treaty on the functioning of the European Union, entitled 'Non-Discrimination and Citizenship of the Union under Article 20 TFEU establish that, 'Citizenship of the Union is hereby established.

³ *Case 316/85 Centre Public d'aide Sociale de Cpurcelles v. Lebon* [1987] E.C.R. 2811; *Case C-66/85 Deborah Lawrie-Blum v. Land Baden-wurttemberg* [1986] E.C.R. 2121; *Case C-22/08 and C-23/08 Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nurnberg 900* [2009] E.C.R. 1-4585.at 25-26; *Case C-192/05 Tas-Hagen v. Raadskamer WUBO van de pension-en Uiteringsraad* [2006] E.C.R. 1-10451; Barnard, *The substantive Law of the EU The four Freedoms* (Oxford, 2nd ed., 2007)at 415;Barnard, *The substantive Law of the EU The four Freedoms* (Oxford, 3rd ed., 2010) at 422-424.

⁴ European Parliament and Council Directive 2004/38/EC 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; European Communities (Free movement of persons) Regulations 2006 (S.I. No. 656 of 2006);Foster, *Blackstone's statutes EU Treaties & Legislation* (Oxford, 20th ed., 2009-2010) at 2-13, 189 and 202.;Toner, (2006) 20(3) *Journal of Asylum and Nationality Law* at 158-178.

Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship'. Article 9 of the Treaty on European Union prescribe that Citizenship of the Union shall be additional to national citizenship and shall not replace it. The rights are set out in Article 20.2 TFEU and for the purpose of this thesis subparagraph (a) provides for the right to move and reside freely within the territory of the Member States.⁵

1.3 RIGHT TO MOVE AND RESIDE FREELY

³Article 21 TFEU (ex Article 18EC) sets out the right of all citizens to move and reside freely within the territory of the Union. For the purpose of fleshing out the rights enshrined under Article 8a (now article 21 TFEU) and the rights of different categories of people under earlier Community law instrument has now been codified into a single legislative instrument known as the Citizens Rights Directive 2004/38/EC. The pre-existing differences between the rights of the economically active and inactive are also reflective in the Directive. This thesis explore and investigate the impact, influences and challenges of European Union citizenship on the fundamental right to move freely and reside in the territory of the Member States, in this case Ireland.⁶ Investigations into the legal substance of Union citizenship have resulted in very heterogeneous assessments which differ

⁵ Horspool and Humphreys, *Core Text Series European Union Law* (Oxford, 2010) at 444-469; Craig and De Burca, *EU Law, Text cases and materials* (Oxford, 4th ed., 2008) at 847-858; Barnard, *The substantive Law of the EU: The four Freedoms* (Oxford, 3rd ed., 2010) at 418-432; Barnard, *The substantive Law of the EU: The four Freedoms* (Oxford, 2nd ed., 2007) at 410-416.

⁶Foster, *Blackstone's statutes EU Treaties & Legislation* (Oxford, 20th ed., 2009-2010) at 2-13, 189 and 202; Toner, (2006) 20(3) *Journal of Asylum and Nationality Law* at 158-178; Article 21(1) TFEU (ex. Art. 18(1) EC); Craig and De Burca, *EU Law, Text, Cases and Materials* (Oxford, 4th ed., 2007) at 743-757; Chalmers, Hadjiemmanuil, Monti and Tomkins, *European Union Law, Text and Materials* (Cambridge, 2005) at 561-566; Steiner, *Woods and Twigg-Flesner, EU Law* (Oxford, 9th ed., 2006) at 407-445; Kaczorowska, *European Union Law* (Routledge-Cavendish, 2007) at 612 -640.

with the chosen reference point. Restricting analysis to the existing rules of the EC Treaty will ensure a conservative conclusion, and particularly so if such comparison, which is suggested by the wording of the Union Treaties, almost inevitably leads to disappointment. Shuibhne⁷ expresses apposite concern at this rather odd and disconcerting instance of citizenship imposing new limits on the economic freedoms. She argued that this also adds to the impression that there is some element of incompatibility between citizenship and economic activity; and calls into question White's hope that the citizenship or free movement case law remain 'broadly consistent and does not make distinctions which are unsustainable. Hofstotter⁸ grounded his argument from the intrusive nature of the concept of citizenship on the grounds that the invocation of a meaningful concept of citizenship fits uneasily with the classical reverse economic actor centered view, which looks at the disadvantaged non-moving citizen and reverse discrimination as undesirable and yet unavoidable consequences of the limited scope of application of Community Law. Whereas at this stage claims to completely dispose of the requirement of a link with Community law in the light of Union citizenship can only be read as proposal *de lege ferenda* with a significant impact on the allocation of competences between the Community and the Member States. Petit,⁹ on the other hand, took the view that, it is important to recognize that all nationals or Citizens have not always enjoy full citizenship rights. A result is contestation over the boundaries of

⁷ Shuibhne, *Displacing Economic free Movement Rights?* in Barnard and Odudu, *The outer limits of European Union Law* (Oxford and Portland, Oregon, 2009) at 167-171.

⁸ Hofstotter, "A cascade of rights, or who shall care for little Catherine? Some reflections on the *Chen* case," (2005) 30(4) *European Law Review* 548-558.

⁹ Petit, "Agir par mimetisme: la Commission européenne et sa politique d'éducation," (2006) 38(3) *Canadian Journal of Political Science* 1-26; Steiner and Woods, *EU Law* (Oxford, 10th ed., 2009) at 455-490.

Citizenship ,that is the conditions under which excluded categories will be recognized as full members. By shifting boundaries, governments expand or contract the space for citizenship and perhaps even more importantly, for claims making about citizenship. Contesting boundaries provides a way for groups representing excluded or unrecognized categories of the population to claim and win inclusion as full citizens. Dougan and Spaventa¹⁰ argued that, on the one hand, Union citizenship is overlaying domestic concepts of solidarity with a new Community dimension. On the other hand, this Community dimension in itself remains fragmented according to the individual's personal status-evolving into a hierarchy within which different classes of Union citizens enjoy different categories of rights. O'Brien argued that Article 18 is a safety net, brought into play only when the traditional categories cannot apply. After having repudiated questions on the meaning and scope of the early provisions on EU citizenship on multiple occasions, in the famous case of *Martinez Sala* ,¹¹ the Court introduced a new concept. The judgment in *Sala* is generally regarded the herald of a new age, though its hazy reasoning has also attracted much adverse comment. The issue was whether a Spanish national residing in Germany, who had no residence permit, only a certificate stating that she had applied for one, contested the refusal of social security. The court, by contrast, held that as a national of a Member State lawfully residing in another Member State, the appellant came within

¹⁰Dougan and Spaventa, "Educating Rudy and the non English patient: a double bill on residency rights under Article 18EC," (2003) 28(5) *European Law Review* 699-712; O'Brien, "Social Blind spots and monocular the ECJ's migrant worker model," (2009) 46 *Common Market Law Review* 1107-1141; Forster, "The familization of European Community Law,"(2008) 45 *Common Market Law Review* 261-289.

¹¹Case C-85/96 *Maria Martinez Sala v. Freistaat Bayern* [1998] E.C.R. 1-1-2691 ; White, "Free movement, equal treatment, and citizenship of the Union, " (2005) 54(4) *International & Comparative Law Quarterly* 885-905; Somek, "Solidarity decomposed: being and time in European Citizenship," (2007)32(6) *European Law Review* 787-818;Case comment, "Harrow LBC v. Ibrahim (C-310/08): homelessness," (2010) 13(3) *Journal of Housing Law* 45-47.

the scope *ratione personae* of the Treaty provisions on EU Citizenship, in particular Article 17.2 (now Article 20.2 TFEU), she was therefore entitled to social security. This strange and dominant application of Citizenship rules continue to receive controversial expansion by the Courts. Spaventa¹² explained on the growing influence of the notion of citizenship. She said naturally, the focus has been on the extent to which Union citizenship affected, and maybe threatened, pre-existing notions of belonging to a given welfare Community, and on the significance of a supranational notion of citizenship on delicate political and social compromises as to allocation of limited resources to non-economically active migrants. Secondly, almost all citizenship cases concerned situations with a cross-border link. It is therefore not surprising that the distinction between personal and material scope of the citizenship provisions might have been overlooked.

⁴In my view and to sum up the issues above, it would seem that the aim of the Court of Justice in applying the concept of Union citizenship to these cases is to prevent direct discrimination or reverse discrimination. It is clear that the extension of right to economically inactive persons was geared to ensuring that in the determination of the right of all Union citizens, the general principles of Community law are respected and that the principle of proportionality is complied with. To this end, the Court has laid down two different approaches, Firstly, those who are economically active and fulfill the self-sufficiency requirement and on the other hand, those who are economically inactive by virtue of the direct application of Article 21 TFEU (ex. Art. 18 EC) and the *Baumbast* principle.

¹²Spaventa, "Seeing the wood despite the trees? On the scope of Union Citizenship and its Constitutional effects," (2008) 45 *Common Market Law Review* 13-45; Hailbronner, "Union Citizenship and Access to social benefits," (2005) 42 *Common Market Law Review* 1245-1267; Shaw, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism* (Italy, EU1 Working Paper RSCAS, 2010) at 8-19; Tryfonidou, "In search of the aim of the EC Free movement of persons provisions: Has the Court of Justice missed the points," (2009) 46 *Common Market Law Review* 1591-1620.

1.4 STUDENTS' RIGHTS IN UNION CITIZENSHIP CASELAW

⁵In addressing the issue of who could be entitled to a State educational grant for studies, the Court was quick to indicate that the criteria be based on the degree of integration that a student had with the Member State concerned. As Barnard¹³ puts it, the Court has taken the Concept of European Union Citizenship, the 'fundamental status of nationals of the Member States, to justify the creation of a sense of transnational solidarity between (taxpaying) nationals of a host Member State and (improverished migrant) nationals of other Member States, with the result that the migrant needs to be treated in the same way as nationals. Considering the pace at which this concept was being applied and the vulnerability of Member States welfare system, frustration soon mounted leading to a call as Weiler¹⁴ argued, for a supranational construct grounded in belonging simultaneously to two different demoi based on different subjective factors of identification. Whereas others¹⁵ argued that the EU should aim at decoupling the concept of State, nation, national identity, and nationality in favour of a form of postnational membership radically different from a (nation) Statist concept of Citizenship.

¹³ Barnard, *The substantive Law of the EU: The four Freedoms* (Oxford, 2nd ed., 2007) at 438-439; Barnard, "EU Citizenship and the principle of Solidarity", in Dougan and Spaventa (eds), *Social Welfare and EU Law* (Oxford, Hart, 2005); Jorgensen, "The right to cross-border education in the European Union," (2009) 46 *Common Market Law Review* 1567-1590.

¹⁴ Weiler, "The European Union Belongs to its Citizens: Three immodest proposals," (1997) 22 *European Law Review* 150; Horspool and Humphreys, *Core Text Series European Union Law* (Oxford, 2010) at 438 para. 12.120-121 and 452 para. 13.14-13.15

¹⁵ Barber, "Citizenship, Nationalism and the European Union," (2002) 27 *European Law Review* 241; Barnard, *The substantive Law of the EU: The four Freedoms* (Oxford, 2nd ed., 2007) at 458-459.

Amidst these debates, the Court again in *Grzelczyk*,¹⁶ reasoning similarly to *Sala* and *Trojani*,¹⁷ confirmed the student's right of movement and residence as based directly on Article 18 EC(now art. 21 TFEU), rather than on national or international law. And as a lawfully resident EU citizen though economically inactive, *Grzelczyk* was entitled to equal treatment on grounds of nationality under Article 12 EC, in relation to benefits which fall within the scope of application of the Treaty. The striking paragraph from *Sala* soon achieved classic status, allowing all EU citizens lawfully resident in the territory of another Member State to rely on the principle of non-discrimination (now Article 18 TFEU) in all situations which fall within the scope *ratione materiae* of EU Law. This new trend became clearer in *D'Hoop*,¹⁸ where the Court confirmed its expansive view of the benefits lying

¹⁶Horspool and Humphreys, *Core Text Series European Union Law* (Oxford, 2010) at 438 para. 12.120-121 and 452 para. 13.14-13.15; *Case C-184/99 Grzelczyk* [2001] ECR I-6193. Para. 31; Craig and De Burca, *EU Law, Text cases and materials* (Oxford, 4th ed., 2008) at 863; White, "Free movement, equal treatment, and citizenship of the Union," (2005) 54(4) *International & Comparative Law Quarterly* 885-905; Somek, "Solidarity decomposed: being and time in European Citizenship," (2007)32(6) *European Law Review* 787-818; Case comment, "Harrow LBC v. Ibrahim (C-310/08): homelessness," (2010) 13(3) *Journal of Housing Law* 45-47.

¹⁷ *Case C-85/96 Maria Martinez Sala v. Freistaat Bayern*, [1998] E.C.R. I-2691; Barnard, *The substantive Law of the EU: The four Freedoms* (Oxford, 2nd ed., 2007) at 431-441; *Case C-456/02 Trojani* (2004) E.C.R. I-7573; Craig and De Burca, *EU Law, Text cases and materials* (Oxford, 4th ed., 2008) at 858- 860; Speventa, "From Gebhard to Carpenter: Towards a (non-) economic European constitution," (2004) *Common Market Law Review* 743, 768; Currie, *The Transformation of Union Citizenship* in M. Dougan and Currie, *50 years of the European Treaties: Looking Back and Thinking Forward* (Oxford: Hart, 2009) at 365-392; Hailbronner, "Union citizenship and access to social benefits," (2005) 24(5) *Common Market Law Review* 1245-1267.

¹⁸ *Case C-224/98 Nathalie D' Hoop v. Office national de l'emploi* [2002] E.C.R. I-2119. at 20 and 27; Craig and De Burca, *EU Law, Text cases and materials* (Oxford, 4th ed., 2008) at 866-868.

within the material scope of the Treaty as it was permissible for a Member State to ensure that a grant to cover maintenance for students from other Member States did not become an unreasonable burden as was also confirmed in *Bidar* case¹⁹ and it was, therefore, legitimate to grant such assistance only to students who had demonstrated a certain degree of integration into the society of that State: the right to be treated equally will work for those in similar circumstances as *Mrs. Sala*. The string of follow-up cases constitutes European Citizenship's finest hour so far and to this respect, the analysis would be incomplete without making reference to the *Baumbast and Chen* cases.

1.5 CITIZENSHIP CASELAW: ECONOMICALLY INACTIVE PERSONS AND JOB-SEEKERS

⁶ Prior to *Baumbast* case,²⁰ it was widely assumed that non-economically active citizens had no rights to reside deriving directly from the EU Treaty, only from the residency Directives created under the Treaty and reaffirmed recently in the *Teixeira v. Lambeth LBC* case .

¹⁹ *Case C- 209/03 R (On the application of Bidar) v. Ealing LBC* [2005] E.C.R. 1-119at 56 and 57; Horspool and Humphreys, *Core Text Series European Union Law* (Oxford, 2010) at 438 para. 12.120-12.121; Craig and De Burca, *EU Law, Text cases and materials* (Oxford, 4th ed., 2008) at 865.

²⁰ *Case C-143/99 Baumbast and R* [2002] E.C.R 1-7091; Somek, "Solidarity decomposed : being and time in European Citizenship," (2007), 32(6) *European Law Review* 787-818; Case Comment' "*Harrow LBC v. Ibrahim (C-310/08): homeless*", (2010) 13(3) *Journal of Housing Law* 45-47; Ed, "Three paradoxes of EU citizenship," (2010) 35(2) *European Law Review* 129-130; Starup and Elsmore, "Taking a logical step forward? Comment on *Ibrahim* and *Teixeira*," (2010) 35(4) *European Law Review* 571-588; Dougan and Spaventa, "Educating Rudy and the non English patient: a double bill on residency rights under Article 18 EC," (2003) 28(5) *European Law Review* 699-712; Szyszczak, "European Union Law: Citizenship and Human rights," (2004) 53(2) *International & Comparative Law Quarterly* 493-501; Guibboni, "Free Movement of Persons and European Solidarity", (2007) 13(3) *European Law Journal* 360-79; Dougan, "The Constitutional dimension to the case law on Union citizenship,"(2006) 31(5) *European Law Review* 613-641; *Case C-480/08 Teixeira v. Lambeth LBC* [2010] P.T.S.R. 1913, "(2010) 13(3) *Journal of Housing Laws* 45-47.

⁷As Wiesbrock,²¹ argued that alongside these legislative developments, the European Court of Justice played a crucial role in identifying Union citizenship as the “fundamental status of nationals of the Member States” and underlining the application of the Treaty’s Free-Movement provisions to economically active and non-economically active citizens. Thus, through successive Treaty amendments, the adoption of secondary legislation and the case law of the European Court of Justice, Free-movement rights were gradually decoupled from “Market citizenship” and extended to non-economically active EU citizens. On the other hand, Tryfonidou²² claim that this move towards convergence is part and parcel of the broader developments which have taken place in the context of Union citizenship and, in particular, of the re-conceptualisation of the market freedoms as economic rights to which all Union citizens are entitled. The question was grounded on whether on the departure of a Union citizen who has exercised Treaty rights in a host State, where he had children and stepchildren attending educational courses in the presence of their Third Country national mother acting as their primary carer, whether those children can rely on Article 21.1 TFEU to acquire right of residence for themselves and their caring mother until the completion of their general education as a right enshrined under Article 12 of Regulation 1612/68? As it transpired two situations emerged between two family. In the *Baumbast* family case, a relationship between a German and his Colombian wife, child and step child, the Court took the view in extending its

²¹ Wiesbrock, “Free movement of third-Country nationals in the European Union: the illusion of inclusion,”(2010) 35(4) *European Law Review* 455-475;Barnard, *The substantive Law of the EU: The four Freedoms* (Oxford, 3rd ed., 2010) at 422-423; Elsmore and Starup, “Taking a logical step forward? Comment on *Ibrahim and Teixeira*,” (2010) 35 (4) *European Law Review* 571-588;Cullen, “From Migrants to Citizens? European community policy on Intercultural Education,”(1996)45 *International & comparative Law Quarterly* 109.

²² Tryfonidou, “Further steps on the road to convergence among the market freedoms,” (2010) 35(4) *European Law Review* 455-475.

jurisprudence on the application of Article 21.1 TFEU that Article 21.1 TFEU Confers a directly effective right which entitles the couple's children to reside, or to continue to reside, in the United Kingdom while attending general educational courses, and the mother was entitled to remain as the primary carer of those children while they completed their education subject to the general principle of Community law and the principle of proportionality. The Court maintained that the right to move and reside in another Member State now benefit both economically active and non-economically active Union citizens. Dougan and Spaventa²³ expressed dissatisfaction over the application of Article 21 TFEU to create a new right which did not tally with the provisions of the Treaty. They argued that, the Court carefully avoided suggesting that the Community legislature had imposed conditions upon free movement which were in themselves capable of constituting a disproportionate restriction upon the citizen's rights under the Treaty. They said this raises the question: how did the Court nevertheless manage to recognize enforceable right to residency for Union citizens which did not tally with the provisions of the Residence Directives? The answer they argued, was by imposing additional obligations upon the Member States, draw directly from the general principles of the Community legal order, which temper the manner in which national authorities seek to apply or enforce the Residency Directives. These principles began to dominant the jurisprudences of the Court and further development soon ensued in the *Zhu* and *Chen* case,²⁴ where a baby, born to

²³ Dougan and Spaventa, "Educating Rudy and the non English patient: a double bill on residency rights under Article 18 EC," (2003) 28(5) *European Law Review* 699-712; Horspool and Humphreys, *Core Text Series European Union Law* (Oxford, 2010) at 464 para. 13.42; Craig and De Burca, *EU Law, Text cases and materials* (Oxford, 4th ed., 2008) at 851-853.

²⁴ *Case C-200/02 Chen v. Secretary of State for the Home Department* [2004] E.C.R. 1-9925.at 25; Craig and De Burca, *EU Law, Text cases and materials* (Oxford, 4th ed., 2008) at 853-855; Barnard, *The substantive Law of the EU: The four Freedoms* (Oxford, 3rd ed., 2010) at 422-423; Bhabha, "Arendt's Children: Do Today's Migrant children Have a Right to Have Rights?," (2009) 31 *Human Rights Quarterly* 410.

Chinese parents in Northern Ireland which gave the baby the nationality of the Republic of Ireland (i.e., Irish nationality), enjoyed the rights of Union citizenship. She therefore enjoyed the right to reside in the United Kingdom under Article 21.1 TFEU, subject to the limitations and conditions laid down by Directive 90/364 (now Article 7.1.(b) of the Citizens Rights Directive 2004/38) which had to be interpreted narrowly. This *modus operandi* whereby Community secondary legislation is reinterpreted (or even effectively rewritten) according to the demands of primary law, and it is for the Member States to bridge the resulting gap between what Community measures say and what the Treaty actually requires is hardly without precedent. A similar result could be seen in *Garcia Avello*,²⁵ where the Court conferred right irrespective of cross-border movement, concerning a Belgian prohibition on change to a registered surname, where Belgian law required the father's surname to be registered but the children wished-given their Spanish nationality-to add the surname of their mother. The children relied on Article 12 EC, together with Article 20 TFEU, to claim that they were being discriminated against by comparison with other Belgian nationals. The Court ruled in their favour on both the 'internal situation' point as well as on the claim of discrimination: The Court rejected the various arguments put forward by Belgium to justify the refusal to allow a change of surname in these circumstances, and ruled that the refusal was in violation of Articles 12 and 17 of the EC Treaty.

²⁵ *Case C-148/02 Carlos Garcia Avello v. Etat Belge* [2003] E.C.R. 1-11613 at 21, 36, 43-44; Craig and De Burca, *EU Law, Text cases and materials* (Oxford, 4th ed., 2008) at 856-858; Horspool and Humphreys, *Core Text Series European Union Law* (Oxford, 2010) at 456; Barnard, *The substantive Law of the EU: The four Freedoms* (Oxford, 3rd ed., 2010) at 436-442; Tryfonidou, "In search of the aim of the EC Free movement of persons provisions: Has the Court of Justice missed the point?," (2009) 46 *Common Market Law Review* 1591-1620 White, "Free movement, equal treatment, and citizenship of the Union," (2005) 54(4) *International & Comparative Law Quarterly* 885-905; Kostakopoulou, "European Union Citizenship: Writing the future," (2007) 13 *European Law Journal* 623-646.

⁸Shaw,²⁶ argued that the role of the Member States as the gatekeepers of EU citizenship, determining access to Union citizenship by reference to the limits of nationality laws at the Member State level, implicitly ‘nationalises’ EU citizenship. Conversely, she asserted, that it is also possible to see how aspects of national citizenship have themselves become ‘Europeanised’. The boundaries of national citizenship are no longer as sharply delineated as they once were, largely as a result of the impact of EU law, but also because of other supranational and international legal orders. She discusses Union citizenship not from the (more common) perspective that it depends on the limits of Member States’ laws regarding nationality, but that it blurs these limits by extending rights to non-nationals. Michael Dougan,²⁷ based his argument on the scope of Union citizenship by exploring how the Court has used the Treaty provisions on citizenship, equal treatment, and free movement rights, as well as secondary legislation to fasten its grip on welfare law despite the fact that it remains largely outside of the European Union’s regulatory power. He argued that the Court make two discrete legal tools- the barriers to movement principle as a means of challenging the territorial limitations of the home state, and the right to equal treatment as a means of overcoming the nationality limitations of the host state-work together to enhance the practical value of Union citizenship for broader category of its potential beneficiaries that either of those legal tools could hope to achieve on its own.

²⁶ Shaw, Citizenship and Enlargement: The Outer limits of EU Political Citizenship, in Barnard and Odudu, *The outer limits of European Union Law* (Oxford and Portland, Oregon, 2009) at 63-67; Hailbronner, “Union citizenship and Access to Social Benefits,” (2005) 24 *Common Market Law Review* 1245; Dougan, “The Constitutional Dimension to the Case law on Union Citizenship,” (2006) 31 *European Law Review* 613.

²⁷ Barnard, *The substantive Law of the EU: The four Freedoms* (Oxford, 3rd ed., 2010)at 443-456; Dougan, *Expanding the frontiers of EU Citizenship*, in Barnard and Odudu, *The outer limits of European Union Law* (Oxford and Portland, Oregon, 2009) at 130-135; Mather, “The Court of Justice and the Union Citizen,”(2005) 11 *European Law Journal* 722

In the context of unemployment benefits the Court has also modified the legal perspective by developing further the principle laid down in the *D'Hoop* decision firstly in the *Collins* case²⁸ in the light of the Courts new interpretation and contrary to its earlier decision in *Lebon*,²⁹ that a job seeker was henceforth entitled under Article 39 to a 'benefit of a financial nature intended to facilitate access to employment in the Labour market of a Member State. The Court following the reasoning in *D'Hoop* decided in *Collins* that although it was legitimate for a State to require that a job-seeker has a genuine link with the employment market of the State, (e.g., by requiring that the person has for a reasonable period genuinely sought work in that State) a residence condition would have to be applied in a proportionate and non-discriminatory way. *Collins* was subsequently confirmed in *Ioannidis*. Similarly in *Turpeinen*,³⁰ *Pusa*,³¹ and *N*,³² the Court ruled that a range of restrictive tax measures imposed by Member States were potentially in violation of Article 18 regardless of the status of the applicant as a worker.

²⁸ *Case C-138/02 Collins (Brian Francis) v. Secretary of State for Work and Pensions* [2003] E.C.R. 1-2703; Craig and De Burca, *EU Law, Text cases and materials* (Oxford, 4th ed., 2008) at 866-868; Barnard, *The substantive Law of the EU: The four Freedoms* (Oxford, 2nd ed., 2007) at 439.

²⁹ *Case 316/85 Centre Public d'aide Sociale de Cpurcelles v. Lebon* [1987] E.C.R. 2811; *Case C-66/85 Deborah Lawrie-Blum v. Land Baden-wurttemberg* [1986] E.C.R. 2121; *Case C-22/08 and C-23/08 Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nurnberg 900* [2009] E.C.R. 1-4585.at 25-26, 30.

³⁰ *Case C-520/04 Turpeinen* [2006] E.C.R. 1-10685

³¹ *Case C-224/02 Pusa v. Osuuspankkien Keskinainen Vakuutusyhtio* [2004] E.C.R. 1-5763.

³² *Case C-470/04 N v. Inspector Van de Belastingdienst* [2006] E.C.R. 1-7409.

Moreover in *De Cuyper*³³ and *Tas-Hagen*,³⁴ concerning unemployment benefit and wartime benefits respectively, the Court ruled that national residence restrictions were prima facie in breach of Article 18 (now art. 21 TFEU).

⁹Conclusively, Shuibhne³⁵ contended that, it is important that the freedoms of movement fit into the broader framework of the objectives of the internal market and European citizenship. At present she suggested, the freedoms of movement must be understood to be one of the essential elements of the 'fundamental status of national of the Member States'. They represent the cross-border dimension of the economic and social status conferred on European citizens. She argued that, the interpretation of EU citizenship as a legal concept has been mostly about nudging the outer limits of the status further outwards. Article 18 EC (now art. 21 TFEU) suggests that the limits to the movement and residence rights of citizenship law come from the Treaty itself and from legislation adopted to give effect to it. In my view, it would seem that from the saga of the establishment of the European Community, a clear aim to establish a Union without internal frontiers for economic progression and social inclusion within what I would construe a 'Nation state' was intended. This dream has not dwindled as the Court of justice has now taken on the mantle as a judicial instrument for complete realization of the aspirations of the founders of this movement in Brussels.

³³ *Case C-406/04 De Cuyper v. ONEM* [2006] E.C.R. 1-6947.

³⁴ *Case C-192/05 Tas-Hagen v. Raadskamer WUBO van de pension-en Uiteringsraad* [2006] E.C.R. 1-10451; Barnard, *The substantive Law of the EU The four Freedoms* (Oxford, 2nd ed., 2007) at 415; Barnard, *The substantive Law of the EU The four Freedoms* (Oxford, 3rd ed., 2010) at 422-424.

³⁵ Shuibhne, *The outer limits of EU Citizenship: Displacing Economic Free Movement Right*, in Barnard and Odudu, *The outer limits of European Union Law* (Oxford and Portland, Oregon, 2009) at 167-195; Currie, "EU Migrant Children, their primary carers and the European Court of Justice; Access to Education as a precursor to Residence under Community law," (2009) 16 *Journal of Social Security Law* 61

This dream has resulted in the continuous expansion of rights by interpreting the concept of Union citizenship towards that objective thus undermining the economic based reasoning behind free movement to now prescribing that resort to the social assistance system of the host State shall not result to automatic expulsion of Union citizens and of course, recently we were told that the loss of Member State nationality does not per se place a claimant altogether outside the scope of Union Law, but constitutes a restriction on the rights associated with Union citizenship, which justifies scrutiny under the Treaty before it can validly take effect ³⁶and indeed that a child resident in his country of origin has a right as a Union citizen to have a Third Country parents reside and work there in the recent *Zambrano* ³⁷decision. It is now uncertain how citizenship laws would impact and influence the acquisition of the nationality of a Member State in future.

³⁶ *Case C-135/08 Rottmann v. Freistaat Batern* [2010] E.C.R. 00; Steiner and Woods, *EU Law* (Oxford, 10th ed., 2009) at 462-465; Roth, "The internal Market and The four Freedoms,"(2004) 41 *Common Market Law Review* 407 at 418.

³⁷ *Case C-34/09 Gerarado Ruiz Zambrano v. Office national de l' employ (ONEm)* [2009] E.C.R.0

1.6 THE ORIGINAL FRAGMENTARY SECONDARY LEGISLATION

¹⁰This part of the thesis addresses issues of conditions for the acquisition and derivation of right of entry and residence for Union citizens under earlier secondary legislations. The earlier secondary legislation adopted in the light of Article 45 TFEU (ex art. 39 EC) on the freedom of movement of EC Citizens and their family members laid down the secondary source right which presently constitutes the derivative right of residence laid down in the Regulation of 1968 defines the workers family as ‘spouse and their descendants under the age of 21 years or are dependants’ and ‘dependant relatives in the ascending line of the worker and his spouse irrespective of their nationality’. ¹ The more distant relatives did not have automatic right to join or accompany the Union Citizen but may be admitted into the host state as Art 10.2 of Regulation (EEC) No 1612 provides.² The court of justice laid down the conditions that had to be satisfied for these family members to be able to derive a right under Community law in *Diatta* case.³ In this case, the applicant was a Senegalese national who had married a French national, and both were resident and working in Berlin.

¹ Article 10(1) of Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (1968) OJ L 257/2.

² Article 10 (2) of Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of Movement for workers within the Community (1968) OJ L 257/2; Power, “*Commission V. Italy (C-531/06)*, and *pothekerkammer des Searlandes (C-171 & C-172/07)*, European Union freedom of establishment-general interest restrictions,” (2009) 20(10) *International Company and Commercial Law Review* N48-49; Winkelmueller, “ECJ-German gambling Law Violates EU Law,” (2011) 22(1) *Entertainment Law Review* 41-43.

³ *Case C-267/83 Diatta v. Land Berlin*, [1985] E.C.R. 567; *Case C-370/90, Immigration Appeal Tribunal ex p. Secretary of state for the Home Department* [1992] E.C.R. 1-4265; Spaventa, “Seeing the Wood despite the Trees? On the scope of Union Citizenship and its Constitutional Effects,” (2008) 45 *Common Market Law Review*, P. 19.

¹¹After some time together, she Separated from her husband with the intention of divorcing him, and moved into separate accommodation. She was then refused an extension of her residence permit on the ground that she was no longer a family member of an EC national. The question was whether a migrant worker’s family must live permanently with that worker in order to qualify for a right of residence.

‘The position was that as long as the Union citizen continue to exercise Treaty rights in the host State by working and residing there, it was irrelevant where the couple resided . As regards the marital relationship, the court was of the view that it is not dissolved so long as it has not been terminated by the competent authority and that it is not dissolved by the fact that the spouses live separately, even where they intend to divorce at a later date’.

The origin of the principle of derivative right of residence for family members of Union citizens stem from the above jurisprudence. Although a free standing right of residence for the family members may be acquired in exceptional circumstances after the death or departure of the Union citizen, as in the *Baumbast* case.⁴

⁴ Starup, “ Taking a logical step forward? Comment on Ibrahim and Teixeira,” (2010) 35(4) *European Law Review* 571-588; Art 3 of Council Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (1970) OJ L 142/24 7; Currie, “EU Migrant children, their primary Carers and the European Court of Justice, access to education as a precursor to residence under community law,” (2009) 6(2) *Journal of social Security Law* 76-106; Rutledge, “income support European Citizenship Directive 2004/38/EC, art. 16,” (2011) 18(1) *Journal of Social Security Law* 13-14.

1.7 METHODOLOGY AND LITERATURE REVIEW

¹²The research methodology relies on the primary and secondary sources of European Community Law to test and consolidate data for the achievement of the results that the research set out to unearth. This primary sources includes the Treaty establishing the European Community , Regulations, Directives, decisions , Recommendations and opinions and other methods of Developing policy on free movement of persons .Whereas the secondary sources are Statutory instruments implementing the free movement of person rules into domestic Irish legislation. The primary Treaty provisions reviews the concept of European Citizenship as it interrelates with the free movement of Union citizens and their family members in the context of Article 20 TFEU (ex art. 17EC) and article 21 TFEU (ex art. 18 EC), whilst also embracing the original fragmentary secondary legislation which regulated the free movement of persons prior to the introduction of the Union citizenship concept being Regulation 1612/68 and of course, the recent Citizens Directive 2004/38/EC which has been implemented into Irish domestic law by virtue of the European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 656 of 2006) and European Communities(Free Movement of Persons) Amendment Regulations 2008 (S.I. No. 310 of 2008). The author uses qualitative and quantitative research methods to collect data via survey questionnaires and individual in-dept interviews and letters to enable the author draw up a report, experiment and evaluate the subject matter of the thesis based on the personal experiences of experts, practitioners in the field of free movement of persons, selected categories of Union citizens and their family members in Ireland and arrive at a conclusion that reasonably establishes whether or not a fair balance has been struck in the manner Ireland has approached issues of right of entry and residence for Union citizens and their family members since the implementation of the Citizens Directive on the 28 April 2006.

CHAPTER TWO

2.1 INTRODUCTORY ISSUES

¹³ This chapter examines and investigates the nature of the right of Irish born children pre and post *Zambrano*¹ detailing the constitutional protection accorded to Irish born children in immigration cases in Ireland . It explores the *ratio decidendi* of the Irish Supreme Court in the *Fajujonu* case² and challenges its compatibility with international and European Union Law. It examines the decision of the Supreme Court in *Lobe*³ and the limitations imposed by the Irish Courts on the right of the child at the expense of protecting its asylum and immigration system. It looks at the *Lobe* case on the basis of the “flood gate” argument and abuse of the asylum process. It also examines the *Chen* case⁴ which had effectively recognized the right of residence of a Minor Union citizen to reside indefinitely with her caring mother under EU Law. It considers the effect of the June 2004 referendum and how it restricted automatic Irish citizenship right by birth and the subsequent introduction of the Irish born child Scheme and series of cases that ensued under that

¹ Colon, *Ties that bind: governmentality, the State, and asylum in contemporary Ireland* (USA, 2010) 28 at 95-111; *Case C-34/09 Gerarado Ruiz Zambrano v. Office national de l' employ (ONEm)* [2009] E.C.R.0; Breen, “Refugee Law in Ireland: disregarding the rights of the child-citizen, discriminating against the rights of the child,” (2003)15(4) *International journal of Refugee Law* 750-785.

² *Bankole Lawrence Fajujonu, Zohra Fajujonu and Miriam Fajujonu (an infant suing by her next friend Celine Maher) v. The Minister for justice, Ireland and The Attorney General* [1990] 2 IR 151.

³ *Osayende, Lobe and Others v. Minister for Justice* (joined cases) (Unreported, High Court, 8th April, 2002); Cubie and Ryan, *Immigration, Refugee and Citizenship Law in Ireland cases and materials* (Dublin, 2004) at 277.

⁴ *Case C-200/02 Chen v. Secretary of State for the Home Department* [2004]E.C.R. 1-9925; Hofstotter, “A cascade of rights, or who shall care for little Catherine? Some reflections on the Chen case,” (2005)30(4) *European Law Review* 548-558.

Scheme, such as the *Bode* case.⁵ The Chapter investigates the impact, influences and challenges of Union citizenship and indeed, the *Zambrano* judgment⁶ on the right of the Irish born child in immigration cases in Ireland and how the concept of Union citizenship may aid adult Irish nationals married to Third Country nationals to acquire right to family reunification in Ireland as Union citizens in the light of the *McCarthy* decision of the Court of Justice.⁷ The chapter draws its foundation from the analysis laid down in chapter one as to the impact and influences of Union citizenship to Irish immigration laws and in achieving the objective of this chapter, arguments put forward by various theorists would be utilized to consolidate the reasoning behind the on-going debate respecting the issues posed.

⁵ *Bode v. Minister for Justice, Equality and Law Reform* [2007] I.E.S.C. 62 at 24; Mullally, "Citizen Children, "impossible subjects" and the limits of migrant family rights in Ireland," (2011) 1 *European Human Rights Law Review* 43-53; Cubie and Ryan, *Immigration, Refugee and Citizenship Law in Ireland cases and materials* (Dublin, 2004) at 249-284; Fraser and Harvey, *Sanctuary in Ireland perspectives on Asylum Law and policy* (Dublin, 2003) at 229-245; Stevens, "Asylum-Seeking families in Current legal Discourse: A UK perspective," (2010) 32(1) *Journal of Social Welfare and Family Law* 5-22.

⁶ *Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l' employ (ONEm)* [2009] E.C.R.O; Breen, "Refugee Law in Ireland: disregarding the rights of the child-citizen, discriminating against the rights of the child," (2003) 15(4) *International journal of Refugee Law* 750-785. Shuibhue, "Seven questions for seven paragraphs," (2011) 36(2) *European Law Review* 161-162; Hofstotter, "A cascade of rights, or who shall care for little Catherine? Some reflections on the Chen Case," (2005) 30(4) *European Law Review* 548-558.

⁷ Ritter, "Purely internal situation situation, reverse discrimination, Guimont, Dzodzi and Article 234," (2006) 31(5) *European Law Review* 690-710 ; *Case C-434/09 Shirley McCarthy v. Secretary of State for the Home Department* [2011] E.C.R.O

2.2 RIGHTS OF THE IRISH CHILD IN IMMIGRATION LAW IN IRELAND: PRE ZAMBRANO

¹⁴For the purpose of the present chapter, this section of the thesis will set a detailed analysis of the right of Irish born children to Third Country Nationals who are asylum seekers or refugees in Ireland, the right to reside by virtue of Irish Constitutional law starting with the *Fajujonu* case,¹ then *Lobe*,² *Chen* case³ of the Court of Justice, the Irish born child scheme of 2005, the *Bode* case⁴ and then the impact and implications of the *Zambrano*⁵ decision of the Court of Justice. The purpose of this chapter is to establish a relationship between the right of Irish born children whose right to have their Third Country parent reside with them in Ireland has been subject to serious litigations and in most cases refusal under domestic Irish law with the rule of European Citizenship detailed in chapter one of this thesis and to ascertain whether a fair balance has been struck in the manner the rights of Irish born children have been approached in Ireland since *Fajujonu*. To appreciate the extent of the rights being a citizen of Ireland accords, it would be relevant to give a descriptive insight to what 'Citizenship' entails. Bosniak⁶ in his Article describes citizenship with detailed comparison to personhood as being opposing concept. He argued that while citizenship references national belonging and its associated rights, personhood evokes the rights and dignity of individuals independent of national status.

¹ *Bankole Lawrence Fajujonu, Zohra Fajujonu and Miriam Fajujonu (an infant suing by her next friend Celine Maher v. The Minister for Justice, Ireland and The Attorney General* [1990] 2 IR 151.

² *Osayende, Lobe and Others v. Minister for Justice (joined cases)* [2003] IRSC 3.

³ *Case C-200/02 Chen v. Secretary of State for the Home Department* [2004] E.C.R. 1-9925.

⁴ *Bode v. Minister for Justice, Equality and Law Reform* [2007] I.E.S.C. 62.

⁵ *Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'employ (ONEm)* [2011] E.C.R. 0.

⁶ Bosniak, "Persons and Citizens in Constitutional thought," (2010)8(1) *International Journal of Constitutional Law* 9-29.

Personhood stands for the universal, in contrast to citizenship, which is ultimately exclusionary. The most well-known exponent of this view is Alexander Bickel,⁷ who eschewed a citizenship-centric Constitutionalism on grounds it was “regressive” and “Parochial”. He maintained that “the authentic voice of the American Constitution” finds expression through its protection of persons. In the Irish Constitutional context, the Constitution reserves to the family as people a certain sphere of authority and that within this sphere it has inalienable and imprescriptible rights.⁸ But this does not mean that the sphere of authority is unlimited or the rights absolute. In terms of the balance struck between the rights of the child, the family and the state under the Irish Constitution. The question that beclouded the Irish courts for many years since the 1990s in respect of asylum and Immigration cases is whether a Child who holds the Citizenship of the State by birth right and born to a Third Country national could by virtue of being a citizen of the Irish state have his Third Country national parents reside in Ireland? To understand the judicial perspective of what rights an Irish citizen child has to have relatives reside with him in Ireland, would require a critical assessment of the scope of appreciation of international agreements on the right of the child of which Ireland has corroborated in contrast to its application of the Irish Constitution to these immigration cases. Firstly, Breen in his article contends that the distinction between the legal effects of international law and domestic law has been reiterated by the Supreme Court decision of *Doyle v. The commissioner of An Garda Siochana*.⁹ In *Doyle*, the relationship between Irish domestic law and the provisions of the European Convention was stated as follows:

⁷ Bickel, *The Morality of Consent* (Yale Univ, Press 1975) at 47 and 53.

⁸ Article 41.1.1 of the Constitution of Ireland 1937.

⁹ *Patrick Doyle v. The Commissioner of An Garda Siochana* [1999] 1 IR 249; Breen, “Refugee law in Ireland: Disregarding the rights of the Child-citizen, discriminating against the rights of the child,” (2003)15(4) *International Journal of Refugee law* 750-785.

“The convention may overlap with certain provisions of Irish Constitutional law and it may be helpful to an Irish Court to look at the Convention when it is attempting to identify unspecified rights guaranteed by article 40.3 of the constitution. Alternatively the Convention may, in certain circumstances, influence Irish law through European Community Law. But the Convention is not part of Irish domestic law and the Irish Court has no part in its enforcement”

¹⁵In the light of the above, the right of the Irish child to have a Third Country parent reside with him in Ireland rest entirely on what the Courts perceive the right to be in the light of Constitutional prescription and Common Law as oppose to what international Convention dictates, to me, this is a breach of the right to fair hearing under Article 6 of ECHR. This has been the basis upon which the right of the child has been determined in Immigration cases in the Irish State. Siobhan Mullaly¹⁰ explained that the case of *Oshoku v. Ireland*¹¹ was the earliest case to ascertain the scope of the rights of the child in the Constitution in immigration matters in the State. Gannon J defended a quintessentially state-centered view on the limits and scope of fundamental rights. There were, he said, “fundamental rights of the State itself as well as fundamental rights of the individual citizens and the protection of the former may involve restrictions, in circumstances of necessity, on the latter. How precisely to define those circumstances of necessity and what limits the rights of children and migrant families might impose, has preoccupied the Courts for years. This question continued to loom and as Coulter¹² stated in her article, the family has a

¹⁰ Mullally, “Citizen Children, “Impossible subjects” and the limits of migrant family rights in Ireland,” (2011) 1 *European Human Rights Law Review* 43-53; Blake QC and Husain, *Immigration, Asylum & Human Rights* (Oxford, 2003) at 40-52.

¹¹ *Oshoku v. Ireland* [1986] I.R. 733.

¹² Coulter, “Supreme Court Decision in Landmark Immigrant Residency Case,” *The Irish Times*, 24 January 2003.

special place in the Irish Constitution, and it has been frequently said that the rights of the family are superior to those of the State itself. The legal views of the Supreme Court in the initial stage of its deliberations favoured such a view as could be seen in the *Fajujonu* case where the Supreme Court Concluded that:

“a citizen child had a Constitutional right to the “company, care and parentage of their parents within a family unit”, and only a “grave and substantial reason associated with the common good” could justify the imposition of restrictions on this right. Particular emphasis was placed on the “appreciable time” of the family within the State and Walsh J. noted that deportation proceedings could not be taken against a family that included citizen children, simply because of a family’s limited financial resources”.

¹⁶As Nuala Haughey¹³ contended that, following the decision in the *Fajujonu* case, in the intervening years the number of failed asylum-seekers applying to remain in the State on the basis of the *Fajujonu* judgment has increased significantly. So too have the authorities’ concerns that asylum-seekers are increasingly using this precedent to stay in the State if their claim to remain as refugees fleeing persecution is not successful. To describe the feeling of the state to this situation, Ronit Lentin,¹⁴ argued that the state of the Republic of Ireland has created what Giorgio Agamben¹⁵ calls a ‘state of exception’, in which state

¹³ Haughey, “State contesting right of non-EU parents of Irish Children to stay some 2,700 non-EU migrants with Irish Children were allowed stay last year”, *The Irish Times*, 9 January 2002.

¹⁴ Lentin, “Femina Sacra: Gendered memory and political violence,” (2006)26(5) *Women’s studies international forum* 463-473; Harrington, “Citizenship and the Biopolitics of post-nationalist Ireland,”(2005) 32(3) *Journal of Law and Society* 424-429

¹⁵ Giorgio, *State of Exception Chicago and London* (Chicago, University press 2005); Conlon, *Ties that bind: governmentality, the State, and asylum in contemporary Ireland* (USA, 2010) Volume 28 at 95-111.

racism combines with what Michael Foucault¹⁶ calls 'biopolitics', in a contemporary move from institutional to constitutional racism.¹⁷ Her argument was that State racism has assumed gendered forms specifically targeting women migrants through their mothering role.

¹⁷In sum, the political and social tension created by these debates as could be seen in the next section of my discourse soon altered judicial perspective and rendered the rights of the Irish citizen child in the Constitution subject to stricter scrutiny and in most cases rejection. The question is why did the Irish courts fail to apply or consider the clear tenets of European Union law in the determination of the right of parents of Irish born children? It would seem to me that the Court of Justice has laid down clear principles and guidelines as to how Member States should construe and apply the concept of Union Citizenship and its associated rights. In *Garcia Avello*,¹⁸ the Court held that the situation of a national of one Member State who has only ever lived in the host Member State cannot be assimilated to a purely internal situation. This in my view, is clear evidence that there is reasonable probability than fantastic possibility that had the rules on Union citizenship been applied, a reference for preliminary ruling would no doubt have yielded the same result as subsequently made in *Chen* and *Zambrano*. The disregard of the right of Irish born children under the Convention for the protection of fundamental rights and freedoms on the grounds that the Irish Courts has no obligation in its enforcement most especially after the Convention was incorporated into Irish law by the Act of 2003 in my view amounted to a serious violation of Article 8 right to respect for family life.

¹⁶ Foucault, *Society Must Be Defended* (London, 1975-76).

¹⁷ Lentin and Mcveigh, "After optimism? Ireland, Racism and Globalisation," Dublin, Metro Eireann Publications 2006.

¹⁸ See paragraph 45 page 41 of this thesis for my analysis in respect of *Garcia, Marks and Spencer and Cadbury Schwepps cases*.

2.3 CONSTITUTIONAL RIGHTS LIMITED: BABY IS A TICKET TO STAY IN IRELAND

¹⁸While the right to citizenship on the basis of birth on Irish soil was solely a legislative right prior to 1999, with the replacement of the former Article 2 of Bunreacht na hEireann (Constitution of Ireland) and the passage of a new Article 2, which in the section relevant for these purposes stated,

‘It is the entitlement and birthright of every person born in the Island of Ireland, which includes its Island and seas, to be part of the Irish Nation’

Therefore it was a constitutional right of any child born on the Island of Ireland to gain Irish citizenship. What became prominent within the polity was growing trend of immigrants having children in the State with the aim of subsequently gaining residency as a result of the precedent set in *Fajjonu* and the clear protection afforded by the Irish Constitution. As Mairead Enright ¹⁹put it in his article, a succession of legal attacks on what have come to be known (in a phrase which underlines the precariousness of their relationship to the nation) as ‘Irish born children’, and ‘non-nationals’ is the sense in which children are cast as mere conduits for the flow of purportedly undersirable culture and bodies into Ireland. These, to use an American term, are mere ‘anchor babies’. Their rights are supposedly instrumentalize by their parents to gain access to a hostile state, and are recycled by the state in an effort to exclude their parents. Liam Thornton²⁰ illustrated the predicament from the Minister for Justice perspective, Mr. Michael McDowell who argued that many of these women, were here to claim asylum.

¹⁹Enright, “Migrants and Child Citizens:Ireland and Greece, Human Rights in Ireland” (Dublin, 2011), available at www.humanrights.ie/index.php/2011/03/09/impact-of-the-cjeu-decision-Zambrano-an; Cubie and Ryan, *Immigration, Refugee and Citizenship Law in Ireland cases and materials* (Dublin, 2004) at 249-284

²⁰Thornton, “*Impact of the CJEU Decision: Zambrano and Irish Law Human Rights Ireland*” (Dublin 2011), available at www.humanrights.ie/index.php/2011/03/09/impact-of-the-cjeu-decision-Zambrano-an.

¹⁹This he argued, was resulting in pressure on maternity wards, as well as the possible negative health consequences for those arriving late into their pregnancy. Dr. Siobhan Mullally²¹ noted the moral panic surrounding the politics of arrival for migrant women within Ireland at that time. Multiple discriminations on the basis of gender, race, ethnicity and migration status were an underlying issue. On the other hand, these debates illustrated not only the orchestrated moral panics about ‘floods of Refugees’ or ‘flood gates’ being opened, but also the positioning of sexually active Irish (m)others having children out of wedlock. Amidst these extensive debates and commentaries, in 2003, the Supreme Court was again posed with the task as Coulter²² puts it, finding the required protection for the integrity of the asylum system or preserving respect for the asylum and immigration system, as an overriding reason put forward by the State in interfering with the rights of these families . In responding to the concern of the State, the Supreme Court in answering the question posed in *Lobe*, was unequivocal that both the factual and statutory context in which the Minister is required to decide whether a deportation order should be made has altered radically since *Fajujonu* was decided. They were clearly of the view that the orderly system in place for dealing with immigration and asylum applications should not be undermined by persons seeking to take advantage of the period of time which necessarily elapses between their arrival in the state and the complete processing of their applications for asylum by relying on the birth of a child to one of them during that period as a reason for permitting them to reside in the State indefinitely.

²¹ Mullally, “Citizen Children, “Impossible subjects” and the limits of migrant family rights in Ireland,” (2011) 1 *European Human Rights Law Review* 43-53; Tormey, “Everyone with eyes can see the problem”:Moral citizens and the Space of Irish Nationhood,”(2007) 45(3) *Journal of international migration* 69-100. Fanning and Mutwarasibo,“Nationals/non-nationals: Immigration, Citizenship and politics in the Republic of Ireland,”(2007) 30(3) *Ethnic and Racial studies* 439-460

²² Coulter, “Supreme Court Decision in Landmark Immigrant Residency Case,” *The Irish Times*, 24 January 2003; Keane, C.J. “what’s to Befall These Irish Children,” *The Irish Times*, 9 April 2002.

²⁰The supreme Court, by a five-two majority,²³ subsequently upheld the decision of the High Court in deciding that non-national parents of Irish born children and their non-national siblings were not entitled to live in Ireland by virtue of having an Irish-born child. In dismissing the appeal Keane CJ referred to the Constitutional rights of the children involved to reside in Ireland and stated that whilst these rights were not absolute the State had no right to deport any Irish citizen, including the children in question. However, Keane CJ was of the opinion that the parents of the children in question could not assert a choice to reside in the State on behalf of their children even if such a decision was in the interest of those children. However, according to Keane CJ, these children were both factually and legally incapable of making such a choice. In effect, the parents must choose to withdraw their children, who are Irish citizens, from the benefits and protection of Irish Law under the Constitution or alternatively, to effectively abandon them with the State, which would then be obliged to support them.

²¹In sum, the government took its cue. It ceased granting residence permits on the basis of parenthood of an Irish born child and began deporting people who had no other basis for remaining in the State. The grueling referendum campaign began and in 2004, the Irish people passed a constitutional amendment which states:²⁴

“Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by Law”.

²³ *Osayende, Lobe and Others v. Minister for Justice (joined cases)* [2003] IRSC 3. Fanning and Mutwarasibo, (2007) 30(3) *Ethnic and Racial studies* 439-460.

²⁴ Article 2.2 of the Constitution of Ireland 1937.

The Irish Nationality and Citizenship Act 2004 came into force on 1 January 2005 removing the automatic right to Irish citizenship by birth on the island of Ireland save also where one of the Third Country national parent has been lawfully resident in the State for three of the previous four years.

2.4 EUROPEAN UNION CITIZENSHIP: STRENGTH IN PURELY INTERNAL SITUATION

²²This section of the thesis discusses the scope and extent of the impact and application of the Union citizenship concept by the Court of Justice and how it has influenced and challenged immigration policies at the national level. It focuses on the extent Article 17EC (now art. 20 TFEU) and 18EC(now art. 21TFEU) could impact on the right of a Union citizen child in the Member State of origin irrespective of cross-border element. Most theorists have expressed concern often with optimism as to the scope of application of the rule on European Citizenship. Some have argued that its principle and application in the field of free movement of Union citizens constitute unnecessary interference with internal immigration rules of Member States. Dougan and Spaventa²⁵ argued that the EU cannot simply grant full rights of residency to all its citizens, because it cannot foot the consequent welfare bill, especially in respect of economically inactive individuals. The aspiration towards a supranational form of social citizenship, which many see embodied in Article 18 EC, must therefore remain sensitive to domestic conceptions belonging to (and being excluded from) the welfare society. Some theorists might hope that the new parameters of social solidarity prescribed by law will inspire sufficient popular acceptance to generate their own momentum of legitimacy. Indeed, the Court's approach may even help (in its own piecemeal way) to invest Union citizenship with the sense of Constitutional significance which will surely be required if it is to fulfill its destiny as the fundamental status of nationals of the Member States. Other theorists will no doubt query whether it is

²⁵Dougan and Spaventa, "Educating Rudy and the non English patient: a double bill on residency rights under Article 18EC," (2003) 28(5) *European Law Review* 699-712.

desirable for the Court to provide the primary driving force behind these development. As Preub²⁶ put it, Union citizenship began as a terminology pooling of the few rights which the individual enjoyed in other Member States. It neither generated an inner bond between the Community and the individual nor did it presuppose such an inner connection as a precondition for acquiring it. The recent developments, both legislative and judicial, suggest that these developments have generated a 'European citizenry' which could 'pave the way for the transition to a European Federal State' they have certainly enriched the status of citizenship, by creating some bonds between individuals a multiplicity of associative relations based on manifold economic, social, cultural, scholarly, and even political activities, irrespective of the traditional territorial boundaries of the European nation States, without binding individuals to a particular nationality. The extent to which this concept of European citizenship would go was amplified in the famous *Chen* case²⁷ where the court of Justice extended the right of residence to a Minor Union citizen by name *Catherine* who has never exercised Treaty rights outside of the United Kingdom to reside there with her mother who was her primary carer , whose child by virtue of the Nationality laws of Ireland was able to acquire Irish citizenship in the Northern Ireland by virtue of the good Friday agreement. The Court was unequivocal in its assertion that her status as an EU citizen did bring such rights under Directive 90/364, provided she satisfied the self-sufficiency conditions. This decision intensified the debate of the refusal of Irish born children a right to reside in Ireland with their non-national parent. As Coulter²⁸ puts

²⁶ Preub, "Problems of a Concept of European Citizenship," (1995) 1 *European Law Journal* 267.

²⁷ *Case C-200/02 Chen v. Secretary of State for the Home Department* [2004] E.C.R. 1-9925; Shuibhue, "Seven questions for seven paragraphs," (2011) 36(2) *European Law Review* 161-162; Hofstotter, "Acascade of rights, or who shall care for little Catherine? Some reflections on the Chen Case," (2005) 30(4) *European Law Review* 548-558

²⁸ Coulter, "European Court decision casts doubt on policy of deportation," *The Irish Times*, 20 May 2004.

it, that after the Supreme Court decision in *Lobe* and considering the *Chen* case²⁹ there are concerns in Government circles that Tuesday's *Chen* judgment in the European Court of Justice will give many of these families approximately 11,000 the right to reside in Ireland. Legal experts said that this meant that non-EU parents of Irish-born children could live anywhere in the EU except in Ireland, as the Supreme Court judgment still applied in this State. However, Government sources stated that the purpose of EU law as argued here was to eliminate any restriction on the right of movement of EU nationals, subject to them not being a financial burden on the host State. *Ms Chen* and her husband were business people with substantial financial resources. Some legal experts she said considered that this means the judgment will not be applicable to those families who do not have such resources, and who might be burden on another EU State. This view was not shared by Government advisers, who feel that it may not be possible to maintain a distinction between rich and poor in deciding on deportations. They point to the *Fajujonu* case, which established the right of the families of Irish-born children to live in Ireland. In this case the chief Justice. Mr. Justice Walsh, was highly critical of the Government for depriving *Mr. Fajujonu* of the capacity to support his family by refusing him a work permit.³⁰

²³In sum, the debate generated by the decision of the Court of Justice continued to be deliberated and reviewed in the light of the hard stance maintained by the Supreme Court on the right of Irish born Children in the Irish State.

²⁹ *Case C-200/02 Chen v. Secretary of State for the Home Department* [2004] E.C.R. 1-9925; Shuibhue, "Seven questions for seven paragraphs," (2011) 36(2) *European Law Review* 161-162; Hofstotter, "Acascade of rights, or who shall care for little Catherine? Some reflections on the Chen Case," (2005) 30(4) *European Law Review* 548-558

³⁰ Coulter, "European Court decision casts doubt on policy of deportation," *The Irish Times*, 20 May 2004.

2.5 IRISH CHILDREN AND NON-NATIONAL PARENTS: POST CITIZENSHIP REFERENDUM

²⁴With a Citizenship lock now in place, there remained many Irish children whose parents were non-nationals and who did not have a settled immigration status within Ireland. The outcome of the referendum, however, did not result in all non-nationals parents in this position being deported with their Irish citizen child. The Department of Justice, Equality and Law Reform introduced the Irish-Born Child Scheme 2005. ³¹This scheme was a process whereby each non-national parent with a citizen child but without a settled immigration status could apply to the Department of Justice to remain in the State (the latest renewal of this permission took place in 2010). Of the initial 17, 917 applications received, 16,693 applicants were granted leave to remain for an initial two-year period subject to renewal, while 1,119 applications were refused. Those applications refused constituted cases completed up to end of January 2006, as reproduced in the *Bode* judgment. The facts of some of the cases refused ranges from one extreme to another and briefly put , for instance in the *Oguekwe* case,³² the application was refused on the grounds that the applicant had not shown residence in the State with his son, or that he had played an active part in his upbringing on a continuous basis since his birth. However for the purposes of the present exercise, the thesis would focus on six other cases of which *Bode* was one and they included; *Bode*, *Fares*, *Oviawe*, *Duman*, *Adio* and *Edet*,³³ and judgments in all but the *Edet* case were delivered by the Supreme Court on December 20th, 2007. The particular issues raised in these cases was the requirement under the Scheme of continuous residence in the State with the Irish-born citizen child.

³¹ Enright, "Migrants and Child Citizens: Ireland and Greece", Human Rights in Ireland (Dublin, 2011), available at www.humanrights.ie/index.php/2011/03/09/impact-of-the-cjeu-decision-Zambrano-an.

³² *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] IESC 25.

³³ *Bode(A Minor) v. Minister for Justice, Equality and Law Reform and Others* [2007] I.E.S.C. 62.

²⁵In the High Court Ms. Justice Finlay Geoghegan found that the Minister's decision to refuse the parents residency in Ireland under IBC Scheme was invalid, because of a breach of the applicant's rights under Article 40.3 of the Constitution, and a breach of the Minister's obligations under Section 3 of the European Convention on Human Rights Act of 2003. This incorporated the Convention into Irish law, and Article 8 of the Convention guarantees respect for a citizen's private life, which she found included his enjoyment of the care of his parent. On appeal to the Supreme Court, The Court made a list of relevant factors that the Minister has to take into account when considering the deportation of any applicant .They found that the Minister was required to consider the Constitutional and Convention rights of all applicants, including their rights to be educated and reared in Ireland and including express consideration of those of the Irish-born child, in making his decision. This had not been done in either cases, so they upheld the decision of the High Court in reviewing the deportation orders. On this basis, the Minister invited further applications from those refused on humanitarian grounds to be considered on a case by case basis. The above represent the present state of the law as some of the factors listed above are to be considered under Section 3 of the immigration Act 1999.

²⁶Conclusively, It is important to note that in all the cases mentioned above issues of European Union Law were not considered. Therefore, it could be argued that these decisions can be distinguished from the facts and issues in *Zambrano*.³⁴ However, the present state of Irish law is that the decision in *Zambrano* is clear. Non-national parents of EU citizen children, irrespective of former or current immigration status within an EU Member State, have not only a right to reside within an EU Member State, but also must be provided the right to work in this State, as to support their EU citizen child.

³⁴ *Case C-34/09 Ruiz Zambrano v. Office National de l'Emploi (ONEm)*[2011] E.C.R. 0; Hofstotter, "Acascade of rights, or who shall care for little Catherine? Some reflections on the *Chen* Case," (2005) 30(4) *European Law Review* 548-558.

The present state of Irish law in the determination of the right of Irish born children post the Irish born child scheme 2005 could be said to include a determination under Section 3.6 of the Immigration Act 1999 addressed seriatim, Section 5 of the Refugee Act 1996 the prohibitions on refoulement are considered and the factors and circumstances relevant to the private and family life of the applicant and family members together with the Constitutional rights of the Irish born child are analysed and balanced.³⁵ Immigration policy in its general sense can clearly be a substantial reason for refusing leave to remain even to fathers of citizen children. This is not to say that the facts of any particular case may not render the refusal of leave to remain unreasonable in that particular case. That has been the law since *Osheku* and *Fajujonu*. No change has been brought about by the decision in *Meadows*.³⁶ Therefore, where the minors are Irish Citizens who cannot be deported, the judgments of the Supreme Court in the cases of *Dimbo* and *Oguekwe* make it clear that the Minister must take account of the personal rights of the minors and the rights of the applicants as a family under the Constitution.³⁷

³⁵ *Coulibaly (a minor acting by her father and next friend Fance) and another v. Minister for Justice, Equality and Law Reform* [2011] IEHC 47; Carolan, "Right to seek residency stressed," *The Irish Times*, 25 May 2007; Cubie and Ryan, *Immigration, Refugee and Citizenship Law in Ireland cases and materials* (Dublin, 2004) at 249-284;

³⁶ *O-A and others v. Minister for Justice, Equality and Law Reform* [2011] IEHC 78.

³⁷ *Oladipo and others v. Minister for Justice, Equality and Law Reform* [2010] IEHC 88.

2.6 IRISH IMMIGRATION LAW: POST-ZAMBRANO

²⁷For Irish law, the impact of this Court of Justice decision should not be underestimated. However, its practical effects in relation to the Irish Immigration law and policy should be overstated. *Zambrano* will not result in 'floodgates' of irregular immigrants arriving on Irish shores. The people who may benefit from the application of this decision are limited due to the changes in Irish citizenship law post 2005. Questions do however remain in relation to the precise impact *Zambrano* will have, not only on Irish law, but within the laws of each of the 27 Member states: Do the rights of the non-national parent continue to apply after the EU citizen child reaches the age of majority? To what extent will the judgment be applied to a non-marital family? Can a parent who does not have an involvement with the care and upbringing of the EU citizen child rely on the decision in *Zambrano*? What if an EU citizen child is being cared for and nurtured by a non-national guardian (blood relative to the child or otherwise), does this guardian gain rights from the *Zambrano* decisions? In my view, it could be argued that where the purpose would enable the exercise of the right conferred by the decision on the citizen child, there may be a case. How will the *Zambrano* judgment impact on the civil partnership Act 2010 which gives legal recognition for same-sex couples in Ireland? Additionally, Cooke J, who is one of the main judges hearing asylum cases in the High Court, said the *Zambrano* judgment was very significant and it would be wholly unreasonable not to allow the State time to consider the ruling. He said the sooner the State took a formal position on the ruling the better. He said clarification may be required from the European Court over when exactly the rights to residency in an EU State came into force.³⁸ He said many of the cases pending in the High Court originated before article 20 of the EU Treaties came into force with the Lisbon Treaty and question whether

³⁸ *Case C-34/09 Ruiz Zambrano v. Office National de l'Emploi (ONEm)*[2011] E.C.R. 0; Hofstotter, "Acascade of rights, or who shall care for little Catherine? Some reflections on the *Chen* Case," (2005) 30(4) *European Law Review* 548-558.

these would be covered by the *Zambrano* judgment. He said the European Court may have to clarify whether the State can refuse residency to parents on the basis that they entered the State illegally and whether the right of residency applies when one parent has residency and the other faces deportation.³⁹ It is legitimate to add that the Court of Justice ruled in the *MRAX*⁴⁰ case that ‘a right of residence of a family member of a Union citizen cannot be refused or denied on the grounds that they entered the State illegally as long as they can establish their family link to the Union citizen family member. We should await future approaches to the issues raised above as the State adopt a proactive approach.

2.7 UNION CITIZENSHIP: RESIDENCY RIGHTS FOR ADULT IRISH CITIZENS

²⁸As to whether adult Irish citizens should enjoy the same right as Irish citizens who are minor or who have exercised Treaty rights of free movement in Ireland? Sawyer,⁴¹ puts it that, philosophies of children’s rights inevitably involve ideas about allowing them to develop and realize their potentials, so as to be fully formed independent adult citizens. A countries policies about its children are as much to do with the future adult population as the children themselves during their minority. On the other hand, Tryfonidou⁴² argued

³⁹ Shuibhue, “Seven questions for seven paragraphs,” (2011) 36(2) *European Law Review* 161-162; Thornton, “Impact of the CJEU Decision: *Zambrano* and Irish Law”, Human Rights Ireland (Dublin 2011), available at www.humanrights.ie/index.php/2011/03/09/impact-of-the-cjeu-decision-Zambrano-an; Smyth, “judge calls on State to consider ruling”, *The Irish Times*, 10 March 2011.

⁴⁰ *Case C-459/99 MRAX v. Belgium* [2002] E.C.R. 1-6591; *Case C-100/01 Oulane v. Minister Voor Vreemdelingenzaken en Integratie* [2005] E.C.R. 1-1215; Hutton, “Immigration cases to be probed,” *Press Association*, 21 March 2011.

⁴¹ Sawyer, “Citizenship is not Enough: The Rights Of The Children Of Foreign Parents,” (2005) *Family Law* 224.

⁴² *Case 297/88 and 197/89 Dzodzi v. Belgian State* [1990] E.C.R. 1-3763; Tryfonidou, *The outer limits of Article 28 EC: purely internal Situations and the Development of the Court’s Approach through the years*, in Barnard Odudu, *The outer limits of European Law* (Oxford and Portland, Oregon 2009) at Chapter 9.

that, firstly, Member States have drafted legislation providing that the EC rules in a particular area should, as a matter of national law, be extended to purely internal situations (this is called ‘voluntary adoption’, ‘spontaneous harmonisation’ or ‘renvoi’). For instance, Belgium has made legislation according to which the same rights of family reunification that are granted by EC law to migrant economic actors should, as a matter of Belgium law, be granted to Belgians in purely internal situations. Secondly, in some Member States a remedy to the problem of reverse discrimination has been provided judicially, with their Constitutional Courts ruling that instances of reverse discrimination should be corrected as a matter of national Constitutional law. She argued that since the Community cannot be regarded by Member States to level down its standards to match those established at national level, in such instances, Member States are required by their Constitutional principle of equality to amend their rules to match those of the Community. In my view, the court was clear in *Jipa*⁴³ when it ruled that *Jipa* being a Romanian national, enjoys the Status of a citizen of the Union under Article 17.1 EC and might therefore rely on the rights pertaining to the status, including against his Member State of origin, and in particular the right conferred by Art.18EC to move and reside freely within the territory of the Member States. To this end, I agree with the position maintained by Tryfonidou and Sawyer that the issue of reverse discrimination against Irish Citizens could be resolved by the Irish authority by legislative initiatives. On the other hand, reflecting on the recent judgment of the Court of Justice in the *McCarthy* case,⁴⁴ while the court was of the view that the measures adopted by the United Kingdom did not affect the rights of the *McCarthy* family under European Union Law or the right to move within the Member

⁴³ *Case C-33/07 Ministerul Administratiei si Internelor-Directia Generala de Pasapoarte Bucuresti v. Jipa* [2008] E.C.R. 1-5157.

⁴⁴ *Case C-434/09 Shirley McCarthy v. Secretary of State for the Home Department* [2011] E.C.R.O. at 46, 47 and 48.

States, it however, was of the view that their situation cannot solely on the bases that they have not moved be construed a purely internal situation and indeed they can rely on their right as Union citizens against the Member State of origin. In *D'Hoop*, the would-be claimant of a job-seekers allowance, who had done her schooling in another Member State although her parents had not moved from their State of origin, the Court held that she fell within Union law by virtue of Article 18EC(now 21 TFEU). In this, the Court seemingly rejected the argument of the British government that to fall within Union law not only must an individual move but also pursue an activity which fall within the scope of the Treaty. Again, in *Garcia Avello*, the Court held that the situation of a national of one Member State who has only ever lived in the host Member State cannot be assimilated to a purely internal situation. Also, in *Marks and Spencer* and *Cadbury Schwepps* is that the right of exit allows beneficiaries of a free movement right to rely on that right not just against the host Member State, but also as against the State of Origin.⁴⁵ Persuasively, this supports my analysis that it is time the Irish Government leads the initiative as its Belgium counterparts to recognize the right of adult Irish citizens to a right of family reunification either under domestic or European Union Law in Ireland. As Colon argued, as a Member State of the EU, the Irish government is obliged to bring its policies in line with other European States. As such, changing practices should also be understood as part of a much broader regime of Governmentality in relation to asylum and migration generally.⁴⁶

⁴⁵Steiner and Woods, *EU Law* (Oxford, 10th ed., 2009) at 462-465.

⁴⁶Colon, *Ties that bind: governmentality, the State, and asylum in contemporary Ireland* (USA, 2010) 28 at 99; Ritter, Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234,"(2006)31(5) *European Law Review* 690-710;Gillmartin and White, *Revisiting contemporary Irish Migration: New geographies of mobility and belonging* (Irish Geography, 2008) 41(2) at 143-149; Fanning, *Immigration and social change in the Republic of Ireland* (Manchester, 2007).

Smyth quoting Brian Burns, a solicitor with Burns Kelly Cottrigan, who is evaluating whether there are grounds for a new appeal. This is a clear case of reverse discrimination, whereby Irish citizens have less right to live with their non-EU spouse than other Europeans. He said, the partners of other Irish Citizens have been deported from the State. For instance, Christy Ogdeide Ryan, the 52-year-old Nigerian wife of a 68-year old pensioner.⁴⁷

²⁹In sum, the impact and challenges that the McCarthy judgment poses could be summed up as follows, should the United Kingdom authorities actually have taken the step to refuse Ms McCarthy's husband a right of residency under National provisions, without good reason, her rights as a Union citizen would then be infringed and she would have an action in EU law. Thus, there appears within the judgment a warning to Member States to maintain national measures affecting the citizens of their State such that they do not infringe upon the substance of Union Citizen's rights like *Pok Sun Shun and others*. It must be accepted that fundamental to these rights of Union Citizens is an entitlement to reside in the Member State of one's nationality, and additionally, by way of comparison to Directive 2004/38, such dependant family Members of one's spouse or partner. It is likely that these issues (and other related issues) will eventually be determined in future cases before the Court of Justice. What is clear, is that a persons status as an EU citizen, and the rights which inhere from this, should not be underestimated.

⁴⁷ Smyth, 'I'm Scared...but I can't bear to be parted from Abigail,' *The Irish Times*, 4 December 2010; *Pok Sun Shun and others v. Ireland, the Attorney General and the Minister for Justice* [1986] I.L.R.M 593.

CHAPTER THREE

3.1 INTRODUCTORY ISSUES

³⁰Chapter Three reviews the Citizens Rights Directive and Irish implementing Regulations of 2006, transposing the provisions of the Directive 2004/38¹ into Irish domestic law and provides answers to specific questions of incompatibility of some aspects of the Irish Regulations in the light of the provisions of the Citizens Rights Directive and Court of justice ruling.² It considers how the Citizens Rights Directive has influenced Irish immigration law as applied against Citizens from other Member States exercising Treaty rights in Ireland? The Chapter addresses the issue of prior lawful residence requirement for the establishment of a right of residence in a Member state which was decided as a legal requirement in the *Akrich* case and then subsequently reverted in *Jia* and recently *Metock* case. The chapter further explores the consequences of death or departure of the Union citizen on the right of residence of family members and question the compatibility of the Irish transposing Regulations in this respect.³The chapter finally set out the

¹ European Parliament and Council Directive 2004/38/EC 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; European Communities (Free movement of persons) Regulations 2006 (S.I. No. 656 of 2006);Steiner and Woods, *EU Law* (Oxford, 10th ed., 2009) at 479-483;Toner, (2006) 20(3) *Journal of Asylum and Nationality Law* at 158-178

²*Case C-109/01 Akrich* [2003] E.C.R. 1-9607; *Case C-1/05 Yunying Jia v. Migrationsverket* [2007] All E.R. 575; *Case C-127/08 Metock v. Minister for Justice, Equality and Law Reform* [2008] E.C.R. 1-6241; Pilgram, "tackling "sham Marriages": the rationale, impact and limitations of the Home office's "certificate of approval" Scheme," (2009) 23 (1) *Journal of Immigration Asylum and Nationality Law* 27-30; Currie, "Accelerated justice or a step too far ? Residence rights of non- EU family members and the court's ruling in *Metock*," (2009) 34(2) *European Law Review* 310-326;Currie, (2009)34(2) *European Law Review* at 310-326.

³ Regulation 9.3 of the Regulations of 2006.

significance of the right of permanent residence and the integration based reasoning behind the right of permanent residence, indicating that a right of permanent residence is acquired under Article 16 of Directive 2004/38/EC after a legal and continuous period of residence in the host state for five years. In respect of this, the chapter detail analysis of the *Ogieriakhi* and *Lassal* cases⁴ to establish the incompatibility of the Irish Regulation 12 of the Regulation of 2006. It raises question as to, why family members of Union citizens after the acquisition of a right of permanent residence do not enjoy a free-standing right under the Regulations of 2006? ⁵ In all the Chapter generally addresses the impact, influences and challenges that Union citizenship has on the right of Union citizens from other Member States resident in Ireland and their family members.

⁴Ewaen Fred Ogieriakhi v. Minister For Justice, Equality and Law Reform (unreported, High Court, MacMenamin J., 11 March 2005);*Case C-162/09 Secretary of State for Work and Pensions V. Lassal* [2010]E.C.R. 00 .

⁵ Regulation 16.2 and schedule 6 of the European Communities (Free Movement of persons) Regulations 2006 (S.I. No. 656 of 2006).

3.2 LEGAL EFFECT OF DIRECTIVE 2004/38/EC AND EUROPEAN COMMUNITIES (FREE MOVEMENT OF PERSONS) REGULATIONS 2006 (S.I. NO. 656 OF 2006)

³¹This section of the thesis provides relevant answers to questions relating to the proper transposition of the Irish implementing regulation of 2006 in the light of the provisions of the Citizens Rights Directive 2004/38, which it set out to transpose. The question for the analysis is whether or not the Irish transposing measures completely complies with the Obligation of the Irish state to fulfill its obligations under European Community Treaty in specific areas and the impact of the *Metock* judgment of the Court on Irish Immigration law. For the purpose of the present exercise, this chapter of the thesis would compare and contrast the following specific provisions of the Citizens Rights Directive: Article 3.1, 3.2, and discuss its relationship with *Akrich*, *Jia* and *Metock* cases¹ and Article 12.3, 16.1.2 and Article 20 of Directive 2004/38/EC with the Irish Implementing Regulation of 2006 to ascertain the scope of compatibility of the Irish Implementing Regulations with the Citizens Rights Directive and would conclude by giving an analysis of its impact on Irish control over ‘first entry rights’ of Union Citizens and their family members.

3.3 ARTICLE 3.1 OF THE CITIZENS RIGHTS DIRECTIVE 2004/38/EC

³²Article 3.1 of the Citizens Rights Directive 2004/38/EC provides that the Directive shall apply to all citizens who move to or reside in a Member State other than that of which they are a national, and their family members as defined in point 2 of Article 2 who accompany or join them.

¹ *Case C-109/01 Secretary of State for the Home Department v. Akrich* [2003] E.C.R. 1-9607; *Case C-1/05 Yunying Jia v. Migrationsverket* [2007] 1 C.M.L.R. 41; *Case C-127/08 Metock v. Minister for Justice, Equality and Law Reform* [2008] E.C.R. 1-6241; Tryfonidou, “Family reunification rights of (migrant) Union citizens: Towards a more liberal approach,” (2009) 15 *European Law Journal* 634.

3.4 REGULATION 3.2 OF THE IRISH TRANSPOSING REGULATIONS OF 2006.

³³Regulation 3.2 of the Irish implementing Regulations of 2006 initially transposed Article 3.1 of the Citizens Rights Directive² into domestic Irish law inadequately by providing that the regulations shall only apply to a family member who is lawfully resident in another Member State. Until the *Metock* case, the European Court of Justice did not have an entirely consistent jurisprudence on this issue. The Irish Immigration authority simply as they asserted transposed this provision in line with the decision of the Court of Justice in the *Akrich* case resulting in hundreds of legal proceedings challenging the compatibility of the Irish measure to the parent Directive. To appreciate the scope and extent of the relationship between the Irish transposing Regulations of 2006 with the *Akrich* case and then the subsequent decision in the *Metock* case, an analysis of the sequence of legal event would be relevant at this stage.

3.5 THE REQUIREMENT OF PRIOR LAWFUL RESIDENT OF ANOTHER MEMBER STATE.

³⁴This part of the thesis addresses the question as to the implication of the prior lawful residence requirement for the determination or consideration of a right of residence for a family of a Union citizen to reside in a Member State and how it impacted on the Irish implementation after the Citizens Rights Directive came into force in the State. This segment also raises the key question of the relationship between *Akrich* case, the Irish transposing Regulations of 2006 and the subsequent decision of the Court of Justice in *Metock*. The key question lie in whether it is relevant that a Union Citizen seeking a right to family reunification in a Member State must establish to the satisfaction of the host Member State that they have lawfully been resident in another Member State within the

² Regulation 3.2 of European Communities (Free movement of Persons) Regulations 2006. (S.I. No. 656 of 2006) Transposing Article 3.1 of the Citizens Right Directive 2004/38/EC; Costello, "Metock:Free movement and "normal family life" in the Union"(2009) *Common Market Law Review* 587, 601.

European Union. In circumstances where hope was high after the decision of the Court in *Carpenter*, that the Court would use the opportunity presented in *Akrich* to confine it to its fact but this was not to be.³ The subsequent controversy instigated by the imposition of the prior lawful resident condition in the *Akrich* case intensified the debate on the right of Third Country national family members of Union citizens seeking right to family reunification. Shuibhne,⁴ expressing her views on the relationship between the *Singh* and *Akrich* case, contended that one cannot help but be struck by the fact that the *Singh* judgment may at its root be more problematic than *Akrich* ever was. The efforts being made in *Akrich* to generate a 'cross-border' free movement point of law and the attendant rights flowing there from seem wholly misplaced given that key aspects of free movement law related to *Singh* such as the 'wholly internal' and '*de minimis*' rules are in a State of flux or at least mired by academic debate. Currie⁵ also expressed her views on *Akrich* to the extent that *Akrich* itself was a somewhat surprising judgment that created uncertainty as to the position of family members from Third-countries. The statement that Third Country members could only benefit from secondary legislation when they had been lawfully resident in another Member State was subject to academic criticisms on a number of grounds, including the lack of clarity as to whether and how it impacted on MRAX, which had indicated that Third country national spouses could come within the scope of art. 10 of Regulation 1612/68 regardless of their original migration status.

³ Tryfonidou, "Jia or "Carpenter II": the edge of reason", (2007) 32 (6) *European Law Review* 908-918; Elsmore and Starup, "Case note on Jia,"(2007) 44 *Common Market Law Review* 787

⁴ Shuibhne, "Free Movement of Persons and the wholly Internal Rule: Time to move On?,"(2002) 39 *Common Market Law Review* 731.

⁵ Currie, "Accelerated justice or a step too far? Residence rights of non-EU family members and the court's ruling in *Metock*," (2009) 34(2) *European Law Review* 310-326; Berkowitz, "*Metock and others v. Minister for Justice, Equality and Law Reform*," (2008) 22(4) *Journal of Immigration Asylum and Nationality Law* 371-374; Chalmers, "The secret delivery of Justice," (2008)33(6) *European Law Review* 773-774.

³⁵This resulted in the momentary hindrance on the rights of Union citizens wishing to seek right to family reunification for their love ones and thus constituted obstacle to the exercise of their Treaty right to free movement. To mention the least prior to the implementation of the Irish Regulations of 2006 there was also another imbalance created by the Court of Justice casting more cloud over the *Akrich* decision. Tryfonidou ⁶argued that the facts before the court in *Jia* were different since it was “not alleged that the family member in question was residing unlawfully in a Member State or that she was seeking to evade national immigration legislation illicitly as in *Akrich* and thus *Jia* was not required to be residing lawfully in a Member State before she could derive the right from EC law to accompany her daughter-law-in Sweden thus limiting the ratio of *Akrich*, in the words of certain Commentators ‘meticulously and explicitly’,⁷ but notably without overruling the *Akrich* decision ratio itself. This divergent views of the Court of Justice was interesting not for what the Court actually held, but for what it failed to analyze or, more specifically, for its failure to deal expressly with the issue of whether the facts of the case presented an adequate link with one of the fundamental freedoms. She suggested that we may be witnessing a change of conception as to the nature of family reunification rights, from rights that have traditionally been granted instrumentally in order to encourage free movement in the process of establishing a Common Market, to human rights that form an aspect of the right to respect for family life that has to be safeguarded as part of the general principle of EC law. It was in the midst of this confusing crux that Ireland implemented Regulation 3.2 of the Regulation of 2006 which resulted in mass legal challenges in *Metock*.

⁶ *Ibid.*, ; Spaventa, (2005) 42 *Common Market Law Review* 225; Tryfonidou, “Mary Carpenter v. Secretary of State for the Home Department: The beginning of a new era in the European Union?,” (2003) 14 *Kings’s College law Journal* 81.

⁷ In the words of Oliver & Reestman, “European Citizens’ Third Country Family Members & Community Law”, (2007) 3 *EuConst* 463. at 469; Elsmore and Starup, (2007) 44 *Common Market Law Review* 787.

3.6 RELATIONSHIP BETWEEN REG. 3.2 OF THE REGULATION OF 2006 AND METOCK.

³⁶As expressed aforementioned, Regulation 3.2 of the Irish Regulations of 2006 provided by imposing the prior lawful residence requirement on Union citizens seeking the right of family reunification for their family members in Ireland. The Irish Regulation attempted to take into account the decision in *Akrich*. The Irish regulations were in fact the subject of previous unsuccessful challenge in Ireland in *SK and TT v. Minister for Justice* and a Supreme Court appeal was pending in those proceedings when the Irish High Court in *Metock* decided to make a preliminary reference to the Court of Justice. This case is unique as it seeks to resolve a clash between a governmental conception of discretionary migration control and the Court of Justice rights-based approach. From its earliest legislative enactment, the EC legislature acknowledges that family members of migrant workers, irrespective of their nationality, also benefited from the Free movement provisions. The entry and residence rights of 'Third-Country national' family members have proved controversial, as national government seek to limit the scope of EC rights in order to preserve a traditional conception of discretionary immigration control.⁸ The facts, law and decision of *Metock* has attracted different comments and argument against its ratio and some for its corrective nature of laying down what one would construe the true and accurate interpretation to a rule made out of momentary reaction. Wiesbrock⁹ argued by making reference to the recent *Chakroun* case, where the court of Justice referred to the *Metock* case when arguing that Directive 2003/86 does not allow Member States to draw a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State.

⁸ *SK and TT v. Minister for Justice, Equality and Law Reform* [2007] IEHC 216; Costello, "Metock: Free Movement and 'Normal Family Life in the Union,'" (2009) *Common Market Law Review* 551.

⁹ Wiesbrock, "Free movement of third-country nationals in the European Union: the illusion of inclusion," (2010) 35(4) *European Law Review* 455-475.

³⁷Starup, stated on the facts of *Metock* that persons will always seek to take advantage of their rights. In EU law, such rights are often brought to the public's attention by high-profile Court of Justice case law. While the fullest impact of Union citizenship may not yet have taken off among the ordinary population, the *Metock* ruling is an example of the Court's case which attracted an awful lot of media coverage and, in the process, uncovered other instances (outside the facts of the case) of an apparently systematic exploitation of the EU law Free movement framework and subsequently created strong arm political tactics among certain Member States at EU level. Whereas, Konstadinides,¹⁰ saw it from the protection of fundamental human rights perspective. He argued that the decision in *Metock* demonstrates that the importance of the protection of fundamental rights (such as respect for family life or the right to a nationality as per *Rottmann*) acquires relevance under EU law only with reference to the elimination of obstacles to free movement. Whatever way the *Metock* decision is assessed and contemplated, it rectified a disturbing precedent of the Court of Justice by spelling out to the contrary an earlier jurisprudence of the Court in *Akrich* which prohibited the recognition of right to family reunification for family members of Union citizens save where they have resided lawfully in another Member State of the Union prior to the making of the application. Consequently, that the right to family reunification is derived irrespective of when and where the marriage was solemnized and how that spouse entered the host Member State.

¹⁰ Konstadinides, "La Fraternite Europeene? The extent of national competence to condition the acquisition and loss of nationality from the perspective of EU Citizenship," (2010) 35(3) *European Law Review* 401-414.

CONCLUSIVE ANALYSIS

³⁸The consequences of this judgment on Ireland was devastating. The Minister for Justice in response to this judgment had no choice but to amend the Regulations of 2006 by virtue of the amended Regulation of 2008¹¹ and to seek a general review of all applications made to the EU Treaty rights section since the Citizens Rights Directive was transposed into Irish law. All such applications were reviewed in the light of the judgment of the Court of Justice in *Metock* and the Minister was thereafter faced with litigations in damages in the High Court. One cannot legally apportion blame to the Irish authority for the incorrect implementation of the Directive had the Court of Justice done a good job in *Akrich* and *Jia* cases. Although the Member States on a national level have the exclusive competences over “first entry to their territory of the European Union”,¹² and the citizenship of the Union is “additional to national citizenship” and not substituting it, the question of whether Member States have de facto lost their exclusive competence of the first entry to their territory remains to be answered. Secondly, a vast majority of the literature dismisses the relationship between national and supranational European Citizenship. This is not only a question about Third Country nationals but individuals moving from one Union Member State to another. Delimiting the scope of citizenship requests a new model for immigration policy. Is the Supranational aspect of EU a projection of the nation State or are the European Institutions manifesting a new model of citizenship, representation, and

¹¹ The European Communities (Free Movement of Persons) (Amendment) Regulations 2008 (S.I. No. 310 of 2008); Pilgram, “tackling Sham Marriages”: the rationale, impact and limitations of the Home office’s “certificate of approval” Scheme, (2009)23(1) *Journal of Immigration Asylum and Nationality Law* 27-30; Fahey, “Third Country national spouses and the Citizens Rights Directives in Irish Law,” (2008) 11 *Journal of Family Law*; Shuibhne, “Margins of appreciation: national values, fundamental rights and EC free movement law,” (2009)34(2) *European Law Review* 235-237.

¹² Costello, “*Metock*: Free movement and “Normal family life” in the Union,” (2009) 46 (2) *Common Market Law Review* 587-662.

democracy that substitute the nation State's policy initiatives?¹³ Traditionally, the Member State had the right to determine individuals' "First entry" into their territory. However, due to the recent legislative and judicial development in cases like *Metock*, *Chen* and *Zambrano*, the right to move and reside freely within the territories of the Member States has become the fundamental right and then fundamental status diminishing the relevance of the Member State's right to determine "first entry rights".¹⁴ Fahey,¹⁵ contends that the major difficulty with the *Metock* decision may prove to be its factual matrix arising not from a nefarious character like *Mr. Akrich* joining his EU spouse through deportation but rather Union citizens who were married in Ireland and unable to have their spouse legally reside with them there. And, why should sympathetic applicants determine the precise boundaries of EU law? The applicant in the now infamous decision of the ECJ in *Carpenter* also evoked tremendous sympathy before the ECJ and it seems impossible not to acknowledge how the ECJ has been influenced by very human factors to the detriment of first principles.

¹³ Kastoroyo, *introduction multiculturalism: An identity for Europea?* In Kastoryano, *An identity for Europe, the relevance of multiculturalism in EU construction* (New York, 14th ed., 2009)

¹⁴ Kostakopolou, *problems and perspectives of the European Citizenship: The fifth Report on citizenship of the Union, Directorate-General internal policies policy Department C Citizens Rights and Constitutional affairs* (2009) D200(8) at 1-16.

¹⁵ Fahey, "Going Back to Basic: Re-embracing the fundamentals of the Free Movement of Persons in *Metock*,"(2009)36(1) *Legal Issues of Economic Integration* 83-89.

3.7 RIGHT OF RESIDENCE BY FAMILY MEMBERS IN THE EVENT OF DEATH OR DEPARTURE OF THE UNION CITIZEN-ARTICLE 12.3

³⁹Provides that children of an EU citizen do not lose their right of residence if the EU citizen leaves the host Member State or dies. If the remaining or surviving spouse has actual custody of the children, she has a derivative right to reside also. This continued right to reside arises where “the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies”.¹⁶

3.8 REGULATION 9.3 OF THE IRISH REGULATIONS OF 2006.

⁴⁰The Irish regulation changes the term “until the completion of their studies” to until the completion of the course of study”.¹⁷

EXPERT ANALYSIS.

⁴¹This term “course of study” is considerably narrower. It means that, in Ireland, the child loses the right of residence if she changes from one course of study to another. If a court were to interpret this point without reference to the Directive, it would be likely to conclude that a course of study ends where a child moves from primary to secondary education (aged 12),¹⁸ from secondary to third level education (aged 18) and from

¹⁶ Article 12.3 of the Citizens Right directive 2004/38/EC.

¹⁷ Regulation 9.3 of European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 656 of 2006) transposing Article 12.3 of Directive 2004/38/EC.

¹⁸ Ibid.,

undergraduate to postgraduate education. In contrast, Article 12.3 allows a child to continue to reside until her studies in general are completed. This is incorrect transposition.

3.9 ARTICLE 16.1 AND 16.2-RIGHT OF PERMANENT RESIDENCE AFTER LEGAL RESIDENCE FOR FIVE YEARS:

⁴²Article 16.1 and 16.2 provides that Union citizens and their family who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there.¹⁹

4.1 REGULATION 12.1 OF THE IRISH REGULATIONS OF 2006.

⁴³Regulation 12.1 has effectively substituted the phrase “in accordance with these Regulations” for “legally”.²⁰

EXPERT ANALYSIS

⁴⁴This is clearly incorrect transposition. There are many reasons why a person might have legal residence in Ireland, other than in accordance with the Regulations. The Directive appears to allow persons to add together different periods of legal residence for the purposes of reaching the five year total. A particular problem with the way in which this provision has been transposed is that a person cannot start to add up the five years prior to the regulation being made (i.e., in April 2006).²¹

¹⁹ Article 16.1 and 16.2 of Directive 2004/38/EC

²⁰ Regulation 12.1 European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 656 of 2006) transposing Article 16.1 and 16.2 of Directive 2004/38/EC.

²¹ Ibid.,

4.2 LEGAL ANALYSIS TO REGULATION 12.1 OF THE REGULATION OF 2006.

⁴⁵In the *Ogieriakhi* case,²² the Minister for Justice effectively relied on the provisions of Regulation 12.1 of the Irish Regulations of 2006 to refuse the applicant a right of permanent residence after his five years legal and continuous period of residence ended prior to the coming into force of the Regulations of 2006. The Minister asserted that those five years period of legal residence which ended prior to the coming into force of the Irish regulations did not count for a right of permanent residence and that the applicant Union citizen spouse must be legally present in the State on the 30 April 2006 when the Citizens Rights Directive came into force and that the two years period does not apply to such periods ending before that date. The Court of Justice seem to have agreed with the expert analysis set out above in the *Lassal* case,²³ to the effect that five years legal and continuous period of residence which ended prior to the coming into force of the Citizens Rights Directive 2004/38/EC entitled *Ms. Lassal* to a right of permanent residence as long as she had not been absent from the host Member State for more than two consecutive years before 30 April 2006. To this extent Regulations 12.1 of the Irish Regulations of 2006 remain incorrectly implemented and would need to be amended in the light of the decision of the Court of Justice in *Lassal*.

²² *Ewaen Fred Ogieriakhi v. Minister for Justice, Equality and Law Reform* [2007] (Unreported, High Court, Charlton J, 25 January 2008): **This is to declare that the applicant in the case referred to herein is the author of this thesis and that the analysis of the case as presented is made without prejudice.**

²³ *Case C-162/09 Secretary of State for Work and Pension v. Toaus Lassal* [2009] E.C.R.O.

4.3 PERMANENT RESIDENCE CARD FOR FAMILY MEMBERS WHO ARE NOT NATIONALS OF A MEMBER STATE: ARTICLE 20

⁴⁶Article 20 provides for the permanent residence certificate for family members who are not Union citizens to be issued within six months and renewable automatically every ten years.²⁴

4.4 REGULATION 16.2 AND SCHEDULE 6 OF THE REGULATIONS OF 2006

⁴⁷Transposes Article 20 of the Citizens Rights Directive and obliges Third Country family members to present to the Irish authorities documents that go beyond what was laid down in the Directive. The following particulars are reflective in the application for a permanent residence card: With regard to the Union Citizen of whom the applicant is a family member/dependent: Occupation of Union citizen in Ireland, Immigration Reference Number, if any, PPS Number of Union Citizen in Ireland, details of relationship between applicant and Union citizen. The application form (EC3-Annex iv to the Conformity study) includes as a check list documents: Passport(s) or National ID, Letter from employer, P60's, Evidence of residence, Marriage Certificate (if applicable), Partnership certificate, Birth certificate's (if applicable), Copy of Work permits, 2 passport sized photos (signed on rear), 2 passport sized photos of EU citizen (Signed on rear) and medical evidence (if applicable).²⁵

EXPERT ANALYSIS

⁴⁸The expert analysis seem to indicate that these documentations are not required for the processing of a permanent residence card. They say that these documents go beyond what

²⁴Article 20 of Directive 2004/38/EC

²⁵ Regulation 16.2 and schedule 6 European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 656 of 2006 transposing Article 20 of Directive 2004/38/EC.

is foreseen in the Directive. Article 16 and 20 of the Citizens Rights Directive does not make provision for a request of these documents upon submission of the application for a permanent residence card.²⁶

4.5 PERSONAL COMMENT AND KEY ISSUE

⁴⁹My experience from those questioned in my research seem to disclose a systemic imposition of the self-sufficiency condition by requiring that non-national spouse of Union citizens must continue to establish that the Union citizen spouse continue to exercise Treaty rights in the State for the acquisition of a permanent residence Card. We recall that Article 16.1 of the Citizens Rights Directive clearly indicate that the conditions provided for in Chapter three does not apply to Article 16. And the only place in the Citizens Rights Directive where it was mandated that the Union Citizen must be exercising Treaty rights by working and residing in the State for family members to derive a right of residence is Article 7 which is a condition imposed under chapter three of the Directive. The question then is, at what stage does a family member of a Union citizen acquire a free- standing right under the Directive? Surely the Directive seem to provide for such a free-standing right after five years of legal and continuous residence as also spelt out in *Lassal* judgment but the Irish transposing Regulations seem to introduce requirement which impedes on this specific right.

⁵⁰Conclusively, it is on this basis, I advocate for a change of approach and principle in the manner the State currently processes applications for right of permanent residence and for the State to recognize that Union citizens and family members who satisfy the conditions specified under Article 16.1 and 16.2 of Directive 2004/38/EC have a free-standing right which is subject to no condition and which equally accords right to equal treatment as Irish nationals.

²⁶ Ibid.,; *Case C-162/09 Secretary of State for Work and Pension v. Toaus Lassal* [2009] E.C.R.O.

4.6 References/Bibliography

Cases:

Case C-109/01 Akrich [2003] E.C.R. 1-9607

Case C-23/08 Athanasias Vatsouras and Josif Koupatantzev Arbeitsgemeinschaft (ARGE) Nummerberg 900 [2009] E.C.R. 1-4585

Case C-143/99 Baumbast and R [2002] E.C.R. 1-7091.

Bankole Lawrence Fajujonu, Zohra Fajujonu and Mariam Fajujonu (an infant suing by her next friend Celine Maher) v. The Minister for Justice, Ireland and The Attorney General [1990] 2 IR 151.

Bode v. Minister for Justice, Equality and Law Reform [2007] I.E.S.C. 62.

Case C-138/02 Collins v. Secretary of State for work and pensions [2004] E.C.R. 1-2703.

Case C-200/02 Chen v. Secretary of State for The Home Department [2004] E.C.R. 1-9925.

Case C-148/02 Carlos Garcia Avello v. Etat Belge [2003] E.C.R. 1-11613.

Case 316/85 Centre public d'aide Sociale de Courcelles v. Lebon [1987] E.C.R. 2811.

Case C-60/00 Carpenter v. Secretary of State for The Home Department [2002] E.C.R. 1-6279.

Case C-66/85 Deborah Lawrie-Blum v. Land Berlin-wurttemberg [1986] E.C.R. 2121.

Case C-267/83 Diatta v. Land Berlin [1985] E.C.R. 567.

Case C-224/98 D'Hoop [2002] E.C.R. 1-6191.

Case C-406/04 de Cuyper [2006] E.C.R. 1-6947.

Case 297/88 and 197/89 Dzodzi v. Belgian State [1990] E.C.R. 1-3763.

Ewaen Fred Ogieriakhi v. Minister for Justice, Equality and Law Reform [2004] (unreported, High Court, MacMenamin J, 11 March 2005).

Ewaen Fred Ogieriakhi v. Minister for Justice, Equality and Law Reform [2007] (unreported, High Court, Charlton J, 25 January 2008).

Case C- 184/99 Grzelczk v. Centre public d' Aide Sociale d' ottignies Louvain La Neuve [2001] E.C.R. 1-6193.

Case C-34/09 Gerarado Ruiz Zambrano v. Office national de l'employ (ONEm) [2009]E.C.R. 00 .

Case C-310/08 Harrow LBC v. Ibrahim [2010] P.T.S.R. 1913.

Case C-459/99 MRAX v. Belgium [2002] E.C.R.1-6591.

Lobe and others v. Minister for Justice (Joined Cases) (Unreported, High Court, 8th April, 2002).

Case C-127/08 Metock v. Minister for Justice, Equality and Law Reform [2008] E.C.R. 1-6241.

Case C-33/07 Ministerul Administratei Si Internelor-Directia Generala de Pasapoarte Bucuresti v. Jipa [2008] E.C.R. 1-5157.

Case C-85/96 Maria Martinez Sala v. Freitaat Batern [1998] E.C.R. 1-2691.

Case C-470/04 N v. Inspector Van de Belantingdienst [2006] E.C.R. 1-7409.

Osheku v. Ireland [1986] I.R 733.

Case C-100/01 Oulane v. Minister Voor Vreedelingenzenaken en Integratie [2005] E.C.R. 1-1215.

Patrick Doyle v. The Commissioner of An Garda Siochana [1991] 1 IR 249.

Case C-224/02 Pusa v. Osuuspankkien Keskinainen Vakuutusyhtio [2004] E.C.R. 1-5763.

Case C-135/08 Rottmann v. Freistaat Batern [2010] E.C.R. 00.

Case C-434/09 Shirley McCarthy v. Secretary of State for the Home Department [2011] E.C.R. 0.

SK and TT v. Minister for Justice, Equality and Law Reform [2007] IEHC 216.

Case C-162/09 Secretary of State for work and Pension v. Toaus Lassal [2009] E.C.R. 00.

Case C-456/02 Trojani [2004] E.C.R. 1-7573.

Case C-192/05 Tas-Hagen v. Raadskamer Wubo Van de Pension-en Uiteringsaad [2006] E.C.R. 1-10451.

Case C-520/04 Turpeinen [2006] E.C.R. 1-10685.

Case C-1/05 Yunying Jia v. Migrationsverket [2007] All E.R. 575.

BOOKS:

Barnard, *“EU Citizenship and the principle of Solidarity,”* in Dougan and Spaventa (eds), *Social Welfare and EU Law* (Oxford, Hart, 2005).

Bickel, *The morality of consent* (yale, Univ, press 1975).

Barnard, *The Substantive Law of the EU The four Freedoms* (Oxford, 2nd ed., 2007).

Barbard, *The substantive Law of the EU The four Freedoms* (Oxford, 3rd ed., 2010).

Barnard and Odudu, *The outer limits of European Union Law* (Oxford and Portland, Oregon, 2009).

Colon, *Ties that bind: governmentality, The State, and asylum in contemporary Ireland* (USA, 2010).

Craig and De Burca, *EU Law, Texts, Cases, and Materials* (Oxford, 4th ed., 2008).

Currie, *The Transformation of Union Citizenship in M. Dougan and Currie, "50 years of the European Treaties: looking Back and thinking forward* (Oxford, Hart, 2009).

Cubie and Ryan, *Immigration, Refugee and Citizenship law in Ireland Cases and materials*(Dublin, 2004).

Dougan, Expanding the Frontiers of EU Citizenship, In Barnard and Odudu, *the outer limits of European Union Law* (Oxford, and Portland, Oregon 2009).

Enright, *"Migrants and Child Citizens : Ireland and Greece, Human Rights in Ireland"* (Dublin, 2011).

Chalmers, Hadjiemmanuil, Monti and Tomkins, *European Union Law, Text and Materials* (Cambridge, 2005).

Fahey, *EU Law in Ireland* (Dublin, 2010).

Fanning, *Immigration and Social change in the Republic of Ireland* (Manchester, 2007).

Foucault, *Society Must Be Defended* (London, 1975-76).

Foster, *Blackstone's Statutes EU Treaties & Legislation* (Oxford, 20th ed., 2009-2010).

Fraser and Harvey, *Santuary in Ireland Perspective on Asylum Law and Policy* (Dublin, 2003).

Gilmartin and White, *Revisiting Contemporary Irish migration: New geographies of mobility and belonging* (Irish Geography 2008).

Giorgio, *State of Exception Chicago and London* (Chicago, University Press 2005).

Horspool and Humphrey's, *Core Text Series European Union Law* (Oxford, 2010).

Kastrorayo, Introduction multiculturalism: An identity for Europe? In Kastoryano, An identity for Europe, the relevance of multiculturalism in EU Construction (New York, 14th ed., 2009).

Kastakopolou, *Problems and perspectives of the European Citizenship: The fifth Report on Citizenship of the Union, Directorate-General internal policies policy Department (Citizens Rights and Constitutional affairs* (2009) D200(8) at 1-16.

Kaczorowska, *European Union Law* (Routledge-Cavendish, 2007).

Shaw, *Citizenship: Contrasting Dynamics at the interface of Integration and Constitution* (Italy, EU 1 working paper RSCAS, 2010).

Shaw, *Citizenship and Enlargement: The outer limits of EU political Citizenship, in Barnard and Odudu, the outer limits of European Union Law* (Oxford and Portland, Oregon, 2009).

Steiner, Woods and Twigg-Flesner, *EU Law* (Oxford, 9th ed., 2006).

Shuibhne, *The outer limits of EC Citizenship: Displacing Economic Free Movement Right, in Barnard and Odudu, the outer limits of European Union law* (Oxford and Portland, Oregon, 2009).

Spaventa, *Free Movement of persons in the European Union* (Kluwer Law international, Netherlands, 2007).

Thornton, *"Impact of the CJEU Decision: Zambrano and Irish Law Human Rights Ireland"* (Dublin, 2011).

Tryfonidou, *The outer limits of Article 28 EC: purely internal situations and the Development of the Court's Approach through the years, in Barnard Odudu, The outer limits of European Law* (Oxford and Portland, Oregon, 2009).

CONSTITUTION:

CONSTITUTION OF IRELAND 1937.

EUROPEAN TREATIES:

Treaty establishing the European Community 1957

Treaty on European Union 1993

Treaty on the Functioning of the European Union

DIRECTIVE:

The Citizens Rights Directive 2004/38/EC

SESONDARY LEGISLATION:

European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 656 of 2006)

European Communities (Free Movement of Persons) Regulations 2008 (S.I.No. 310 of 2008).

JOURNAL ARTICLES:

Barber, "Citizenship, Nationalism and the European Union,"(2002) 27 *European Law Review* 241.

Bhabha, "Arendt's Children: Do Today's migrant children Have a Right to Have Right?," (2009) 31 *Human Rights Quarterly* 410.

Breen, "Refugee Law in Ireland: disregarding the Rights of the Child-Citizen, discriminating against the rights of the child," (2003) 15(4) *International Journal of Refugee Law* 750-785.

Berkowitz, "Metock and others v. Minister for Justice, Equality and Law Reform," (2008) 22(4) *Journal of Immigration Asylum and Nationality Law* 371-374.

Bosniak, "Persons and Citizens in constitutional thought,"(2008) *International journal of Constitutional law* 9-29.

Chalmers, "The secret delivery of Justice," (2008) 33 (6) *European Law Review* 773-774.

Costello, "Metock: Free Movement and "Normal family life" in the Union,"(2009) 46(2) *Common Market Law Review* 587-662.

Currie, "Accelerated Justice or a step too far? Residence rights of non-EU family members and the Court's ruling in Metock," (2009) 34 (2) *European Law Review* 310-326.

Currie, "EU migrant Children, their primary carers and the European Court of Justice; Access to education as a precursor to Residence under Community law," (2009) 16 *Journal of Social Security Law* 61.

Cullen, "From migrants to Citizens? European Community policy on intercultural Education,"(1996) 45 *International comparative Law Quarterly* 109.

Dougan and Spaventa, "Educating Rudy and the non English patient: a double bill on residency rights under Article 18EC," (2003) 28(5) *European Law Review* 699-712.

Dougan,"Constitutional dimension to the case law on Union Citizenship,"(2006) 31(5) *European Law Review* 613-641.

Ed, "Three paradoxes of EU Citizenship,"(2010) 35(2) *European Law Review* 129-130.

Fahey, "Going Back to Basic: Re-embracing the fundamentals of the free movement of persons in Metock,"(2009) 36(1) *Legal issues of Economic integration* 83-89.

Forder, "The familization of European Community Law,"(2008) 45 *Common Market Law Review* 261-284.

Fanning and Mutwarasibo, "Nationals/non-nationals:Immigration, Citizenship and politics in the Republic of Ireland,"(2007) 30(3) *Ethnic and Racial studies* 439-460.

Guibboni, "Free movement of persons and European solidarity,"(2007) *European Law Journal* 360-379.

Hailbronner, "Union Citizenship and access to Social benefits,"(2005) *Common Market Law Review* 1245-1267.

"*Harrow LBC v. Ibrahim (C-310/08) homelessness*," (2010) 13 (3) *Journal of Housing Law* 45-47.

Harrington,"Citizenship and the Biopolitics of post-nationalist Ireland,"(2005) 32(3) *Journal of Law and Society* 424-429.

Hofstotter, "A Cascade of rights, or who shall care for little Catherine? Some reflections on the Chen case,"(2005) 30(4) *European Law Review* 548-558.

Jorgenses, "the right to cross-border education in the European Union," (2009) 46 *Common Market Law Review* 1567-1590.

Konstadinides, "La Fraternite Europeene? The extent of national competence to condition the acquisition and loss of nationality from the perspective of EU Citizenship,"(2010) 35(3) *European Law Review* 401-414.

Kostakopoulou, "European Union Citizenship: writing the future,"(2007) 13 *European Law Journal* 623-646.

Lentin, "Femina Sacra: Gendered memory and political violence,"(2006) 26(5) *Women's Studies international forum* 463-473.

Lentin and Mcveigh, "After optimism? Ireland, Racism and Globalisation, "Dublin, *Metro Eireann publications* 2006.

Mather, "The court of Justice and the Union citizen,"(2000) *European Law Journal* 722.

Mullally, "Citizen children, "impossible subjects" and the limits of migrant family rights in Ireland," (2011) 1 *European Human Rights Law Review* 43-53.

O'Brien, "Social Blind spots and monocular the ECJ's migrant worker model,"(2009) 46 *Common Market Law Report* 1107-1141.

O'Leary, "The past, present and future of the purely internal rule on EU law,"(2009) 44 *Irish Jurist* 13-16.

Oliver & Reestman, "European Citizens' Third country Family members & Community law,"(2007) 3 *EUConst* 463 at 469.

Petit, "Agir par mimetisme:La Commission europeene et sa politique d' education, "(2006) 38(3) *Canadian journal of political science* 1-26.

Pilgram, "tackling sham marriages: the rationale, impact and limitations of the Home office's "certificate of approval" Scheme," (2009) 23 (1) *Journal of Immigration Asylum and Nationality Law* 27-30.

Preub, "problems of a concept of European Citizenship,"(1995) *European Law Journal* 267.

Power, "Commission v. Italy (C-531/06), and Potheckerkammer des Searlands (C-171 & C-172/07), European Union Freedom of establishment-general interest restrictions," (2009) 20 (10) *International Company and Commercial Law Review* 48-49.

Ritter, "purely internal situation, reverse discrimination, Guimont, Dzodzi and Article 234,"(2006) 31(5) *European Law Review* 690-710.

Rutledge, "Income support European Citizenship-Directive 2004/38/EC, art. 16," (2011) 18(1) *Journal of Social Security Law* 13-14.

Roth, "The internal Market and The four Freedoms," (2004) 41 *Common Market Law Review* 407 at 418.

Shuibhue, "Seven questions for seven paragraphs,"(2011) 36(2) *European Law Review* 161-162.

Shuibhue, "Free Movement of persons and the wholly internal rule:Time to move on?,"(2002) 39 *Common Market Law Review* 731.

Starup and Elsmore, "Taking a logical step forward? Comment on *Ibrahim* and *Teixeira*," (2010) 35(4) *European Law Review* 571-588.

Szyszczak, "European Union Law Citizenship and Human rights," (2004) 53(2) *International & Comparative Law Quarterly* 493-501.

Spaventa, "Seeing the wood despite the trees? On the Scope of Union Citizenship and its Constitutional effects," (2008) 45 *Common Market Law Review*. P. 19.

Spaventer, "From Gebhard to Carpenter: Towards a (non-) economic European Constitution," (2004) *Common Market Law Review* 743, 768.

Sawyer, "Civis europeanus sum: The citizenship rights of the children of foreign parents," (2005) *Aut public Law* 477-484.

Sawyer, "Citizenship is not Enough: The rights of the children of foreign parents,"(2005) *Family law* 224.

Stevens, "Asylum-Seeking families in Current legal Discourse: A UK perspective," (2010) 32 (1) *Journal of Social Welfare and family Law* 5-22.

Somek, "Solidarity decomposed: being and time in European citizenship," (2007) 32(6) *European Law Review* 787-818.

Tormey, "Everyone with eyes can see the problem": moral citizens and the space of Irish Nationhood," (2007) 45(3) *Journal of International migration* 69-100.

Tryfonidou, "Further steps on the road to convergence among the Market freedoms," (2009) 35(4) *European Law Review* 455-475.

Tryfonidou, "in Search of the aim of the EC Free movement of persons provisions: Has the Court of Justice missed the point," (2009) 46 *Common Market Law Review* 1591-1620.

Tryfonidou, "Jia or Carpenter II": the edge of reason," (2007) 32 (6) *European Law Review* 908-918.

Tryfonidou, "Family reunification rights of (Migrant) Union citizens: Towards a more liberal approach," (2009) 15 *European Law Journal* 634.

Tryfonidou, "Mary Carpenter v. Secretary of State for the Home Department: The beginning of a new era in the European Union?," (2003) 14 *King's College Law Journal* 81.

Toner, "New Regulations implementing Directive 2004/38," (2006) 20(3) *Journal of Immigration Asylum and Nationality Law* 158-178.

Weiler, "The European Union Belongs to its Citizens: Three immodest proposals," (1997) 22 *European Law Review* 150.

Winkelmullen, "EC-German gambling law violates EU Law," (2011) 22(1) *Entertainment Law Review* 41-43.

Wiesbrock, "Free movement of third-country nationals in the European Union: the illusion of inclusion," (2010) 35 (4) *European Law Review* 455-475.

White, "Free movement, equal treatment, and citizenship of the Union, " (2005) 54 (4) *International & Comparative Law Quarterly* 885-905.

WEBSITES ACCESSED:

www.dit.ie library link to <http://www.bailli.org>

[Http://Curia.europa.eu/jurisp/cgi-bin/gettext.pl?](http://Curia.europa.eu/jurisp/cgi-bin/gettext.pl?)

www.dit.ie library link to [Http://0-www.firstlaw.ie.ditlib.dit.ie\[FL5235\]](http://0-www.firstlaw.ie.ditlib.dit.ie[FL5235])

www.dit.ie library link to <http://www.Westlaw.co.UK.ditlib.ie>

[Http://O-www.irishtimes.co.ditlib.dit.ie/newspaper/Ireland.](http://O-www.irishtimes.co.ditlib.dit.ie/newspaper/Ireland.)

[Http://europa.eu.int/scadplus/leg/en/lvb/133152.htm](http://europa.eu.int/scadplus/leg/en/lvb/133152.htm)

www.dit.ie library link to [hht://www.Courts.ie](http://www.Courts.ie)

www.dit.ie Library link to <http://www.westlaw.ie>

www.humanrights.ie

OFFICIAL PUBLICATIONS:

Official Journal of the European Union L158 of 30 April 2004.

Official Journal of the European Union C115/361 of 9th May 2008

NEWSPAPERS:

The Irish Times 9 January 2002

Daily Mail (London) 15 November 2006

Hutton, "immigration cases to be probed, " *Press Association*, 21 March 2011.

Immigrant Council of Ireland Press Release 8th March 2011

Lentin and Mcveigh, "After optimism? Ireland, Racism and Globalisation, "Dublin, *Metro Eireann publications* 2006.

The Irish Times 19 August 2003

The Irish Times 24 January 2003

The Irish Times 20 May 2004

The Irish Times 24 May 2004

The Irish Times 26 May 2008

The Irish Times 2 May 2008

The Irish Times 9 February 2010

The Irish Times 7 January 2011

The Irish Times 22 March 2011

The Irish Times 10 March 2011.

4.7 APPENDICES

	Appendix
Opinion of Catherine Cosgrave Senior Solicitor, Immigrant Council of Ireland on the subject matter.	1 2
Leanora Frawley of Kelleher O’Doherty Solicitors Ms. Hilka Becker, Senior Solicitor, Immigrant Council of Ireland-independent Law Centre.	3
Jonathan Tomkin Barrister at Law	4
Face to face interview with Golden Anikwe Chief executive of co-operative support services (CSS) Ireland.	5
Face to face interview with Barrister Ade Adeyanju	6
Letter to Olamide Akinsete of the Residence Against Racism (RAR) under the leadership of	7
Letter to Pastor Jide Sadiq of Kingdom Christian Ministry.	8

4.8. Copy of Survey Questionnaire

SURVEY OF EWAEN FRED OGIERIAKHI STUDENT OF THE MASTERS OF ARTS IN LAW OF THE DEPARTMENT OF LAW, DUBLIN INSTITUTE OF TECHNOLOGY, AUNGIER STREET, DUBLIN 2.

THESES SURVEY QUESTIONNAIRE

MASTERS OF ARTS IN LAW.

The purpose of this survey is to obtain the views of selected 20 Union citizens and their family members who have been exercising Treaty Rights in Ireland for a period of not more than five years, legal practitioners and NGOS in the field of free movement of persons as to the scope and extent of the application, impact, influences and challenges of the rules on European citizenship to Union citizens and their family members who are exercising EU Treaty rights in Ireland or Irish citizens resident in Ireland. The survey also seeks to investigate the level of compatibility of the Irish Regulations S.I.No. 656 of 2006 in the light of the Citizens Rights Directive 2004/38/EC and in the light of the jurisprudences of the court of Justice.

The feedback will enable the researcher properly evaluate the scope and extent of the application of the rules on Union citizenship and to make recommendations for future amendments to the Irish Regulations of 2006 and policy development in the area of right of residence for Union citizens and their family members in Ireland.

You are kindly requested to assign specific grading to a range of issues relating to the subject matter of the research. Please answer each question with serious thought. Do not sign your name on this form.

Part 1 DETAILS OF PARTICIPANTS

FIRST NAME.....

MIDDLE NAME.....

SURNAME.....

ADDRESS.....

.....

.....

.....
.....
RESIDENT IN IRELAND FOR HOW LONG?.

OCCUPATION.....

PART 2 SURVEY QUESTIONS.

Q1. This survey concerns the citizenship of the European Union. Are you familiar with the term “citizen of the European Union” ?

ONLY ONE ANSWER POSSIBLE

- Yes and you know what it means.....1
- Yes, you have heard about it, but you are not sure what it means.....2
- No, you have never heard the term “citizen of the European Union”3
- [DK/NA].....10

Q2. How well do you feel that you are informed about your rights as a citizen of the European Union ?

ONLY ONE ANSWER POSSIBLE

- Very well informed.....4
- Well informed.....3
- Not well informed.....2
- Not informed at all.....1
- DK/NA].....10

Q3. For each of the Statements which I am going to read out, please indicate if this is true or false:

ONE ANSWER PER LINE

- True.....1
- False.....2
- [DK/Na].....10

Q3. The granting of right of residence to economically inactive persons by the application of the rule on European Citizenship under Article 21 Treaty on the functioning of the European Union (ex art. 18(1)EC) is a positive approach to free movement rules.

- True.....1
- False.....2
- [DN/NA].....10

Q4. Ireland has been forth coming in implementing correctly the rules on Union citizenship on free movement of persons to move, enter and reside in Ireland.

- True.....1
- False.....2
- [DN/NA].....10

Q5. The granting of free standing right of residence by the application of the European Citizenship rules on free movement of persons by the European Court of Justice does not have economic implications for Ireland.

- True.....1
- False.....2
- [DN/NA].....10

PART 3

Q6. For each of the statements there are four options available in question 6 to 10 which are graded from 1 to 4; of these 4 is the highest rating. Please circle your choice.

How would you grade the compliance of the Irish Regulations: European Communities (Free Movement of Persons) Regulations 2006 (S.I. No 656 of 2006)?..... 1 2 3 4

Q7. How would you rate the administrative machinery put in place in the Department of Justice, Equality and Law Reform to deal with applications for residency under EU law for Union citizens and their family members?.....1 2 3 4

Q8. How would you grade the impact of the judgment of the European Court of Justice in the light of the Metock v. Minister for justice, equality and law Reform case to Irish immigration policy on right of residence for union citizens and their family members.....1 2 3 4

Q8. How would you rate the implication of the judgment of the European Court of Justice in the Zambrano case to Irish domestic immigration laws and policies on third country national parents of Irish born citizen minors.....1 2 3 4

Q9. How would you grade the application of the rules of European Citizenship as being unnecessarily interference in the internal immigration affairs of Ireland in the light of the Zambrano judgment
.....1 2 3 4

PART 4 .

For each of the questions on this part please answer 'Yes' or 'NO' or 'DN/NA'.

Q10. The concept of Union citizenship is of huge benefit to the free movement of Union citizens and their family Members and should be granted to adult Irish citizens resident in Ireland.

- YES

-NO

-[DN/NA].

Q11. Ireland recognize the free standing right of residence of family members of Union citizens in the event of death or departure of the Union Citizens.

-YES

-NO

-[DN/NA].

Q12. After the right of permanent residence is acquired after five years legal and continuous residence the family members acquire a free standing right of residence under Regulation 12 of S.I. No. 656 of 2006 in Ireland.

-YES

-NO

-[DN/NA].

Q13. After 10 years of legal continuous residence under the European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 656 of 2006) Union citizens and their family members cannot be expelled save on imperative grounds of public security.

-YES

-NO

-[DN/NA].

PLEASE RETURN COMPLETED SURVEY QUESTIONNAIRE TO:

Ewaen Fred Ogieriakhi

24 Lerr Avenue,

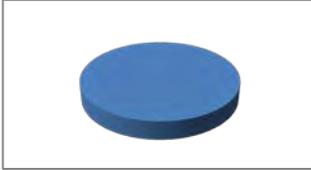
Abbeylands, Barnhill,

Castledermot,

Co-Kildare.

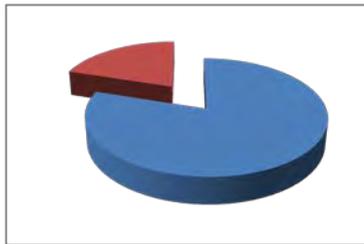
4.9 ANALYZING QUESTIONNAIRE RESULTS

1. This Survey concerns the citizenship of the European Union. Are you familiar with the term “Citizen of the European Union”?



100% of the people surveyed felt that they knew and understood the term “ Citizen of the European Union”.

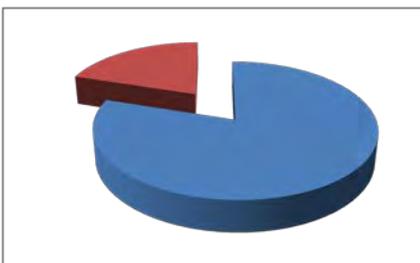
2. How well do you feel that you are informed about your rights as a citizen of the European Union?



80% of people surveyed felt that they were **very well informed** of their rights as a citizen of the European Union.

20% of people surveyed felt that they were **well informed** of their rights as a citizen of the European Union.

3. The granting of right of residence to economically inactive persons by the application of the rule on European Citizenship under article 21 Treaty on the functioning of the European Union (ex. Art. 18 (1) EC is a positive approach to free movement rules.

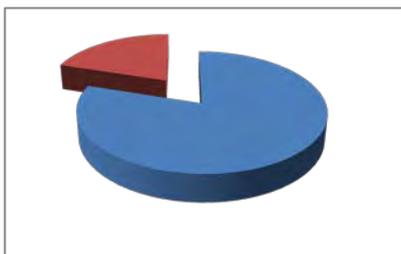


movement rules.

80% of people surveyed **agree** that the granting of right of residence to economically inactive persons by the application of the rule of the European citizenship under article 21 Treaty on functioning of the European Union (ex art. 18 (1) EC) is a **positive approach** to free

20% of people surveyed **do not agree** that the granting of right of residence to economically inactive persons by the application of the rule of the European Citizenship under article 21 Treaty on functioning of the European Union (ex art.18 (1) EC) **is a positive approach** to free movement rules.

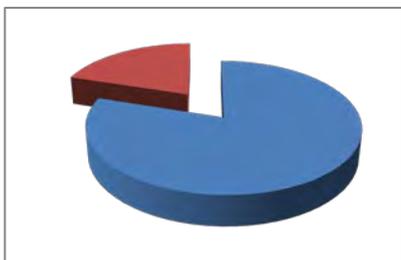
4. Ireland has been forthcoming in implementing correctly the rules on Union Citizenship on free movement of persons to move, enter and reside in Ireland.



80% of people surveyed **do not feel** that Ireland has been forthcoming in implementing correctly the rules on Union Citizenship on free movement of persons to move, enter and reside in Ireland.

20% of people surveyed **feel** that Ireland has been forthcoming in implementing correctly the rules on Union Citizenship on free movement of persons to move, enter and reside in Ireland.

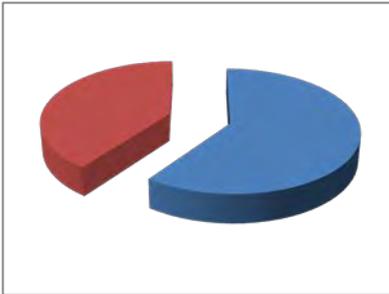
5. The granting of free standing right of residence by the application of the European Citizenship rules on free movement of persons by the European Court of Justice does not have economic implications for Ireland.



80% of people surveyed feel that the granting of free standing right of residence by the application of the European Citizenship rules on free movement of persons by the European court of Justice **has economic implications** for Ireland.

20% of people surveyed feel that the granting of free standing right of residence by the application of European Citizenship rules on free movement of persons by the European Court of Justice **does not have economic implications** for Ireland.

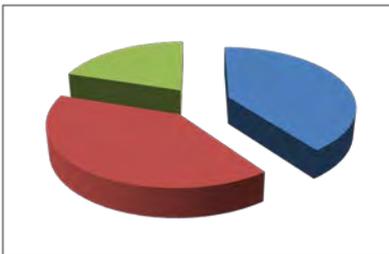
6. The compliance of the Irish Regulations: European Communities (Free Movement of Persons) Regulations 2006 (S.I. No 656 of 2006).



60% of people surveyed feel that Ireland has not complied at all with European Communities (Free Movement of Persons) regulations 2006 (S.I. No 656 of 2006).

40% of people surveyed feel Ireland have done the bare minimum to comply with European Communities (Free Movement of Persons) Regulations 2006 (S.I. No 656 of 2006).

7. The administrative machinery put in place in the Department of Justice, Equality and Law Reform to deal with applications for residency under EU law for Union citizens and their family members.

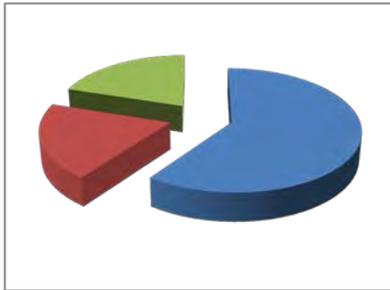


40% of people surveyed do not rate the administrative machinery put in place by the Department of Justice to deal with applications for residency under EU law for union citizens and their family members.

40% of people surveyed feel that the administrative machinery put in place by the department of Justice is of a bare minimum standard to deal with applications for residency under EU law for union citizens and their family members.

20% of the people surveyed feel that the administrative machinery put in place by the Department of Justice to deal with applications for residency under EU law for union citizens and their family members is only of an average standard.

8. The impact of the judgement of the European Court of Justice in the light of the *Metock –v- Minister for Justice, Equality and Law Reform* case to Irish immigration policy on right of residence for union citizens and their family members.



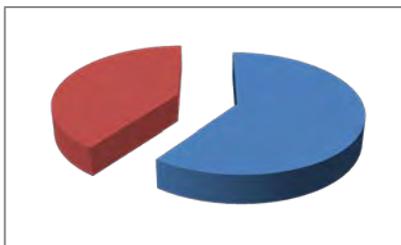
60% of people surveyed feel that the judgement of the ECJ in respect of the *Metock-v- Minister for Justice* had a massive impact on Irish immigration policy on right of residence for Union citizens and their family members.

20% of people surveyed felt that the judgement of the ECJ in respect of the *Metock-v- Minister for Justice* had a

big impact on Irish immigration policy on right of residence for Union citizens and their family members.

20% of people surveyed felt that the judgement of the ECJ in respect of the *Metock-v- Minister for Justice* had an impact on Irish immigration policy on right of residence for Union citizens and their family members.

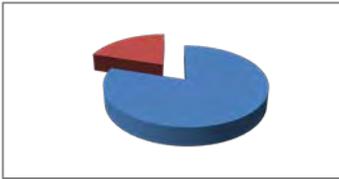
9. The implication of the judgement of the European Court of Justice in the *Zambrano* case to Irish domestic immigration laws and policies on the third country national parents of Irish born citizen minors.



60% of people surveyed feel that the judgement of the ECJ in the *Zambrano* case will have a serious effect on Irish domestic immigration laws and policies on the third country national parents of Irish born minors.

40% of people surveyed felt that the judgement of the ECJ in the *Zambrano* case will have a slightly less serious effect, but an effect all the same on Irish domestic immigration laws and policies on the third country national parents of Irish born citizen minors.

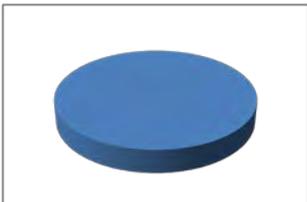
10. The application of the rules of European citizenship as being unnecessary interference in the internal immigration affairs of Ireland in the light of the *Zambrano* Judgement.



80% of people surveyed feel that the application of the rules of European citizenship does not cause any unnecessary interference on internal immigration affairs of Ireland in light of the *Zambrano* judgement.

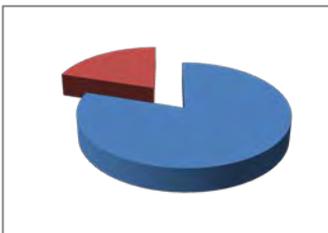
20% of people surveyed feel that the application of the rules of European citizenship may cause a slight interference on internal immigration affairs in Ireland in light of the *Zambrano* judgement.

11. The concept of Union citizenship is of huge benefit to the free movement of Union citizens and their family members and should be granted to adult Irish citizens resident in Ireland.



100% of the people surveyed felt that the concept of Union citizenship is of huge benefit to the free movement of Union citizens and their family members and should be accorded to adult Irish citizens in purely internal situation.

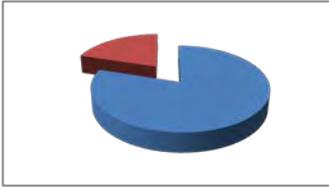
12. Ireland recognize the free standing right of residence of family members of Union citizens in the event of death or departure of the Union citizens.



80% of people surveyed said that Ireland does not recognise the right of residence of family members of Union citizens in the event of death or departure of the Union citizens.

20% of people surveyed said that Ireland does recognise the right of family members of Union citizens in the event of death or departure of the Union citizens.

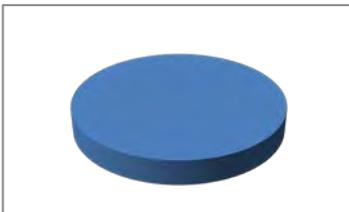
13. After the right of permanent residence is acquired, after five years legal and continuous residence the family members acquire a free standing right of residence under Regulation 12 of S.I. no 656 of 2006 in Ireland.



80% of people surveyed felt that after the right of permanent residence is acquired, after five years legal and continuous residence the family members do not acquire a free standing right of residence under Regulation 12 of S.I. No 656 of 2006 in Ireland.

20% of people surveyed felt that after the right of permanent residence is acquired, after five years legal and continuous residence the family members do acquire a free standing right of residence under Regulation 12 of S.I. No 656 of 2006 in Ireland.

14. After 10 years of legal and continuous residence under the European communities (Free Movement of Persons) regulations 2006 (S.I. No 656 of 2006) Union citizens and their family members cannot be expired save on imperative grounds of public security.



100% of people surveyed said that after 10 years of legal continuous residence under the European Communities (Free Movement of Persons) regulations 2006 (S.I. No 656 of 2006) Union citizens and their family members cannot be expired save on imperative grounds of public security.

5.1 SURVEY ANALYSIS: LETTERS AND FACE TO FACE INTERVIEWS.

DATA ON VIEWS OF LEADING IMMIGRATION LEGAL PRACTITIONERS IN IRELAND

⁵¹At the seminar on free Movement of Workers in Ireland held in the Law Society of Ireland Blackhall Place on the 5th November 2010, and having being in attendance at the seminar had the opportunity to discuss the issues posed by thesis with some legal practitioners :

Catherine Cosgrave a senior Solicitor with the Immigrant Council of Ireland : ²⁷

⁵²Expressed her views on the aftermath of the *Metock* case and raised serious questions on ‘Sham marriages’. She said this is one of the problems that the Minister for Justice is finding difficult to deal with at the moment. She said because of the judgment, the Minister is under obligation to accept a marriage certificate from a failed asylum seeker irrespective of place and time of the marriage and how he entered the State. She also expressed dissatisfaction with the review application process that such applications are dealt with by the same official who made the original decision instead of a senior official. She was further dissatisfied that after considering the applications, permissions to reside are granted from the date of decision as oppose to the date of submission of the application.

Leanora Frawley of Kelleher O’Doherty Solicitors:²⁸

⁵³Her opinion was grounded on the Roma and their experience of Criminal Law in Ireland. She challenged the compatibility of Section 12 of the Immigration Act 2004.

²⁷ see Appendix 1

²⁸ See Appendix 2

The penalty being provided by Section 13 of the Same act, which imposes penalty on failure of non-national to produce a valid passport or other equivalent document when requested by a member of Garda Siochana “on demand”. She referred to Article 26 of Directive 2004/38/EC which permits such checks only when it is imposed on their own nationals. She contended that it violates the right to equal treatment. She relied on the case of *Sarah Oulane v. Minister Voor Vreemdelingenzaken en Integratie* where the Court of justice ruled such measure discriminatory. She said that they have challenged this at District Court level with some success in that Gardai and the State Solicitors Office are now aware of the challenge and will apply to have the matters struck out once prompted but they have not been able to bring a challenge at High Court level resulting in permanent change and as such the Roma continue to be charged and detained under Section 12, even where identity is not an issue.

Ms. Hilka Becker, Senior Solicitor, Immigrant Council of Ireland-independent law centre:²⁹

⁵⁴Expressed her views on “Reverse Discrimination of Host Country Nationals, the necessary Evil of Free Movement?”. Ms. Becker began by raising the question of whether Irish nationals should be afforded the same rights as citizens of the EU exercising the right of free movement, asking whether reverse discrimination might be contrary to Article 14 of the ECHR, Article 8 of the ECHR or Article 41 of the Irish Constitution. In relation to the question of whether reverse discrimination is permitted by EU law, Ms. Becker referred to the Opinion of Advocate General Sharpston in the *Zambrano* case, noting that this indicates that all EU citizens, including those in purely internal situations, can rely on Article 18 TFEU (which prohibits discrimination). In this case, the Advocate General stated

²⁹ See Appendix 3

that if one insists that physical movement to a Member State other than the Member State of nationality is required before residence rights as a citizen of the Union can be invoked, the result risks being both strange and illogical. Ms. Becker also referred to, amongst other cases, the *Rottmann v. Freistaat Bayern* decision, which, in the context of a decision withdrawing naturalization, indicates that the adoption by Member State of a measure in respect of one of its nationals must have regard to EU law. She concluded by advocating that we keep a close eye out for the implications of *Zambrano* case.

Jonathan Tomkin Barrister at law: ³⁰

⁵⁵Mr. Tomkin outlined the recent case of *Secretary of State for Work and Pensions v. Taous Lassal*. It was suggested that this case is particularly interesting for a number of reasons. Firstly, this decision provides a useful example of how the Court approaches the calculation of time periods set out in Directive 2004/38 (The 2004 Residence Directive). Secondly, the case provides guidance on the relationship between successive pieces of secondary legislation adopted to give effect to rights enshrined in the Treaty and the Charter. Thirdly, it is interesting because the judgment displays a wide range of interpretative techniques and therefore provides interesting insight into reasoning methodology of the Court of Justice of the European Union. He said it enables Union citizen and their family members to reside after five years indefinitely.

³⁰ See Appendix 4

4.7 FACE TO FACE INTERVIEWS AND LETTERS

Golden Anikwe³¹

⁵⁶As part of the survey a face to face interview was conducted with Golden Anikwe Chief executive of Co-operative Support Services (CSS) Ireland, a native of Nigeria, expresses his views on the implementation of Regulation 12 of the Regulation of 2006. Golden explained the difficulties that one of his clients had when he sought to renew his residency permanently but was told he must produce his spouse as a prior condition . His legal representative asserted that the requirement that his estrange spouse be exercising Treaty right in Ireland is a condition specified under Chapter three and as such should not apply to him as he has acquired a right of his own. The matter is presently in the High Court for determination. Golden maintain that his client has since the refusal been rendered economically inactive in the State.

Barrister Ade Adeyanju³²

⁵⁷In another face to face interview with Barrister Ade Adeyanju a legal practitioner resident in Navan, Co-meath explained that the application of the European Union Citizenship rules by the Court of Justice has brought hope for thousands of third-country national parent who were parent of Irish born children but were deported back to their country of origin. He stated that the Government should now as a matter of European law ensure that in the implementation of the *Zambrano* judgment rights of Third Country parent of Irish born children under the Charter of fundamental rights of the Union is duly

³¹ See Appendix 5

³² See Appendix 6

taken into account and in the light of the Human right Act 2003. He said a close friend of his was deported back to Nigeria in 2006 after his application for residency in the State as a parent of an Irish born child was refused and that owing to the recent *Zambrano* judgment he has submitted a fresh application to the Irish embassy in Nigeria and they are expected back to Ireland in due course. As regards what ground could result to expulsion after *Zambrano*? He asserted that the only criminal activity that would result in the automatic expulsion of a parent of a Minor Union citizen must be one based on imperative grounds of public security and except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the rights of the Child of 20 November 1989.

Letter to Olamide Akinsete³³

⁵⁸He is a member of the Residence Against Racism (RAR) under the leadership of Rossana Flint. He expressed his dissatisfaction about the power accorded to An Garda Siochana to determine what residence stamp a parent of an Irish born child should be issued. He was of the view that in most of the cases, the Garda immigration officer lacks experience and skills to deal with people from ethnic community background and often take matters into their own hands. He stated that since the last one year an immigration officer has continuously restricted his residency permit by issuing him a one month residence document instead of three years stamp on the grounds that he has matters for obstructing a Garda during the course of his duty on appeal at the Circuit Court. He believes that the immigration Garda took the matter personal as she had renewed the residence permit of two of his friends in the same case for three years. He says that this discriminatory exercise of administrative power should be checked. He expresses satisfaction over the judgment of the Court of Justice in *Zambrano* saying that from now onwards, the decision

³³ See Appendix 7

as to what residency stamp he would be issued would be determined in accordance with European Union law as oppose to the discretionary power of a member of An Garda Siochana.

Letter to pastor Jide Sadiq of Kingdom Christian Ministry.³⁴

⁵⁹Mr. Sadiq was of the view that the introduction of the Irish born child Scheme by Mr. Michael McDowell was deliberate as it set out to obstruct the legal effect of the *Chen* case in Irish domestic law. He says that it would seem that the principles of European Union Citizenship and its legal effect on the Free movement of persons which resulted in the decision in *Chen*, marked the bedrock upon which *Zambrano* was determined. He expresses frustration that the *Chen* decision was not fully implemented into Irish domestic law as at when due. He said if the *Chen* judgment applied now in the *Zambrano* decision, he saw no reason while it did not apply in 2003.

³⁴ see Appendix 8

5.2 RECOMMENDATION ON THE KEY ISSUES OF THIS THESIS

⁶⁰ Consistent with the findings of this research and considering the diverse issues raised and analyzed by it, I make the following recommendations which to the best of my knowledge would ameliorate the difficulties that thousands of Union Citizens and their family members may be facing in the Irish State and to minimize legal cost that may stem from disputing these rights enshrined under European Community Law. That the provisions of the Citizens Rights Directive as transposed by the European Communities (Free Movement of Persons) Regulations 2006 (S.I. No 656 of 2006) be reviewed and amended to the following extent:

AMENDMENT TO REGULATIONS 9.3 OF THE REGULATIONS OF 2006

⁶¹(i) That the term “Until the completion of the course of study” in Regulation 9.3 of the European Communities (Free movement of Persons) Regulations 2006 (S.I. No. 656 of 2006) be amended to read “Until the Completion of their studies” to prevent unnecessary interference to the right of family members of Union citizens in the event where one course of study end with the intention of progressing to another.

IMPLEMENT THE LASSAL JUDGMENT OF THE COURT OF JUSTICE

⁶²(ii) Consequently, with reference to Regulation 3.4.(a) of the Regulations of 2006, seem to replace the phrase “in accordance with these Regulations” for “legally” by providing that :

“ A person lawfully resident in the State in accordance with the provisions of the European Communities (Aliens) Regulations 1977 or the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997 shall be deemed to be lawfully resident in the State for the purposes of these Regulations”.

The implication of the above provision on the right of Union citizens and their family members is that they would be unable to count periods of residence that ended prior to the coming into force of the Regulations of 2006 for the purpose of acquiring a right of permanent residence. This is contrary to the judgment of the Court of Justice in *Secretary of State for Work and Pension v Lassal*. This would breach the requirement that the right to permanent residence is not subject to the conditions provided for in Chapter three to the Directive. And I recommend that Regulation 12.1 should be amended along the lines of “Notwithstanding regulation 6”, or an attachment to the schedule of the Regulation indicating that periods of residence resided under earlier Community law instrument which ended prior to the coming into force of the Regulations of 2006 count for the acquisition of permanent residence save where the person has been absent from the State for more than two consecutive years before 30 April 2006. This would rectify the *Lassal* judgment into domestic Irish Law.

AMEND ANNEX IV-EU 3 FORM

⁶³(iii) I further recommend that the free standing right of family members of Union citizens who have resided in the State legally and continuously for five years be recognized in Annex IV-EU 3 form by excluding the imposition of documentary evidences which relates to the Union citizen since the departure of the Union citizen no longer affect the right of residence of the family members on acquisition of permanent residence and indeed since the right is independent. At the moment, the requirement that family members who want to obtain a permanent residence card must establish the continuous residence of their Union citizen spouse in the State is a complete breach of the aims of Article 16 Citizens Rights Directive 2004/38/EC.

IMPLEMENTING THE ZAMBRANO JUDGMENT

⁶⁴In respect of the impact of the recent judgment of the Court of Justice in *Zambrano*, I will make the following recommendations for the implementation of the decision into Irish domestic Law:

⁶⁵(iv) I recommend that the Residence and Immigration Bill be either reviewed or a new Bill introduced to flesh out the rights laid down by the Court of Justice in the *Chen* and *Zambrano* case specifically on the right of Irish born children and their Third-Country national parents to reside in the State . To this end,that the right of permanent residence under these decisions be visibly spelt out in law and the requirement for obtaining same be laid down to enable transparency. It would seem at the moment that there are no transparent application process in place on the Department of Justice website and indeed, it would also seem that applicants who submitted written applications for conferral of right of residence under the *Zambrano* decision are been given three years stamp or stamp three. This in my view is wrong as it results in discrimination between the right of residence granted under the *Chen* judgment and those under *Zambrano*. I see no reason why a minor citizen child under the *Chen* decision should enjoy a right to permanent residence or indefinite leave to remain as oppose to a minor child under the *Zambrano* decision being granted only three years residency stamp. I recommend that the period of residency under the *Zambrano* judgment be a right of permanent residence to avert claims of discrimination in future from these applicants.

SPECIALIST COURTS FOR ASYLUM AND IMMIGRATION CASES

⁶⁶(v) That the Minister for Justice should lead an initiative to set up specialist immigration Courts specifically designated for the dealing of Asylum and immigration cases with specialist adjudicators as oppose to the present system.

EUROPEAN UNION RIGHTS FOR IRISH CITIZENS RESIDENT IN IRELAND

⁶⁷(vi) That under a new legislative dispensation adult Irish citizens should be accorded equal rights as most of their European Counterparts to be able to exercise Treaty rights in Ireland irrespective of cross-border movement in compliance with cases like *Zambrano*, *Jipa* and *Chen* . As argued during the course of this thesis, it is for the Irish government to lay down this right as they have such power to do so. I see no sense in denying Citizens of Ireland a right that may benefit them when they involve in matrimonial relationship with a Third-Country national who may seek family reunification rights. That Irish citizens do not enjoy such right under domestic and are equally denied same under European Union Law.

PREVENTING DISCRIMINATORY STOP AND SEARCH

⁶⁸I recommend that appropriate amendments be made to section 12 of the Immigration Act 2004 in line with the judgment of the Court of Justice in *Oulane* for the prevention of discrimination and protection of Union citizens and their family members from unlawful discrimination by members of An Garda Siochana.

