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The fundamental status of Union citizenship

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Abstract

This paper examines the European Court of Justice's interpretation of the fundamental status of Union citizenship in recent case law. The first part of the paper analysis to what degree cross border movement is a condition for invoking fundamental rights protection. In the second part of the paper, the analysis is concerned with Union citizenship as membership. Citizenship can act like a gatekeeper for fundamental rights protection and thus create separate rules for Union citizens and third country nationals; the paper argues that this results in a privileged position for a selected few. Lastly the paper aims to evaluate how citizenship in this way may represent a challenge to human rights, and how the Court ideals with claims of activism.

Keywords: European Union, citizenship, nationality, membership, Treaty of Lisbon, European Convention on Human Rights, accession, federation, Charter of Fundamental Rights of the European Union, third country nationals, fundamental rights, migration.

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1. Introduction

1.1 Topic and research question

The topic of this paper is the fundamental status that characterizes a citizenship of the European Union, and how this status acts like a triggering mechanism for so called "fundamental rights", such as the right to move and reside within the territory of the Union.[1] The subject touches upon both constitutional and material EU law.

According to Article 20 in the Treaty of the Functioning of the EU (hereafter TFEU), Union citizenship is meant to be a derivative citizenship sprung out of a citizenship in one of the Member States. Union citizenship is therefore supposed to be "additional" and not replace national citizenship. This doctrine on national citizenship as the primary has however been under contestation after the European Court of Justice (hereafter ECJ) announced that Union citizenship" is destined to be the *fundamental* status of nationals of the Member States."[2] In practice the Court has shown that this interpretation may result in limitation on Member State's discretion regarding, most notably, questions of expulsion and the right to family reunification.

The more one looks at concrete cases, the more abstract the concept of citizenship in the European context seems to become. In this paper Union citizenship is explored from a rights and membership perspective by posing the research question: *Does the status of Union citizenship reduce the emphasis placed on free movement for citizens invoking fundamental rights protection?*

The paper aims to address the implications and possible consequences of this question by analyzing the fundamental rights inherent in Union citizenship from a constitutional perspective. The intension is to explore the meaning of 'fundamental rights', and assess how

[1] This right is found in Article 21 TFEU.

[2] This wording was first cited in Case C‑184/99 *Grzelczyk* [2001] ECR I‑6193, para. 31.

its independence holds up in competition with purely economic freedoms. Also, in line with the membership perspective, the paper provides a comparison of fundamental rights protection for Union citizens and citizens from non-Member countries by contrasting the ECJ's approach to the proportionality test applied by the European Court of Human Rights (hereafter ECtHR).

A major focus is thus to examine whether the exercise of the rights as a Union citizen is dependent on cross border movement having taken place before a claim is advanced by defining the scope of the Citizenship directive (2004/38/EC). An underlying issue is to evaluate the consequence of applying one set of rules to the category of Union citizens who participate in cross border movement, and another set of rules to the rest category of "im-mobile" Union citizens.

The topic is of current interest, perhaps especially from the perspective of an outsider looking in. A full Union membership would entail that Norwegian citizens formally become Union citizens. During the process of writing this paper it has however become clear that the term 'Union citizen', for the purpose of free movement, to an extensive degree already include citizens belonging to the European Economic Area (hereafter EEA). A subsequent objective is therefore to establish how this affects national sovereignty in both EEA countries and the Member States through the demarcation between national immigration rules and the right of residence recognized in the Citizenship Directive.

There has been a growing attention to citizenship during the last couple of decades. This has resulted in a vast production of research papers dealing with the subject. A number of the papers on European citizenship focus on situations where national legislation interferes with the rights accorded to Union citizens. In this respect the paper at hand is no exception. However, in addition, this paper provides a closer look at how citizenship status can be a triggering mechanism for the expansion of rights through EU law, particularly the right of residence and the right to family reunification.

The EU is at times described as a work in progress. This is most definitely true of the ad hoc development of fundamental rights law. The EU Charter of Fundamental Rights came into force with the Lisbon Treaty in December of 2009. Before this time fundamental rights was developed and sanctioned through proceedings before the ECJ. The Luxembourg case law will therefore be the main legal source in the following analysis of Union citizenship.

1.2 Structuring the argument

The case law analysis rests on a theoretical framework. Chapter 2 therefore considers contemporary scholars' description of a denationalization of citizenship in the European context from a historical stand point. This chapter also defines the legal concept of a Civis Europeus and points to the main difference between Union citizenship and the purely legal concept of citizenship. The chapter then considers the content and form of citizenship and to what extent the acquisition of Union citizenship is contingent on citizenship in a Member State. Since Union citizenship diverts fundamental rights, chapter 3 then goes on to discuss the substance of these rights and how they are balanced against economic freedoms.

In chapter 4 the question is whether the exercise of rights as a Union citizen is dependent – like the exercise of the classic economic freedoms – on free movement having taken place *before* a claim is advanced. In this chapter it becomes clear that the fundamental status of Union citizenship evolves through a dynamic case law, which defines the scope of EU law and hence the competence of the Court. The aim here is also to see how the right to free movement ties in with social rights, like the right to family reunification. The analysis will show that the approach of the ECJ reflects the idea that when mobility and economics become deeply involved, it becomes exceedingly difficult to keep the family out. It will also become clear that the byproduct of the ECJ's citizenship friendly approach to free movement is the indirect development of a differential set of rights for Union citizens who exercise their free movement rights and those who remain in their Home State.

In keeping with the perspective on free movement and family chapter 5 shows how similar situations – in family reunification cases - reach different outcomes under alternative set of rules. Firstly between those Union citizens who make use of their free movement rights and those who do not, secondly between Union citizens and third country nationals. In the extension of this topic at the more conceptual level, there is also a question of whether fundamental rights are in competition with human rights. This issue will be addressed in chapter 5.2.5.

A common thread throughout the whole of the paper is the view that citizenship, as a fundamental rights concept, makes up a membership where particularly the social rights of some individuals come to the foreground, while others are excluded. In chapter 6 this perspective on citizenship as membership ties in with the debate about the ECJ's supposedly activist role in the area of family rights.

2. Defining citizenship in the European context

2.1 Denationalization of citizenship

A sensible law abiding Englishman could, according to the historian A.J.P. Taylor, until August of 1914 walk through life and barely acknowledge the State's existence. You could live where you wanted and how you wanted. You could travel practically anywhere in the world without permission from anyone. Usually there was no need for a passport, and many were not in possession of one either.[3] After World War 1, however, there was a change in this relaxed relationship between free movement and national borders.

The war had resulted in a Europe consisting of many new independent states based on ethnic nationality – an environment where nationalism came to its right. With this shift in ideology it became increasingly important for each independent state to shape the rules gov-

[3] Fromkin (2005) p. 22-3.

erning who was to be considered a member of that particular community and who was to be kept out. The EU citizenship presents a challenge to the idea of nationalism while at the same time placing a federalist label on the Union. It appears that the notion of territory has replaced the former emphasis on national identity. It is as Spiro, the author of 'A new international law on citizenship' has put it, 'becoming increasingly clear that state discretion is no longer unfettered and that citizenship practice must account for the interests of individuals as well as those of states'.[4]

Adopted by the Council of Europe in 1997, the European Convention on Nationality (ECN) still defines nationality as 'the legal bond between a person and a State.'[5] On the other hand, contemporary scholars are describing citizenship as 'increasingly denationalized, with new forms of citizenship (both above and below the state) either actually or ideally displacing the old."[6] The European citizenship can be seen as a sophisticated example of this type of 'post - national citizenship' – a citizenship that has detached itself from the exclusive realm of the nation state.

The idea that citizenship represents something more than nationality is however not a novel thought. For a long time the rights associated with citizenship was contingent on the gender and financial status of individuals. Thus holding the nationality of a given state was not necessarily sufficient to enjoy civil liberties such as the right to vote or own land. The possibility of having rights can, on the other hand, be completely detached from citizenship; even stateless[7] persons can rely on human rights conventions as these apply to refugees, stateless persons, criminals and ordinary citizens alike[8]. Still, it is most common to think of

[4] Spiro (2011) p. 717.

[5] Article 2a ECN.

[6] Bosniak (2006) p. 24.

[7] Defined in the Convention relating to the Status of Stateless Persons under Article 1 (1), as a person who is 'not considered as a national by any state by the operation of its law.'

[8] Høstmælingen (2010) p. 27.

citizenship as a concept where the parties, the individual and the state, are governed by a set of rights and obligations. The concept of EU citizenship creates a more complex picture by introducing a third party to the table, namely the Union.

2.2 The legal concept of a Civis Europeus

2.2.1 The definition of a Union citizen

The citizenship of the European Union was formally introduced in Article 9 of the Maastricht Treaty (TEU) in 1992. The status of Union citizen was – without being contingent on economic status – granted to all nationals of the Member States. For those citizens who participate in free movement the definition of 'Union citizen' creates a common reference to workers, self-employed persons, self-sufficient persons and students alike. Consistent with the focus on individuals, which otherwise separate Union law from other international law, the development of Union citizenship indicates a broader scope for the European collaboration.

The outsider countries Norway, Lichtenstein and Iceland are committed through the EEA Agreement, but this does not contain corresponding regulations on citizenship. The EFTA Court has stated that it considers such omissions as intentional and it was therefore previously assumed that the Court does not regard Union citizenship as a factor when interpreting the EEA Agreement.[9] However, after the Citizenship Directive (2004/38/EC) was implemented in 2007 the Court's decision cannot be upheld with regard to the part concerning the free movement of persons.[10] This means that the Directive's use of the term 'Union citizen' for the purpose of free movement[11] does not differentiate between citizens belonging to either the European Union or the European Economic Area.

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[9] Case E-1/01 *Hörður Einarsson* v *The Icelandic State*, para. 43.

[10] Chapter 4.4.2 considers recent case law from the EFTA Court which seconds this opinion.

[11] The opposite is the case for the part of the Directive concerning political rights as these are exclusive to citizens of the Member States. See also chapter 4.1.

2.2.2 Content and form of Union citizenship

There are different modes of acquiring citizenship. Article 20 TFEU formally confers the status of Union citizenship on every person holding the nationality of a Member State. In this way citizenship of the Union is still contingent on nationality and is thus given the formal status of a jus tractum citizenship, or derivative citizenship. A central question for the ECJ has been whether Union citizenship in reality implies something more than a citizenship based on nationality, in the form of either jus soli ("right of the territory") or jus sanguinis (right of blood). In other words, whether Union citizenship represents something more substantial than a formal accessorial status.

Union citizenship does not entail any obligations on the part of the citizen. On the other hand, as a citizen of the European Union one is entitled to both substantive and procedural rights, *additional* to the rights associated with citizenship in a Member State. A few of these rights, like the citizenship initiative, are completely independent from the notion of free movement, but most of them are not. The rights are found in Articles 21-25 TFEU, and include the right to vote for the members of the European Parliament, the right to vote at local elections and the right to consular assistance. However, Union citizenship rights particularly differ from national citizenship rights as they do not open for participation in national elections. In this way Union citizenship falls outside the scope of the typical legal definition of citizenship as a *full* membership of a state or society.[12]

For the purpose of this paper the relevant article is Article 21, which provides Union citizens with a right to move and reside freely within the territory of the Union. This provision is influenced by the right to free movement of economically active persons[13] and includes derivative rights such as a right to equal treatment with nationals of the Host State, the right to move and reside and the right to family reunification – even if the family members in question are third country nationals. These derivative rights presuppose a cross border ele-

[12] Viblemo (2010) p. 112.

[13] Rosas (2012) p. 144.

ment, and are therefore in principle not available to Union citizens unless they chose to exercise their free movement rights. The rights to residence and family reunification are also conditional on the economic status of the citizen concerned. For example, if the citizen applies for a right of residence for more than three months and is not economically active, there is a sufficient resources requirement[14] intended to ensure that the family does not become a financial burden on the Host State.

2.2.3 Controversies regarding Member State autonomy

The introduction of Union citizenship was not without controversy. In countries with particularly strict immigration policies there has been a fear that Union citizenship would enlarge the power of the Union at the expense of Member States' sovereignty. For instance there had to be a second referendum to convince the Danish government to sign the Maastricht Treaty[15]. The doctrine on European citizenship that has always held that this citizenship is to be "additional to and not replace national citizenship,"[16] is therefore by no means accidental. In fact, the idea of replacing national citizenship is positively rejected. Since Union citizenship is dependent on a citizenship in one of the Member States it is still formally up to the nation state to control access to EU citizenship. However, since this citizenship is a Union concept the task of determining its content is left to the supranational institutions of the EU. In other words, even though the Member States formally control access it is still EU law that makes up Union citizenship. Consequently, since the rights deriving from Union citizenship typically are asserted against the Home State of the citizen, citizenship has the potential for creating tensions between the Member States and the EU.

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[14] European Parliament and Council Directive 2004/38 (Citizens' free movement rights) Article 7 paragraph 1c.

[15] Denmark has also reserved competence to deny the right to family reunification with third country nationals where possible.

[16] Article 20 TFEU.

The doctrine that European citizenship shall be additional and not replace national citizenship is now under contestation from scholars. Kochenov[17] for instance argues that there has been a mutation of Member States' nationalities under pressure from EU citizenship. His main point is that the function of the Member State's nationalities mostly serves as access points to the status of EU citizenship, which in turn has come to influence the rules for the acquisition of the Member State's nationalities. In this way Union citizenship is no longer merely a derivative status, and has already lead to the creation of more favorable naturalization procedures for the acquisition of nationality for those already in possession of the EU citizenship. Six Member States – including Austria, Germany, Hungary, Italy, Romania and Slovenia - are already providing Union citizens with quicker naturalization procedures compared to those provided for third country nationals.[18]

In chapter 3 the aim is to define the concept of fundamental rights, before looking at the impact citizenship can play for individuals raising claims before national courts in chapter 4.

3. Citizenship as a fundamental rights concept

3.1 Introduction

The Union is not considered to be a human rights body, and is primarily concerned with the internal market and the four freedoms. However the ECJ has for some time been concerned with the social aspect that free movement brings with it. The respect for fundamental rights now follows from written primary law in the Lisbon Treaty[19] Article 2 and Article 6. Article 2 states that the Union is founded on 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights', while Article 7 provides

[17] Kochenov (2010/23).

[18] Ibid: p 2.

[19] Hereafter TEU.

a (so far unpracticed) mechanism for sanctioning Member States that are in 'serious and persistent breach' of the values listed in Article 2.[20]

Since the Union is not a human rights body, one would think that the task of ensuring the respect for human rights would be better safeguarded by precisely this type of institution. In Article 6 (2) one also finds an opening for the Union *as such* to join the European Convention on Human Rights (ECHR):"The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms." According to Article 218 (8) TFEU accession requires a unanimous decision from the Council in addition to being approved by the Parliaments of all of the Member States. However, when such an accession finally takes place, it will enable Union citizens to raise claims before the European Court of Human Rights in Strasbourg on the grounds that an EU legal act is in violation of the human rights set out in the Convention.

3.2 The meaning of fundamental rights

EU fundamental rights law is inspired by the constitutional traditions common to the Member States as well as international human rights treaties. The term 'fundamental rights' mimics the German expression 'Grundrechte' indicating a broader scope than 'human rights' as the latter usually does not apply to companies.[21] Fundamental rights represent a contrast to commercial rights, but are not identical to human rights. The conceptual distinction is drawn between "*fundamental rights* [as] a constitutional concept based on case law, Article 6 TEU and the Charter of Fundamental Rights, while the notion of *human rights* is used primarily in the context of EU external relations."[22]

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[20] Two Member States, Great Britain and Poland, have specified in an additional protocol that the EU will not be able to declare that provisions or practices in these countries are in violation of human rights.

[21] For a more elaborate discussion on corporate human rights protection, see Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (2006) Oxford University Press.

[22] Rosas (2012) p. 164.

It now follows from Article 6 (3) TEU that fundamental rights are considered to be general principles of Union law. The idea developed through case law beginning with the Court's decision in *Stauder*.[23] The case concerned a Commission Decision designed to reduce EU butter stocks, which entitled consumers in possession of certain social security schemes to buy butter at subsidized prices. However, in order to control that the discounted butter in fact was sold to the intended recipients, the consumers were forced to produce a cupon as evidence, which in the German and Dutch versions, unlike the French and Italian versions, had to indicate the name of the beneficiary. Stauder, a German national, challenged the requirement that his name be on the cupon on the grounds that this was in violation of his right to privacy. The Court took the view that the most liberal interpretation of the provision at issue should prevail since that interpretation "contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court[24]."

The Court's acceptance of general principles in *Stauder* is of importance as it made fundamental rights a part of EU primary law. Since general principles are dynamic in nature and evolve through case law it is left to the Court to apply them selectively. It is an ongoing debate whether general principles, as fundamental rights, transfers too much power to the judiciary at the cost of the legislative power, or put another way – whether general principles give too much power to the central authority vis-à-vis the Member States. This is reflected in "Article 6 (TEU) [which] prescribes an institutional sensitivity to EU fundamental rights law. It is not to be used to enlarge Union competences.[25]" The question whether the Court is using fundamental rights as a tool for activism will be more fully addressed in chapter 6.

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[23] Case C-29/69 *Stauder v City of Ulm* [1969] ECR 419. See also Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

[24] Ibid *Stauder v City of Ulm*: para. 7.

[25] Chalmers (2010) p. 228.

3.3 Balancing commercial freedoms with fundamental rights

The substance of EU fundamental rights law is perhaps best assessed when fundamental rights are balanced against other Union values such as economic freedoms. The method applied by the Court is as usual a proportionality test, but it will become clear that this test is not identical to the proportionality test carried out by the ECtHR. The case law of the ECJ provides many examples where fundamental rights have influenced, or even determined the Court's decision. There are also examples where fundamental rights have been successfully claimed without establishing a connection to free movement, although such cases are rare. [26]

Schmidberger[27] is currently considered to be one of the leading cases in which the proportionality test has been most clearly articulated. In *Schmidberger* respect for and protection of fundamental rights (the freedom of association) was used by a Member State as a justification for a restriction on a fundamental freedom (the free movement of goods). The case concerned a group of environmental activists who were demonstrating against the pollution caused by transit traffic in Alpine valleys by blocking motorways coming into Austria from Italy. The Court considered that this was a restriction on the import of goods that violated Article 34 TFEU, and then went on to evaluate whether this violation could be justified due to the Austrian governments need to protect the right to freedom of expression and freedom of assembly regulated in Articles 10 and 11 of the ECHR.

The Court reasoned that "unlike other fundamental rights enshrined in [the ECHR] such as the right to life or the prohibition of torture and inhumane or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression or the freedom of

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[26] Most notably in *Ruiz Zambrano,* Case C-34/09 judgment of 8 March 2011 nyr. In this case third country nationals were able to make a claim for a derived right of residence for the ascendant of a child who is a Union citizen – and who enjoys such a right under Article 20 TFEU, even though the Union citizen had never exercised its right to freedom of movement. See also chapter 4.3 and 5.2.5.

[27] Case C-112/00 *Schmidberger* [2003] ECR I-5659.

assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose."[28] Thus the Court concluded that the exercise of these rights may be restricted. From this statement it is apparent that the ECJ does not favor commercial freedoms over fundamental rights. However fundamental rights that are not considered to be absolute, like the prohibition on torture or degrading treatment, have to be balanced against economic freedoms.

In *Schmidberger* the Court found that the Austrian government's decision to grant the demonstration was proportionate as it struck a fair balance between the competing interests of the case: The protesters had applied beforehand, the government had issued a time limit, the demonstration was peaceful and the traffic had been temporarily redirected and, finally, the demonstration had a legitimate aim. The case has however been criticized by Morijn[29] because the ECJ is weighing the legitimate interest of fundamental rights protection *directly* against the free movement of goods by applying a proportionality test, which seems to imply that fundamental rights protection is negotiable. On the other hand, as argued by Chalmers,[30] it is hard to see what the Court could have done other than look for an appropriate balance considering the Court's statement that non - absolute rights can be restricted. One might still object that the degree of governmental involvement in organizing the demonstration, in order to avoid a violation of Union law, defeats the whole purpose of organizing a protest in the first place. In spite the actual result in *Schmidberger* there seems to be a danger that restrictions may impair the very substance of the rights guaranteed.

In recent case law the Court seems less willing to protect fundamental rights at the expense of common market freedoms. The *Viking Line*[31]and *Laval* cases come from the area of ser-

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[28] Ibid, Schmidberger, para. 80.

[29] Morijn (2006) p. 40.

[30] Chalmers (2010) p. 760.

[31] Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 *and* Case (C-341/05) *Laval un Partneri Ltd* v

vices and deal with the question of horizontal effect; the possibility for giving treaty rules application beyond public institutions to include private associations as well. Starting with the latter, *Laval* was a Latvian company which attempted to use Latvian workers to construct a public building in Sweden, but was met with protests by Swedish construction unions who were trying to get Laval to sign Swedish collective agreements. The company refused and subsequently brought proceedings before Swedish courts arguing that their freedom to provide services was being restricted by unions who were using posted workers. Moreover the company argued that it was discriminated against because Swedish authorities failed to recognize the collective agreements Laval had entered into with unions in Latvia. The main question before the Court was whether Article 56 TFEU could be applied to measures adopted by trade unions.

After having established that collective action is a fundamental right recognized under Union law, the Court followed the same procedure as in *Schmidberger* by balancing this right with the freedom of services. The logic followed by the Court was that "the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of […] legal autonomy by *associations or organisations not governed by public law*."[32] (My highlights). The Court thus reasoned that in order to ensure the effectiveness of the Treaty, everyone who hinders free movement has to be affected by it.[33] In other words, the Court is giving the Treaty horizontal effect by extending its application to include private as well as public parties.

One could argue that the Court in *Laval* is actually protecting individual freedom as it ensures freedom from public interference for (cross border) contracting parties.[34] On the other

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Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetare förbundets avd. 1, Byggettan, Svenska Elektrikerförbundet [2007] ECR I-11767.

[32] *Laval*, Ibid: para. 98.

[33] *Laval*, Ibid: para. 80.

[34] Davies (2012).

hand it must be clear that the effectiveness of the right to take collective action is quite heavily impaired when labor unions run the risk of pricy litigation procedures, which again will affect individual workers possibility to successfully negotiate their interests.

Viking Line concerned a Finnish shipping company which was relying on the freedom (to choose their state) of establishment in order to prevent threatened boycott actions from national trade unions objecting to the company's wish to employ workers under cheaper terms in Latvia. In this case "the Court appears to go further [than in *Laval]*, and suggests that the application of free movement law to private bodies is not dependent on them playing some quasi - regulatory role."[35]

The Court's application of a proportionality test to the concept of fundamental rights – themselves – in *Viking* and *Laval*, have undergone similar criticism as *Schmidberger*. On the other hand, in the test constructed by the ECtHR fundamental rights are ranked higher than other considerations. It is therefore not a balancing of interest on an equal level, but "the *restrictions* on fundamental rights which must satisfy a proportionality test."[36] However, even now – before the EU's accession to the ECHR – "an individual complaint might be brought in Strasbourg if national law implementing the CJEU decisions were found to be in breach of Article 11 [the right to association]. So the CJEU may not have had the last word."[37]

When the EU accedes to the European Convention of Human Rights the ECtHR will officially become the authority on human rights issues and the right to appeal will extend beyond preliminary rulings to include decisions from the Commission as well. However, some scholars[38] argue that accession will not lead to an overnight change in the practice of

[35] Chalmers (2010) p. 801.

[36] Douglas Scott (2011) p. 677.

[37] Douglas Scott, Ibid: p. 678.

[38] Næsborg-Andersen (2011) p. 198.

the ECtHR since it previously has shown significant sympathies with EU's peculiarities. Perhaps especially through the development of the 'equivalent protection doctrine'[39], which determines that "state action taken in compliance with international obligations is justified as long as the relevant organization protects human rights in a manner equivalent to that provided by the Convention."[40] It is assumed that this doctrine will continue to be a part of ECtHR's practice at least for the immediate future even though the different proportionality tests carried out by the ECJ and the ECtHR questions whether citizens are actually offered an equal degree of protection.

As already mentioned above, the Court has stated that the European citizenship is 'destined to be the fundamental status of nationals of the Member States.' This concept of citizenship as a fundamental rights status is an expression used in many recent judgments of the ECJ, and has been described as an "ideological principle to back up interpretations of EU primary and secondary law favourable to free movement[41]." In the following chapter the aim is to show how citizenship as a fundamental rights concept can affect or even determine the outcome of a case and in turn contribute to define the material scope of EU law.

4. Wholly internal situations – a contradiction in terms?

4.1 Introduction

In the opinion of Advocate General Sharpston delivered on 30 september 2010, she asked whether "the exercise of rights as a Union citizen [is] dependent – like the exercise of the classic economic 'freedoms' – on some trans-frontier free movement (however accidental, peripheral or remote) having taken place before the claim is advanced? Or [if] Union citizenship look[s] forward to the future, rather than back to the past, to define the rights and

[39] Developed through case law starting with the ECtHR's decision in *M & Co* v. *The Federal Republic of Germany*, 13258/87, February 9. 1990.

[40] Parga (2009) p. 180.

[41] Rosas (2012) p.16.

obligations that it confers?"[42] This chapter addresses the question from A.G. Sharpston by assessing to what extent citizenship rights can be invoked in domestic situations.

Freedom of movement is considered to be a primary and core right of Union citizenship. According to Article 21 TFEU every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. Article 21 applies where cross-border activities are treated less advantageously than domestic ones, or where migration is made more difficult than staying at home, or leads to disadvantages under national rules.[43] Article 21 is further complemented by the Citizenship Directive.[44]

The Citizenship Directive applies to Union Citizens who make use of their free movement rights by traveling to another Member State. The Directive was also implemented in the EEA Agreement in attachment V in December 2007. The question of the Directive's relevance for the EEA was however complicated by the fact that the Directive ties the right to free movement of persons to the EU's rules regarding Union citizenship. In order to avoid unnecessary doubts about the meaning of the Directive the EEA Committee decided that the term 'Union citizen' is to be understood - in the context of free movement - as a reference to either a citizen of the EU or EEA/EFTA. The Directives provisions regarding political rights, on the other hand, such as the aforementioned Citizenship initiative is considered to be exclusive for citizens belonging to the Member States of the EU.[45]

According to the Directive all Union citizens have the right to reside on the territory of another Member State for a period up to three months without any conditions or any for-

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[42] Case C-34/09 *Ruiz Zambrano* [2011] ECR I- 1177, para. 3 of the Opinion.

[43] Chalmers (2010) p. 462.

[44] Directive 2004/38/EC. The Directive is at times also referred to as the Free Movement Directive.

[45] The European portal, in the EEA - note base: http://www.regjeringen.no/nb/sub/europaportalen/eos/eos-notatbasen/notatene/2006/mai/direktivet-om-fri-personbevegelighet.html?id=582616

malities other than the requirement to hold a valid identity card or passport.[46] The only preconditions on residence extending the three month period, is that the citizen has 'sufficient resources' and is in possession of comprehensive sickness insurance in the Host State.[47] In spite of keeping conditions and formalities on travel to a minimum, a survey[48] published by the European Commission in 2010 shows that the vast majority of Union citizens choose to reside in their Home State. Although these citizens – and citizens who have returned to their Home State after a period abroad – formally fall outside the scope of the Directive, the case law reveals several situations where the right of free movement may be invoked before the Home State of the Union citizen or EEA national.

The following references to the ECJ's case law regarding freedom of movement must be viewed in light of the close link between the desire to move and reside and the possibility for keeping close family ties intact through family reunification. In her article about "relational nationality"[49] Knop views citizenship as a common ground for law and gender. She makes the more general point that even though the law might not define it, economics and family go hand in hand; and when mobility and economics become deeply involved it becomes exceedingly difficult to keep the family out. This perspective is very much in line with the EU's perception of family; which is to see it as an integral part of integration. The most politically sensitive cases concern the right for migrant citizens to be accompanied by family members coming from outside the Union, so called third country nationals.

4.2 Wholly internal situations and material limitations

The main rule is that when there is no cross border element a situation is classified as 'internal'. In this situation it is up to the Member State to decide whether it is willing to pro-

[46] Article 6 (1), Directive 2004/38/EC.

[47] Article 7 (1), Directive 2004/38/EC.

[48] European Commission (337/2010) p. 9.

[49] Knop (2001).

vide the same rights to nationals as those visiting Union citizens are able to enjoy under the Citizenship Directive.[50] In the case of *Uecker and Jacquet*[51] the question before the Court was whether third country nationals married to Community workers – who had not exercised their free movement rights under the EC Treaty – could rely on the same rights as the spouses of migrant workers. The Court however denied the application from the complainants to bring their partners from Norway and Russia to Germany on the grounds that there was no cross border element.

The Court also made the more general point that "Citizenship of the Union […] is not intended to extend the scope ratione materiae of the Treaty also to internal situations which have no link with Community Law."[52] On this background legal scholars have concluded that "[j]urisdiction is prior to substance."[53] However, although the cross border requirement still remains the main rule for invoking EU law, case law reveals that the definition of an internal situation is subject to a dynamic interpretation which in turn seems to widen the scope of EU law after all.

4.3 Asserting competence – outside the Treaty

In *Singh*[54] the Court operates with a looser conception of what an internal situation is – creating a connection to EU law through the so called 'returnee principle' for nationals of a Member State that has returned to their Home State after a period of residence in another Member State. The case concerned a British woman working in Germany, where she was able to apply for family reunification with her Indian husband on the basis of EU law. After returning to the UK she was told by the British authorities that as a British citizen in Britain

[50] A situation often referred to as 'reversed discrimination'.

[51] Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171.

[52] *Uecker and Jacquet,* Ibid: paragraph 23.

[53] Chalmers (2010) p. 463.

[54] Case C-370/90 *Singh* [1992] ECR I-4265.

she could no longer rely on the rights accorded to migrant workers, with the result that her Indian husband was not granted a residence permit.

However, the ECJ stated that "A national of a Member State might be deterred from leaving his country of origin […] if, on returning to the Member State of which he is a national […] the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State."[55] The Court also went on to state that this would particularly be the case were family members of the Union citizen is concerned. In other words, to take away Ms Singh's EU rights upon her return would be a deterrent to free movement following the rationale that if she had known that this could happen, it would have made it less attractive for her to go abroad in the first place. The Court is particularly drawing on analogy to Regulation 1612/68 on the freedom of movement for workers within the Community as grounds for allowing Ms Singh to keep her rights. Another question is whether the Court isn't also moving very close to ruling on a hypothetical question, which of course would be a reach beyond its competence.

The returnee principle crated in Singh only refers to the free movement of workers who return to take up economic activity in their Home State. In later practice[56] however, the Court has shown that citizens have an unconditional right of residence in their Home State, which means that they cannot be subjected to the same conditions for residence as might be applied to non-nationals upon their return. This suggests that so called returnees do not need to work in order to maintain the rights created by their stay abroad. Nor do they need to comply with the conditions on resources and sickness insurance that long term non-nationals will be subjected to under the Citizenship Directive.[57]

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[55] *Singh*, Ibid: para. 19.

[56] Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie* v *Eind* [2004] ECR I-10719.

[57] Davies (2012).

A case which is often seen in connection to *Singh* is *Metock.*[58] The case was referred for a preliminary ruling by the High Court of Ireland. It concerned asylum seekers who had married UK citizens residing in Ireland, which made them spouses of migrant Union citizens protected under the Citizenship Directive. The catch was that the Irish legislation implementing the Directive demanded that the family members demonstrate lawful residence within the Union *prior* to their first entry. This was however not possible since their asylum applications were definitively refused by Irish authorities. However, since the Citizenship Directive does not impose this condition, the ECJ ruled that Member States may not impose other conditions – such as previous lawful residence in another Member State – than the ones already set out in the Directive. The judgment thus seems to make clear that the previous status of a family member of a migrant Union citizen is irrelevant. Although, "the state may still impose proportionate sanctions upon the family member for any previous violations of immigration law, but these must not go so far as to deter free movement – one should think of a fine, but not of a denial of residence."[59]

The ruling in *Metock* must be seen in connection to the Court's judgment in *Akrich.*[60] In that case the ECJ ruled that taking up residence in another Member State merely to gain rights under the Directive is in fact not an abuse of rights.[61] The Court's ruling in *Akrich* is consistent with its decision in the Chen and Zhu case.[62] The case concerned a Chinese mother, who gave birth on the soil of Northern Ireland to the effect that her baby acquired Irish nationality. When the child and the mother returned to their home in the United Kingdom, the question was whether the baby had acquired a residence right under Community law providing the mother with a derived residence right. The Court did not agree with the Member State in that "the aim of having her child acquire the nationality of another Mem-

[58] Case C-127/08 *Metock* [2008] ECR I-6241.

[59] Chalmers (2010) p. 471.

[60] Case C-109/01 *Secretary of State for the Home Department* v *Akrich* [2003] ECR I-9607.

[61] *Akrich* [2003] ECR I-9607, paragraph 55.

[62] Case C-200/02 *Chen*.

ber State [constitute] an attempt improperly to exploit the provisions of Community law."[63] It is in the opinion of Advocate General Geelhoed in the Akrich case difficult to apply the doctrine of misuse of Community law in a specific case. Geelhoed suggest that one of the reasons for this is that "the dividing line between abuse and use for a purpose not contemplated by the legislator is hard to define."[64] In Akrich the Court clarified that "marriages of conveniences entered into in order to circumvent the provisions relating to entry and residence of nationals of non-Member States" will amount to an abuse of rights.[65]

Metock created much steer among Member States, particularly in Ireland and Denmark.[66] There has been a fear that the Court's ruling in *Metock* would lead to increased immigration by enabling third country citizens to circumvent national rules on family reunification. This is not an incorrect interpretation of the Court's decision. Viewed in connection to *Singh* and *Eind, Metock* leaves little space for national immigration policies. If one desires family reunification with family members from outside the EU this is practically possible and not particularly inconvenient since it only demands relocation to another Member State for a shorter period of time. It is not evident that this use of the Citizenship Directive is cohesive with the aim of enhancing free movement activity across the Member States. However, there is little evidence in the case law that claims regarding the misuse of rights receive much support.

The implications of the *Metock* judgment are particularly strong in countries with strict regulations on family reunification with third country nationals. As it differs from the rules imposed against the countries own nationals the situation becomes similar to that of *Uecker and Jacquet.* A growing number of nationals of the Member States, in countries such as

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[63] *Chen*, Ibid: para. 34.

[64] Case C-109/01 *Akrich* [2003] ECR I-9607, para.173 of the Opinion.

[65] *Akrich*, Ibid: para. 57.

[66] In Norway the skepticism against the implementation of the Citizenship Directive to the EEA Agreement has been expressed in Inst. O. nr. 33 (2008-2009).

Denmark and the Netherlands, are compensating for their disadvantaged position under national rules by participating in migration motivated by the intent of reunifying with family members from outside the Union at the dismay of state authorities.[67] *Metock* has also shown that Member States have different means of resolving the issue of 'reversed discrimination.' In Denmark, where there is broad consensus for strict migration policies amongst the majority of political parties, *Metock* did not only result in imposed amendments in national legislation, but also in a national agreement aiming to minimize its effect.[68] In Italy, on the other hand, national polices were altered to fit the Citizenship Directive and thus avoid unequal distribution of rights between nationals and migrant Union citizens.

In *Carpenter*[69] the Court followed the same approach as in *Singh* and *Metock* by going outside the Directive to create a connection to EU law. The case concerned a British man living in his Home State, England, with his children and third country national wife. After his wife was expelled, Mr. Carpenter successfully argued that since his work required him to perform services abroad, he was only able to maintain his cross-border work activity if his wife could babysit the children. The Court thus found that it was not necessary to live abroad in order to fall within the scope of EU law provided one is engaged in cross border economic activity. The case must be seen in connection with the evolving nature of family rights within the EU: *Carpenter* creates a situation where the right to family reunification with third country national family members are applicable not only to so called returnees, like in *Singh*, but also to citizens who have permanent residence in their Home State if they, like Mr. Carpenter, are involved in cross-border economic movement. One objection to the Court's ruling in *Carpenter* may be that the obstacle to free movement could easily have been overcome by placing the children in nursery school. Once again it seems that when family is involved the Court is less reserved with asserting competence.

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[67] Chalmers (2010) p. 471.

[68] Europa Kommisjonen Danmark (22.09.2008): *Politisk aftale mellem regeringen og Dansk Folkeparti om håndtering af EU-retten om fri bevægelighed efter EF-Domstolens afgørelse i Metock-sagen*.

[69] Case C-60/00 *Carpenter* [2002] ECR I-6279.

In *Garcia Avello*[70] the Court in some sense went beyond *Carpenter* by making the possibility for future movement sufficient to circumvent national immigration policies. The question before the Court was whether Belgian rules on family names demanding that children of married parents used their father's last name, amounted to direct discrimination. The children in question were born in Belgium of Spanish and Belgian parents, which granted them dual citizenship under Belgian nationality code. Belgian authorities argued that this was an internal matter for the state to decide alone. The children were in fact nationals of the Member State concerned and they had never been abroad let alone made use of their free movement rights. The rule could therefore not amount to direct discrimination since the rule did not refer to nationality.

Still the Court found grounds for indirect discrimination. The children's dual citizenship in two Member States was considered sufficient to invoke EU law even though the cross-border requirement was lacking. The Court found that even though the rules governing a person's surname fell within the competence of the Member States this competence had to comply with Community law "in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States."[71] The Belgian rules were found to be neither justifiable nor proportional, particularly when considering that the children had already acquired Spanish passports. In the opinion of the Advocate General Jacobs a discrepancy in surnames is liable to cause obvious practical inconvenience like difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in the other Member State of which they are also nationals.[72] The case has some common ground with *Singh* since the obstacles to free movement in both cases are on the borderline of constituting hypothetical scenarios.

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[70] Case C-148/02 *Garcia Avello*.

[71] *Garcia Avello*, Ibid: para. 25.

[72] *Garcia Avello*, Ibid: para.36 seen in connection with para. 56 of the Opinion.

Surprisingly after *Garcia Avello* the Court indicated a setback for fundamental citizenship rights in *Förster*.[73] The facts concerned a German woman who was studying in the Netherlands. She applied for a student maintenance aid, but failed to meet the conditions of a residence period for five years and a requirement that she be economically active. Considering that similar conditions were not imposed on Dutch students, one of the questions before the ECJ was whether this differential treatment of students coming from another Member State were in agreement with what is now Article 18 TFEU, or if it amounted to discriminatory practice. The facts predate the Citizenship Directive, but the Court still uses it to form its decision.

The ECJ first determined that the principle of non-discrimination was applicable to the case, but went on to consider that the distinction between national and migrating students could be justified since there was an actual difference in the level of integration made into Dutch society between them. In her appeal against the Dutch decision, Ms. Förster claimed that she was sufficiently integrated by relying on the Court's previous decision in *Bidar*,[74] which considered that a "certain degree of integration"[75] over a certain length of time in the Host State was sufficient. The Court still decided that her residence in the Netherlands for over a period of three years, during which she had been in gainful employment on several occasions next to her studies, was not enough to fulfill the level of integration set out in *Bidar*.

The case seems to disagree with the Court citizenship friendly approach to the resources requirement in previous case law. For instance in *Grzelczyk*, which also concerned study finance for migrating citizens, the Court pointed out that EU law accepts "a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence

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[73] Case C-158/07 *Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507.

[74] Case C-209/03 *Bidar* [2005] ECR I-2119.

[75] *Bidar*, Ibid: para. 57.

encounters are temporary."[76] *Förster* has also been criticized because it "seems to attack the very idea of EU citizenship and flies in the face of other recent cases on residence condition such as Bidar […] where the Court made a point of emphasizing that the rules in question, insofar as they were applicable, were equally applicable to nationals."[77]

In *Zambrano*[78]the stakes were higher. The Grand Chamber judgment concerned Mr. Ruiz Zambrano and his wife, both Colombian nationals, who sought asylum in Belgium. Their applications were denied, leaving them without a residence right and Mr. Zambrano without a work permit. While their case was under appeal the wife gave birth to two children, which acquired Belgian nationality pursuant to Article 10 (1) of the Belgian Nationality Code. Belgium being a member of the European Union also made the children entitled to a Union citizenship and thus a residence right. The case raised the question of whether the expulsion of the parents meant that the children would have to follow.

Like in *Garcia Avello* the cross border requirement seemed to be circumvented: The children who were of Belgian nationality had never been outside the territory of their Member State and could therefore not rely on the Citizenship Directive. In spite of this lack of connection to Union law they were able to make a successful claim for a derived residence right for their third country national parents. In this particular case the Court placed great emphasis on the dependent relationship between parents and their children: If the parents were to be expelled their children, who were EU citizens, would have to leave the territory of the Union in order to accompany them, which in effect would deprive the children of their fundamental right of residence.

The verdict was particularly controversial because the Union citizens being minor children had no means to meet the sufficient resources requirement that had been a condition in pre-

[76] Case C-184/99 Grzelczyk [2001] ECR I‑6193, para. 44.

[77] Chalmers (2010) p. 459

[78] Case C-34/09 *Zambrano*.

vious case law.[79] It is however not unlikely that the Court in *Zambrano* placed some emphasis on the fact that Mr. Zambrano had been providing for his family before his illegal employment was discovered by immigration authorities, making it less plausible that he would become a financial burden on the Member State in the future.

Following directly after *Zambrano* was *McCarthy*.[80] The case concerned a woman from the UK who was married to a Jamaican national. Mrs. McCarthy had both Irish and English citizenship, but she could not rely on the Directive since she had always lived in England. Her situation was an internal matter and therefore similar to *Zambrano*. However, the Court shortened the parameter by distinguishing Mrs. McCarthy's situation from the children in *Zambrano* by stating that "by contrast with the case of Ruiz Zambrano, the national measure at issue […] does not have the effect of obliging Mrs. McCarthy to leave the territory of the European Union."[81] Thus it was made clear that only a threat of having to leave the *whole* of the Union – and not just the Home State of the citizen – is sufficient for invoking fundamental rights protection.

The indication in more recent case law[82] is a restrictive interpretation of the Court's ruling in *Zambrano*. These cases will be discussed further in chapter 5 which provides a more detailed assessment of the role Union citizenship may play for the loss and acquisition of nationality.

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[79] Most notably in the Chen and Zhu case, Case C-200/02.

[80] Case C-434/09 *McCarthy* judgment of 5 May 2011 nyr.

[81] *McCarthy*, Ibid: para. 50.

[82] Primarily Case C-256/11 *Dereci*, Case C-83/11 *Rahman*, Case C-40/11 *Yoshikazu Iida*.

4.4 Findings: Legal clarity and scope

4.4.1 Situations where the right to free movement applies to the Home State of the Union citizen

This chapter started out with the question posed by Advocate General Sharpston[83], whether Union citizenship looks forward to the future, rather than back to the past, to define the rights and obligations that it confers. After looking at cases like *Carpenter* and *Garcia Avello* it is apparent that trans-fontier movement is not a necessary condition for exercising one's rights as a Union citizen: Even the possibility of making future movement more difficult is a relevant criterion when assessing which cases may fall within the scope of EU law.

Another finding is the difference in treatment of nationals and migrating EU citizens, like in *Uecker and Jacquet*, what is usually referred to as reversed discrimination. However, there is also a difference in the treatment of nationals of the same Member State, between mobile citizens, like in *Singh* or *Eind*, who can invoke 'the returnee principle' after a stay abroad and immobile citizens who are subject to rely solely on national immigration rules. It is not apparent that this is an ideal situation. Nevertheless it also shows that for those EU nationals willing to use their free movement rights, the EU citizenship becomes their primary citizenship.

The case law also reveals that the definition of 'cross border' is interpreted in a citizenship friendly way through a liberal understanding of what constitutes an 'internal situation' and of what might *possibly* amount to a 'deterrent to free movement.' For instance when the Union citizen is under threat from expulsion, the fundamental rights status of citizenship makes the cross border element less decisive, like in *Zambrano*, or when the sufficient resources requirement is subordinated the returnee principle, like in *Eind.*

[83] Case C-34/09 *Ruiz Zambrano* [2011] ECR I- 1177, para. 3 of the Opinion.

On the other hand, while the principle from *Zambrano* stands firm: EU law can be activated even in internal situations, the principle is strictly limited to cases with more or less identical facts. Some therefore view the case as a confirmation of the main rule laid out in *Uecker and Jacquet*; that the material scope of EU law does not extend to purely internal situations. *McCarthy*, which followed directly after *Zambrano*, seems consistent with this latter view. Here the Court stated that "it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State."[84] The Court goes on to clarify that exceptions to this rule, like the one made in *Garcia Avello*, is contingent on the Union citizen being subject to a 'serious inconvenience' both at the 'professional and private' level.[85] In other words, one principle case may not represent any real threat to national autonomy.

However, it seems that when family is concerned, like in *Carpenter*, the Court seems particularly activist in its willingness to create a connection to EU law which does not follow from the Treaty and which subsequently broadens the competence of the Court. Several of the above mentioned cases concern family members who are third country nationals and therefore represent a particular sensitive area of Member State's immigration policies. The lack of judicial support for claims about the misuse of rights has resulted in discontented Member States teaming up in order to pressure the Court to reverse the development or try to circumvent implementation of EU law through national agreements, like in Denmark. The Court has to balance national autonomy against the principle of effective judicial protection. When viewed in context, cases such as *Sing*, *Eind* and *Metock* seem to tip the balance in favor of the latter.

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[84] *McCarthy*, Ibid: para. 45.

[85] *McCarthy*, Ibid: para. 51, which references para.36 in *Garcia Avello*.

4.4.2 The relevance of Union citizenship for interpreting the EEA Agreement

A point of departure is the Court's ruling in the *Hôrdur Einarsson* case[86], referred to in chapter 2.2.1. This case does not concern citizenship, but whether a system of differentiated value-added tax applied under Icelandic law to books in the Icelandic language and books in foreign languages amounted to indirect protection of domestic products. One of the questions before the Court was whether the preferential tax treatment of books in Icelandic may be justified on grounds relating to the public interest in enhancing the position of the national language, and whether the defendant, the Icelandic State, could rely on Article 6 (3) TEU as grounds for derogation even though the EEA Agreement contains no corresponding provision. The Court stated that *"*Since the Treaty on European Union was negotiated before the conclusion of the EEA Agreement, it must be assumed that this discrepancy is intentional."[87] The Court therefore concluded that it could not base its reasoning on the analogous application of Article 6 (3) TEU in the instant case. It is plausible that this statement has transferable value and that the EFTA Court, for the same reason, has not considered citizenship as a factor when interpreting the EEA Agreement.

However, this hypothesis is less clear after *Wahl*,[88] a recent judgment concerning restrictions on the right of entry for EEA nationals and hence the interpretation of the Free Movement Directive. In this case the Court stated that even though the concept of 'Union Citizenship' and immigration policy are not included in the EEA Agreement "these exclusions have no material impact on the present case." The Court also affirmed its usual approach by stating that "the impact of the exclusions must be assessed on a case-by-case basis and may vary accordingly."[89] Since the Court's ruling in *Wahl* has an apparent reference to the Directive it must therefore be viewed as a moderation of the assumption based on the *Hörður Einarsson* judgment.

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[86] Case E-1/01 *Hörður Einarsson* v *The Icelandic State.*

[87] *Hörður Einarsson*, Ibid: para. 43.

[88] Case E-15/12 *Jan Anfinn Wahl* v *The Icelandic State.*

[89] *Wahl*, Ibid: para. 74-5.

The question of the Directive's relevance to EEA Agreement is complicated by the fact that the Directive ties the right to free movement of persons to the EU's rules regarding Union citizenship. It is clear that the EEA Committee has decided that the Directive's use of the term 'Union citizen' does not differentiate between citizens belonging to either the EU or EFTA states. What is less clear is the relevance of the ECJ's interpretation of 'the right to freedom of movement' in cases referring, on the one hand, to the Citizenship Directive and, on the other, to the Treaties.

It seems apparent that judgments where the Court is directly interpreting the Directive must be relevant for the interpretation of the EEA Agreement as well. This means that the ECJ's decision in *Singh*, *Eind*, *Carpenter* and *Metock* can be invoked before the EFTA Court. Cases, like *Chen*,[90] where the Court applies Article 20 and 21 TFEU in the interpretation of the Directive, must fall into the same category.

On the other hand, are the judgments characterized by *not* referring to the Citizenship Directive. These cases immediately seem to fall outside the scope of the EEA Agreement. In the commentaries to the law implementing the Agreement[91] in Norway, it is also the opinion of Bull that the Ruiz Zambrano case is *probably* not relevant within the EEA context since the EEA Agreement does not contain corresponding provisions to Union citizenship. In other words, the same argument as used in *Hörður Einarsson*.

However, *Zambrano* and similar cases like *Dereci* – which are purely based on Union citizenship as expressed in Article 20 TFEU – still concern the right to freedom of movement, which according to the EEA - notes cited above, is included in the EEA Agreement. In light of this and the EFTA Court's ruling in *Wahl* one cannot conclude that these decisions will be without relevance in future case law.

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[90] See also Case C-413/99 *Baumbast* v *Secretary of State for the Home Department* [2002] ECR I-7091.

[91] Note (55) point 3 to L27.11.1992 nr. 109 (EØS-loven).

In the next chapter, the focus is to show how Union citizenship can act like an exclusive membership by impacting on Member State discretion in nationality law. It will become apparent that citizens belonging to the EEA do not enjoy an equal right of protection by relying on human rights conventions.

5. Citizenship as Membership

5.1 Introduction

Chapter 4 has shown the effect that exercising one's free movement rights can have for Union citizens' possibility of being joined by family members from abroad – particularly from countries outside the European Union. In this chapter we will look closer at how specific EU law concepts, like the principle of harmonization and mutual recognition restrains nationality laws in the Member States. A comparative perspective on citizenship rights in the EU and non-Member States will reveal that the supremacy of Union law places greater demands on nationality laws than human rights law. This can, as indicated in chapter 4, affect not only the right of residence for Union citizens, but also create derived residence rights for third country national family members faced with expulsion.

5.2 Union citizenship's impact on the loss and acquisition of nationality

5.2.1 A comparative perspective

In the EFTA country Norway, national immigration authorities recently decided to expel a minor Norwegian citizen on account of her Kenyan mother's fraud. The case[92] concerning the three year old Maria is still pending, but already gives rise to the more principle question of what a national citizenship is worth if it does not even provide the citizen with a right of residence? The case has raised some eyebrows. Professor of Law, Mads Andenæs,

[92] City Court case nr.: 13-113713TVI-OTIR/08.

is one of Maria's legal representatives. In his opinion it is unthinkable that the expulsion of a Norwegian citizen from Norway could be explained as an immigration policy measure.[93]

However, perhaps the case is not such a surprise. International law contains few provisions that limit the individual state's freedom to design its own nationality laws. This means that each state is free to set conditions for the acquisition and loss of nationality of that State, unless the State is explicitly bound by a treaty.[94] In this subchapter the aim is to explore how Union law differs from international law in this respect. Citizenship rights, exclusive for citizens belonging to a Member State, can overrule national immigration policies in expulsion and family reunification cases. It will become evident that national discretion is limited in questions concerning the acknowledgment of other nationalities, revocation of national citizenship as well as the expulsion of nationals from the territory of the Union.

5.2.2 The principles of harmonization and mutual recognition

Already in *Micheletti*[95] it was made clear that for the Member States of the EU discretion is not unfettered where the recognition of other nationalities is at issue. The case concerned Mr. Micheletti who was both Argentinean and Italian, but had lived mostly in Argentina. For this reason the Spanish government refused to recognize him as an Italian and consequently as an EU citizen. The Court stated that "Under international law, it is for each Member State, *having due regard to Community law*, to lay down the conditions for the acquisition and loss of nationality."[96] (My highlights). It was therefore not in the competence of Spain to challenge the recognition of Mr. Micheletti's status as an Italian, or to refuse to recognize it.

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[93] Folkvord (2013).

[94] Ot.prp. nr. 41 (2004-2005).

[95] Case C-369/90 *Micheletti*.

[96] *Micheletti*, Ibid: para. 10.

This ruling must be considered in light of the principle of harmonization – if Spain could decide this case for itself it would not only undermine the rights and freedoms inherent in Union citizenship, but also result in a situation where Member States could decide for themselves whether persons holding a dual citizenship should be treated equal to other Union citizens, or whether they should be considered third country nationals. This also follows more generally from the mutual recognition principle resulting from the Cassis de Dijon case:[97] If a citizen is registered with dual citizenship in one state, another Member State has to accept the assessments underlying that decision.

5.2.3 The nature of the proportionality test

Following *Micheletti* was *Rottmann*[98], which created a steer among Member States when EU law was applied to what appeared to be an entirely internal matter: The revocation of nationality in a Member State from a citizen of that community. The facts were however a bit on the unusual side. An Austrian applied for citizenship in Germany which was first granted, but later revoked because of fraud. Since his Austrian citizenship had been automatically lost by the acquisition of his German citizenship, he no longer had the nationality of any Member State and his Union citizenship would therefore be lost as well, which in turn created a surprising link to EU law.

The Court stated in *Rottmann* that the acquisition and loss of nationality is subjected to EU law if it impacts Union citizenship. The Court viewed it as a question of proportionality:[99] The consequences for the individual – he had given up his Austrian nationality, which would be difficult or impossible to regain and therefore would leave him in a status of persona non grata – versus the Member State's reason for revoking his German citizenship –

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[97] Case C-120/78 *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

[98] Case C-135/08 *Rottmann*.

[99] *Rottmann*, Ibid: para. 55.

he was a criminal sailing under false pretenses. His fraud was however not enough for the Court to accept a revocation of nationality. In the Court's view Germany had to consider the severity of the criminal charges brought against Mr. Rottmann in Austria before issuing an expulsion order against him. Since these charges concerned suspicion on serious fraud on an occupational basis, this would however probably not help his case.

Consistent with the Court's ruling in *Micheletti*, the Court ruled in Rottmann's favor not because of the concern that Mr. Rottmann would lose both his German and Austrian citizenships, but because of the consequences of his potential statelessness, namely that this would also deprive him of his Union Citizenship. These cases are not in direct conflict with the doctrine of national citizenship as the primary, but indicate that nationality laws are to some extent constrained by Community law when the status of Union citizenship is under threat. The Court is not claiming that national authorities have no say in the matter – only that they must prove that their national measures are proportionate in relation to the Union citizen. In this respect the ruling in *Rottmann* is consistent with EU law in general. However, this being said, the Court's demand of a proportionality test forces nationality laws to conform to EU law, consequently making it more difficult to expel nationals from the Member States.

For citizens who fall within the scope of the Citizenship Directive, Articles 27-29 regulate the question of eviction. The proportionality test is strict: It follows from Article 27 paragraph 2 that previous criminal convictions do not constitute grounds for eviction by themselves. The Member States must also prove that the personal conduct of the individual concerned "represent a *genuine*, *present* and *sufficiently serious* threat affecting one of the *fundamental* interests of society." (My highlights). These criteria are further developed through case law.

It follows from the ECJ's verdicts that – because the Union citizen's right to move and reside is considered to be *fundamental* – exceptions and derogations from free movement must fulfill several mandatory requirements. In the *Kohll van Duyn*[100] case the Court thus stated that when applying Treaty exceptions, the starting point is that these are to be strictly interpreted "so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community."[101]

It is also left to the Member States to prove the necessity of the restriction. A case in point, which current relevance was recently confirmed in the above mentioned *Wahl*[102] judgment, is *Adoui.*[103] In this case two French women were working in a bar in Belgium as prostitutes. Belgian authorities wanted to expel them as their conduct was formally illegal. Questions concerning moral values, like prostitution, will typically enjoy a certain degree of national discretion. The Court however pointed out that since Belgium did not take any repressive measures against national prostitutes the women's criminal conduct could not automatically amount to an expulsion as the conduct did not appear to be "sufficiently serious to justify the restrictions on the admission to or residence within the territory of a Member State […]."[104] The reasoning behind the Court's decision in *Adoui* is that national rules have to be practiced consistently in order to prove the Member State's sincerity when practicing exceptions from free movement.

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[100] Case C-41/74 *Van Duyn* v *Home Office* [1974] ECR 1337.

[101] *Van Duyn*, Ibid: para. 4.

[102] Case E-15/12 *Jan Anfinn Wahl* v *The Icelandic State para. 104-5.*

[103] Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* v *Belgian State and City of Liege* [1982] ECR 1665.

[104] *Adoui and Cornuaille*, Ibid: para. 8.

5.2.4 The supremacy of Union law

Davies[105] argues that the key aspect of *Rottmann* is not the cross border element – the fact that Rottmann moved from one Member State to another, but that Mr. Rottmann at the time when his national citizenship was revoked was in fact a German citizen living in Germany. Usually the Court will have no competence to interfere in such wholly internal situations. However, *Rottmann* shows that even the revocation of national citizenship is subjected to EU law. Some might consider *Rottmann* as a revolutionary step in the evolution of citizenship rights because it seems to reach far into the sovereignty of Member States' nationality laws. Several scholars[106] on the other hand view *Rottmann* as an entirely conventional application of Union law with a highly predictable outcome following the logic of the principle of primacy of Community law over national law.

The facts in *Rottmann* were indeed quite particular and some argue that the application of *Rottmann* is limited to cases with identical facts, which would indeed limit its application. However, the Court's reasoning that the loss and acquisition of nationality is a question subordinated EU law gives the case a broad justification as these situations easily will effect Union citizenship in cases where the there is no dual citizenship to the rescue.[107]

Scholars[108] argue that the Member State's rhetoric about national citizenship being superior to Union citizenship is contrary to the Court's view that the latter is destined to be the "fundamental status" of Europeans – and even that national citizenship is not autonomous of Union citizenship: "The Court has indeed often said that Member States in principle

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[105] Davies (EUDO Observatory on Citizenship, Online date: 10.11.2013).

[106] Shaw (EUDO Observatory on Citizenship, Online date: 10.11.201).

[107] The trend in many European countries in later years has been a move away from dual citizenship laws. Introducing naturalization procedures where the new citizenship automatically deletes the old, which is also the rule practiced in Norway.

[108] Davies (EUDO Observatory on Citizenship, Online date: 10.11.2013).

determine their own citizenship laws, but this statement is entirely compatible with the proviso that they must do so in conformity with EU law."[109]

5.2.5: Union citizenship rights in competition with human rights: Derived residence rights for third country nationals

In keeping with the membership theme this subchapter looks closer at how Union citizenship acts like a separator between union law and human rights law in family reunification cases.

In *Zambrano*[110] the protection against eviction from the Member State where one is a national – and coincidently the right to move and live on the Member State as a Union citizen – was under threat. The Court was asked whether third county national parents could rely on a derived right of residence for the ascendant of a child who is a Union citizen – and who enjoys such a right under Article 20 TFEU. In this way, the case dealt with two primary topics that were intertwined: Derived rights for third country nationals and to what extent the status of Union citizenship is *fundamental* when the citizen in question is firstly a minor, and secondly unable to provide for itself or its third country national family.

In this case the Court provided an explanation as to how the Member State's citizenship doctrine relates to the status of Union citizenship as *fundamental*, when it stated that national measures are precluded *in so far as* such decisions deprive the Union citizen of "the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."[111] The *Zambrano* case thus indicates that the Member State has to perform a 'genuine enjoyment test' before expelling a Union citizen from the country. The case law post

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[109] Ibid: Davies para. 6.

[110] Case C-34/09 *Zambrano*.

[111] *Ruiz Zambrano*, Ibid: para. 45.

Zambrano[112] has however showed that this is a strict test demanding almost identical facts to be applicable.

For instance, in the above mentioned *McCarthy* case it was made clear that the protection is stronger for children dependent on their 'primary career' than for adults. These cases are however not that different in the sense that both the parents in *Zambrano* and Mrs. McCarthy's husband would be dependent on social welfare. However, in *McCarthy* the Court applied a narrow interpretation of *Zambrano* by introducing a demand for a career relationship to exist between the third country national and the EU citizen dependent on that care. One can therefore conclude that the right for family life is not sufficient and that the closeness or dependence between relatives is crucial in the Court's evaluation.

Dereci[113] was next in line to test the limits of *Zambrano*. Mr. Dereci was a Turkish national who entered Austria illegally and married an Austrian citizen. He also had three minor children, whom like their mother were Austrian and thus Union citizens. Along with four other applicants in a similar position he requested a residence permit by relying on the Citizenship Directive which was refused on the grounds that their Union citizen spouses had never exercised their free movement rights. The main question before the Court was whether Article 20 TFEU precludes Member States from refusing residence permits to third country national family members when the Union Citizens are not dependent on them for their subsistence.

The case was similar to *Zambrano* in the sense that there was no cross border element. However, *Dereci* differed from the facts of *Zambrano* in that it concerned adults and not children, and thus did not concern a codependent relationship[114]. Most importantly, in *Dereci*, the threat of having to leave the territory of the Union was directed at the spouses

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[112] Primarily Case C-256/11 *Dereci*, Case C-83/11 *Rahman*, Case C-40/11 *Yoshikazu Iida*.

[113] Case C-256/11 *Dereci*.

[114] *Dereci*, Ibid: para. 32.

of the Union citizens and not the citizens themselves. After *Dereci* it was thus clear that the cross border requirement that seemed to have been overcome in *Zambrano* was in fact not. Only the threat of having to leave the territory of the Union as a whole was considered sufficient to invoke the fundamental status of Union citizenship.[115] The Court also specified that a purely economic reason or a wish to keep the family together within the territory of the Union is not sufficient in itself "to support the view that the Union citizen will be forced to leave the territory."[116]

Following *Dereci* was *Yoshikazu Iida.*[117]Mr. Iida was a Japanese national who obtained a residence permit as the foreign spouse of a German national. After his wife moved to Vienna with their daughter, Germany revoked his spousal residence permit since he no longer lived with his wife. However he was currently legally resident on account of his work authorization, but still chose to apply for a long-term residence permit on the basis of custody rights over his German daughter. The main question before the ECJ was whether parents of Union citizens are entitled to a right of residence under the Citizenship Directive, which applies to migrating Union citizens *and* to their family members, as defined in point 2 of Article 2, who accompany or join them.

Since Mr. Iida's daughter had participated in free movement it was clear that the Directive was applicable. However, Mr. Iida was not able to comply with Article 2(2)(d), which requires that a direct relative in the ascending line of the Union citizen concerned must be 'dependent'[118] on that citizen in order to be regarded as a 'family member' within the meaning of that provision. Mr. Iida therefore had to rely on his spousal relationship according to Article 2(2)(a) in order to fall within a definition of "family member" as recognized

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[115] *Dereci*, Ibid: para. 66.

[116] *Dereci*, Ibid: para. 68.

[117] Case C-40/11 *Yoshikazu Iida*.

[118] An explanation of the term "dependent" is provided in para. 55 of the judgment. See also Case C-83/11 *Rahman* para. 18 for a more elaborate discussion.

by the Directive. Also, in the opinion of Advocate General Trstenjak, the assessment of whether to grant a residence permit to a third country national had to place significant importance on whether the third country national family member is actually accompanying or joining the Union citizen.[119] Since Mr. Iida did not follow his wife and daughter to Vienna he would not be able to comply with this condition. The logic is easy to follow: It would have been strange if the third country national could derive a right of residence in the Member State in which his wife or daughter, the Union citizen, is *not* living as it would defeat the purpose of a family reunification.

On the other hand, Advocate General Trstenjak makes the point that the protection of the free movement rights of Mr. Iida's daughter could be compromised if the threat of having the father's residence permit revoked would make the parents consider moving the child's place of residence back to Germany.[120] This is an example of the same reasoning as used in *Zambrano*; the idea that if a certain refusal in national immigration law could potentially cause a violation against free movement rights, that refusal should not be allowed. However, the use of this kind of hypothetical scenario appears to be problematic because it is very likely to go beyond the original meaning of the Directive when interpret without factual support. The Court also pointed out that "It must be recalled that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions."[121] The hypothetical idea that Mr. Iida could deprive his family members of their right to free movement appears, in any respect, to be fictional since Mr. Iida's legal residence in Germany was supported by his work permit and thus not dependent on his family relations.

After the Court's decision in *Yoshikazu lida* it thus became clear that third country national parents may only derive a right of residence if they actually accompany their Union citizen

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[119] *Yoshikazu lida*, Ibid: para. 90 of the Opinion.

[120] *Yoshikazu lida*, Ibid: para. 66 of the Opinion.

[121] *Yoshikazu lida*, Ibid: para. 77.

family member. Moreover the right of residence is contingent on the existence of a real threat for the parent to have to leave the territory of the Union as a whole – and there are no other remedies available. Therefore, since Mr. Iida was already legally resident on account of his work authorization he was not able to make a claim for a long-term residence permit on the basis of custody rights over his German daughter or his spousal relationship.

With reference to the question of whether citizenship rights can provide stronger protection than human rights, a point of departure is the *Zambrano* case. In that instance the Court made no mention of the Human Rights provisions referred to it. This implies that Article 20 TFEU in that particular case provided for a direct basis for derived residence rights for the third country family members in question. In *Dereci* however the Court made it clear that where there is no real threat, for the Union citizen of having to leave the territory of the Union as a whole, national courts have to consider if there is a violation of Article 8 ECHR before invoking Union law. In family reunification cases concerning citizens who have exercised their free movement rights this is not necessary as they fall within the Citizenship Directive.

The above mentioned Norwegian case concerning the three year old Maria[122] has common ground to the *Zambrano* judgment only except that she was born in an EFTA country. The fact that she acquired Norwegian citizenship, the same as her biological father, is without interest since he has made no claims for custodial rights and her third country national mother therefore is considered to be her sole caregiver. In her situation citizenship made no difference for the City Court's decision to expel her mother even though this consequently leads to the expulsion of a Norwegian citizen from Norway. In Denmark the use of *Zambrano* is limited to precisely those cases where the third country national parent is acting as the child's primary career *and* the Danish parent is completely out of the picture.[123]

[122] See chapter 4.4.1.

[123] Starup (2011) p. 270.

In other words, if Maria was born in Denmark and not in Norway, her mother would enjoy a derived right of residence and neither of them would risk being sent out.[124]

The *Maria* case illustrates that the legal standing of children under the human rights regime is complicated by the fact that they have few procedural rights. Most often they are for instance not considered a party to the case concerning the expulsion of their parents even though they are directly affected by the Court's decision. The question of having guardianship over a child may actually impact negatively on a person's claim to residence. "Normally the point of departure is that expulsion of the mother does not intrude sufficiently upon the family bond because the mother may take her child with her to her country of origin. Even if the child has the nationality of the country concerned, there is no self - explaining right for the mother to live in that country as well."[125] This in turn means that national immigration rules trumps ECHR Protocol 4 Article 3 which prohibits the expulsion of nationals. For Maria it means that her Norwegian citizenship has no real content as long as it does not provide her with the right to live and reside in her country of origin, or to receive the same welfare rights as other Norwegian citizens are entitled to.

Zambrano has been considered to strengthen the legal position for children as the definition of a Union citizen does not create separate categories for adults and children. Thus the point of departure for the expulsion of a family member of a Union citizen will be different from the human rights regime. A child which is also a Union citizen may therefore directly affect the outcome of an expulsion case concerning the right of residence for third country national family members where there exists a dependent relationship between parent and

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[124] Last year's debate in Norway on immigrant children facing deportation from their country of birth and/or long term residence in the controversial cases of Mahdi Shabazi (HR-2012-2398-P) and Verona Delic (HR-2012-02399-P), would probably not have reached a different outcome in a Member State as these children were never granted national citizenship which still is a condition for acquiring Union citizenship and fundamental rights protection.

[125] Boeles (2009) p. 153.

child. For migrating Union citizens the review of Articles 27-29 above clearly show that cumulative conditions for eviction create stronger protection for migrating EU citizens next to third country nationals facing the risk of expulsion. It is not enough that the migrant has committed a crime the Member State still has to produce evidence that the person appears to "represent a *genuine*, *present* and *sufficiently serious* threat affecting one of the *fundamental* interests of society."

One explanation for the apparently more rights friendly approach under the EU's fundamental rights regime is that the EU thinks of family reunification as an integral part of integration. Also, since Union citizenship is considered to be the fundamental status of nationals of the Member States the supremacy of EU law demands that the Member State prove that any infringement on the derivative rights to move and reside is in fact a necessary measure. The implementation of the ECHR, on the other hand, has not changed the fact that Member States are still in principle sovereign and the ECtHR feels the pressure to respect this, albeit it will lead to weaker protection of citizenship rights.

However, *Dereci* is a reminder that most Union citizens applying for family reunification have to rely on human rights and not derived citizenship rights. Thus in *Dereci* the Court describes its findings as being "without prejudice"[126] to the human rights treaties that might be applicable to the case and specifically mentions Article 7 of the Charter of Fundamental Rights of the EU. Since the number of Union citizens who can rely on their citizenship as means for derived residence rights for their family members is limited, one could argue that citizenship rights do not represent a challenge the authority of human rights.

5.2.6 Findings

In conclusion it seems that the Court has provided a more restrictive approach in the post *Zambrano* case law, which limits the use of the argument to cases where 1.) the person

[126] Case C-256/11 *Dereci*, para 69.

concerned is a citizen of the Union, 2.) that citizen is a child, 3.) who is dependent on its parents for subsistence, and most importantly 4.) is under a real – and not hypothetical – threat of having to leave not only their Member State, but the whole of the Union.

Following these cases there is at least two possible readings of *Zambrano*. The more restrictive reading claims that Zambrano confirms the need for a cross border element in order to invoke EU law. The other is to admit that even though the case has a limited application, the principle still stands; free movement is not necessarily a condition for invoking EU law in wholly internal situations. Either way, considering that *Zambrano* was a case that dealt with derived rights for third country nationals the strict interpretation of its application lifted Member States fear that this would make substantial inroads into their national immigration policies.

The development in case law post *Zambrano* is by some scholars described as consistent with 'the usual approach of the Court': While it starts out with an expansive interpretation of provisions on fundamental treaty rights it then applies a restrictive interpretation of exceptions permitted under these rights.[127] Perhaps however this is reading too much into the case law. In the conservative reading of *Zambrano*, the case is, as mentioned, merely viewed as an affirmation of the general rule that EU law should not interfere with wholly internal matters.

In sum, the case law of *Micheletti*, *Rottmann* and *Zambrano* give little tribute to the Member State rhetoric that Union citizenship is secondary to national citizenship. In *Micheletti* it was thus made clear that the recognition of other nationalities is not up to the Member State to decide alone. Then in *Rottmann* the Court upheld the supremacy of Union law in cases concerning the loss and acquisition of nationality – forcing Member State nationality law to conform to the supremacy of EU law where the status of Union citizenship is under threat. The case law has revealed a Court of Justice willing to go far to protect the fundamental

[127] Boeles (2009) p. 63.

status of Union citizens even in wholly internal situations like in *Zambrano*, although its application is strictly limited.

6. Constitutional considerations

Constitutional debates often circle around the separation of labor between the judicial and legislative branch. However, between the Council creating new policies to the Court's application of these policies the line of division is less than sharp. Particularly with regard to the lack of legislation of fundamental rights before 2009 this is a concept which largely has been developed through case law.

The relationship between the Member States and the ECJ is complicated. The Court's role is not to interpret national legislation and the job of making new policies is left to the other EU institutions. Because of the demand that new polices need an absolute majority it is however almost inevitable that policymaking at times happens in Court. As indicated in chapter 3, when judges apply general principles, which do not follow by written law, there is a certain danger that the Court ends up portraying the role of legislator. A way for the Court to avoid this stamp of activism is to combine the concept of fundamental rights with commercial rights. In other words, there has to be a clash between the national measure and a free movement right. In cases that are highly political in nature there is also a constitutional sensitivity that the Court is inclined to respect.

In *Grogan*[128] student unions handed out pamphlets about pregnancies were names and locations of abortion clinics in Great Britain were mentioned. The Irish Supreme Court ruled that it was unconstitutional to help women to have abortions by providing such information. The student unions, argued that besides their right to freedom of expression they were protected under Community law. The reasoning was that the provision of Article 56 TFEU, which prohibit any restriction on the freedom to supply services, applies to medical

[128] Case C-159/90 *Society for the Protection of the Unborn Child (SPUC) v Grogan* [1991] ECR I-4685.

services and thus abortions carried out legally in other Member States. Thus, since the effective enjoyment of this right is contingent on the necessary information any prohibition to restrict information on British abortion clinics would amount to a violation of Community law. The Court of Justice took a different stance ruling that 'the link between the activity of the students associations […] and medical terminations of pregnancies carried out in clinics in another Member State is too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of [Article 56 TFEU]'[129]. In this relation it has to be mentioned that the student Unions did not receive any remuneration for their promotional services, which of course is a requirement for evoking Article 56 TFEU.

Some argue that the Court's reluctance to interfere in *Grogan* provides incentives to cheat: "The clear message in Grogan […] was that students should offer to advertise, for a nominal fee, on behalf of the British abortion clinics, in order to bring themselves within the field of EU law."[130] However, if one considers *Grogan* in light of *Adoui*[131] the former also concerns a question where moral values is at issue, which typically enjoys a certain degree of national discretion. In addition one must take into account that the student Unions were only punished by fines, and that the outcome could have been entirely different if they had been exposed for more repressive means such as an arrest. In light of these contemplations it is more plausible to see *Grogan* as an example of that fundamental rights do not offer unlimited protection. Particularly where the plaintiff is not able to prove an encroachment of a free movement right the Court will be reluctant to challenge national legislators.

[129] Ibid *Grogan*: para. 24.

[130] Chalmers (2010) p. 256.

[131] See chapter 5.2.3.

Moreover, where the issue at hand has a particular constitutional sensitivity, such as the question of abortion has in Ireland; the Court is inclined to respect this.[132]

The Court's concern with coupling fundamental rights with commercial rights and reluctance to interfere in constitutional sensitive issues is however not a consistent approach taken in all areas of Union law. Research[133] shows that policy considerations also play an important part in EU law. The analysis indicates that this is particularly the case where family is concerned. Thus in many of the cases mentioned in chapter 4 and 5, like *Singh*, *Carpenter* and *Zambrano*; the Court seems less preoccupied with creating a clear link to Union law. In fact these cases are hard to explain without the argument of judicial activism. In *Singh* for instance the Court is moving quite close to ruling on a hypothetical question, and was only able to support its decision by drawing on analogy to the relevant directives. The idea that "A national of a Member State might be deterred from leaving his country of origin […] if, on returning to the Member State of which he is a national […] the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State,"[134] can only be understood as an attempt to create an incentive for free movement activity.

This is particularly obvious when comparing *Singh* to *Yokusi Ilida* where the Court explicitly rejects ruling on a hypothetical scenario. The major difference between the two cases is that the Court in *Yokusi Ilida* did not consider that the free movement rights of the Union citizen was being compromised by the threat of having her father's residence permit revoked since he was still legally resident through his work authorization. Thus, the Courts activism with regard to family seems to be limited to cases where the right of residence for

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[132] See also Case C-36/02 *Omega Spielhallen – und Automatenaufstellungs* v *Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, where the respect for national constitutional identities is offered without much reservation.

[133] *EØS-rett* (2011) p. 240.

[134] Case C-370/90 para. 19.

third country nationals may impact on the Union citizen's right to move and reside. However, cases like *Singh* confirm the opinion of Advocate General Sharpston[135] that citizenship looks forward to the future when it defines the rights that it confers, although there seems to be a fine line between this approach and ruling on hypothetical questions.

The Court's activism with regard to family has not done much to ease the criticism against the Union's democratic deficit. By creating a separate set of rules for migrating Union citizen and immobile Union citizens the concept of 'reversed discrimination' has become present. Chapter 3 clarified that fundamental rights are considered to be general principles of Union law. In the constitutional hierarchy of norms Treaties rank above general principles, and according to Article 20 TFEU Union citizenship is meant to be "additional" and not replace national citizenship. This standpoint is however not reflected in the case law. Since it is left to the Court to apply general principles selectively there is a shift in power from the legislative to the judiciary branch.

One could argue that citizenship rights that, like the Citizenship Initiative, are independent from free movement is more expedient in increasing democracy in the Union as it applies to everyone and not just an elite group of the most resourceful members of society.

7. Conclusion

In the introduction of this paper I posed the research question whether *the status of Union citizenship reduces the emphasis placed on free movement for citizens invoking fundamental rights protection?*

As the analysis has revealed, a citizenship of the European Union is not just a formal title symbolized by an illusory common identity, but a *fundamental* status encompassed with concrete enforceable rights. There is now little doubt that for those citizens who make use

[135] Case C-34/09 *Ruiz Zambrano* [2011] ECR I- 1177, para. 3 of the Opinion.

of their free movement rights this is also their primary citizenship. In chapter 2.2.3 it was thus made clear that national citizenship is for many reduced to an access key to Union citizenship, which in turn has come to influence the rules for the acquisition of the Member State's nationalities.

After establishing the concept of fundamental rights in chapter 3 the question in chapter 4 was whether the exercise of rights as a Union citizen is dependent – like the exercise of the classic economic freedoms – on some trans-frontier free movement having taken place before a claim is advanced. The case law analysis started out with the Court's decision *Uecker and Jacquet*, which revealed that "Citizenship of the Union […] is not intended to extend the scope ratione materiae of the Treaty also to internal situations which have no link with Community Law."[136] However, from cases like *Singh*, *Carpenter* and most notably *Zambrano* it was clear the definition of an 'internal situation' is subject to a dynamic interpretation which in turn seems to widen the material scope of EU law.

Nevertheless, even though these cases demonstrated that EU law can be activated in wholly internal situations, the post *Zambrano* case law has shown that its application is limited to cases with more or less identical facts. The Court's decision in *Förster* also indicated a surprising setback for fundamental rights when the combination of Union citizenship and the non-discrimination principle did stop the Court from stamping its sign of approval on differential treatment of migrating students. *McCarthy* which followed directly after *Zambrano* confirmed its position in *Uecker and Jacquet* and clarified that exceptions to this rule, like the one made in Garcia Avello, is contingent on the Union citizen being subjected to a 'serious inconvenience' both at the 'professional and private' level.[137] From the case law one can thus infer that the point of departure for the exercise of rights as a Union citizen is contingent on free movement having taken place *before* a claim is advanced. Con-

[136] *Uecker and Jacquet*, Ibid: paragraph 23.

[137] *McCarthy*, Ibid: para. 51, which references para.36 in *Garcia Avello*.

versely, omissions from this general rule are justified because the Union citizen's right to free movement is restricted in the present, or could be in the future.

Then, in chapter 5, it became clear that Member State discretion is limited in questions concerning the acknowledgment of other nationalities, revocation of national citizenship as well as the expulsion of nationals from the territory of the Union. A comparative perspective on citizenship rights in the EU and non-Member States also revealed that the supremacy of Union law places greater demands on nationality laws than human rights law. As the case law revealed this can affect not only the right of residence for Union citizens, but also create derived residence rights for third country national family members faced with expulsion.

Chapter 5 thus clarified that citizenship rights are not necessarily contingent on free movement, but follow from institutional EU law concepts such as supremacy, the principle of harmonization and mutual recognition. The Court's decision in *Rottmann* also revealed that supremacy demands a strict proportionality test in cases where nationality law infringes on the status of Union citizenship. Consequently this provides Union citizens with stronger protection in expulsion cases.

The conclusion must therefore be that the main rule for invoking many of the rights accorded Union citizens still is contingent on cross border movement having taken place *before* a claim is advanced. It is nevertheless clear that the fundamental status of Union citizenship can reduce the emphasis placed on the cross border requirement in situations where the right to live and reside is seriously compromised by national immigration rules.

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