

§ 5 THE CONCEPT OF UNION CITIZENSHIP: PRESENT POSITION

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I. SOME UNCERTAINTIES

5.1 Union citizenship, “is it a ‘flag which fails to cover its cargo’, as Laurence Gormley once suggested?¹ Or is there, as Jo Shaw² has concluded, “a positive contribution to the legitimacy of the European Union, which an active and participatory concept of social citizenship may make”? In a broader sense, is citizenship merely symbolic “as creation of another type of expressiveness”, perhaps even “a fiction as the creation of another type of semantic reality” in the sense of the Flemish legal philosopher Jan Broekman?³ Or can it be regarded as a source of rights extending the scope of citizens’ rights in the European Treaties?

A first reading of the concept of citizenship, as introduced by the Maastricht Treaty and reinforced by the Amsterdam Treaty, seems to suggest its character as a Symbol. The Maastricht Treaty simply affirmed that “citizenship of the Union is hereby established” (old Art. 8 EC). “Every person holding the nationality of a Member State shall be a citizen of the Union”. The Amsterdam Treaty added the following sentence: “Citizenship of the Union shall complement and not replace national citizenship”, Art. 17 (2) EC. The Lisbon Treaty has taken over this concept in Art. 20 TFEU.

5.2 Art 20 (2) TFEU says that citizens of the Union “shall enjoy the rights and be subject to the duties provided for in the Treaties”. The most important rights relate to:

- free movement, Art. 20 (2) (a) TFEU (ex-Art. 18 EC)
- the right to vote and to stand as a candidate for municipal elections and elections to the European Parliament, Art. 20 (2) (b) TFEU (ex-Art. 19 EC)
- rights of diplomatic and consular protection, Art. 20 (2) (c) TFEU (ex-Art. 20 EC), and
- the right of petition to, and protection by, an ombudsman of the EP, Art. 20 (2) (d) TFEU (ex-Art. 21 EC).

Nothing is however specified about corresponding duties and responsibilities (for a discussion § 21).

It is also well known that some of the rights included in Union citizenship have already been developed by ECJ practice, in its extensive interpretation of the fundamental freedoms of the EC Treaty (4.2), and rights to non-discrimination based on nationality and gender (§ 12). The combination of these developments was highlighted by the *Cowan* case of 1989⁴ (para 4.15). What did the Treaty add to this established right of the European citizen in the role of consumer? Has a paradigm change taken place? That is, a move from granting rights not only to the market citizen (*bourgeois*) but also to the “Union citizen” *stricto sensu* not playing an economic role (*citoyen*)?⁵

II. THE LEGAL CORE OF UNION CITIZENSHIP

5.3 From the very wording of the Treaty and the history of its drafting, one is tempted to conclude that Union citizenship is nothing more than a corollary of nationality of one of the Member States. As the German author Kluth has expressed it: “This (citizenship) always attaches to Member State nationality.”⁶ This is in accordance with the ECJ’s *Micheletti* judgment⁷ handed down in 1992, parallel to the adoption of the Maastricht Treaty. In this judgment the Court made it clear that

¹ In: Kapteyn/VerLoren van Themaat, Introduction to the Law of the European Communities, 3rd Ed. 1999 at 157.

² Shaw, in: Collected Courses of the European Academy VI-1, 1998 at 346.

³ A Philosophy of European law, 1999 at 142.

⁴ See Case 186/87 *Cowan v Trésor Public* [1989] ECR 195.

⁵ O’Leary, CMLRev 1995, 519 at 524; for a detailed discussion see Wollenschläger, Grundfreiheit ohne Markt, 2006, and my review in ELJ 2009, 144.

⁶ In: Chr. Callies/M. Ruffert (Hrsgs.), Kommentar zum EUV, 3rd ed. 2007, Art. 17 EG Rdnr. 8.

⁷ Case C-369/90 *Micheletti v Delegación del Gobierno en Cantabria*, [1992] ECR I-4239; Case C-192/99 R v Secretary of State for the Home Dpt. ex parte Mangjit Kaur [2001] ECR I-1237.

Member States, and Member States only, may create and abolish nationality. However, they may not put restrictions on it if another Member State has already granted nationality. The Court said:

(...) it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for the recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty (para 10)⁸.

Closa⁹ therefore comes to the conclusion that citizenship of the Union might be characterised as “a [derived] condition of nationality”. The Union has no competence to establish criteria of its own on granting citizenship as a corollary of nationality. However, in *Rottmann* the Court held that Member States must respect the principle of proportionality when withdrawing nationality from a citizen of the Union. This is said to be the case when nationality has been acquired by deception.¹⁰

5.4 The mutual recognition principle of Member State nationality is established by international law, not Union law. This involves both a *positive* and a *negative* aspect. That is, once a Member State has recognised a citizen as its national, this decision should be respected Union-wide, even in the case of dual nationality, as shown in *Micheletti*. By contrast, mutual recognition in the negative sense means that once a Member State has revoked nationality according to its own law and procedural requirements, then this decision has to be respected by every other Member State and by the Union itself (within the limits of the proportionality principle, 3.17), unless a new bond of nationality to another state has been established.

III. OTHER CRITERIA FOR ESTABLISHING RIGHTS AND DUTIES IN THE UNION

5.5 Union citizenship does not of course exclude rights of (natural) persons under EU law being established by other criteria, especially those based on the concept of residence. This is particularly true, as shall be seen in Chapter IV, with rights of non-discrimination, with fundamental rights and judicial protection, as well as rights of workers and consumers. The Amsterdam Treaty, following its predecessor to that extent, has created different subjective rights. These are not based on the formula *nationality = Union citizenship*, but on other criteria, especially residence. Art. 2 EU in the version of the Lisbon Treaty formulates that it is founded on the “values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between men and women prevail.” These values are interpretation guidelines of EU law.

Primary Union law:

- provides that “each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied”, Art. 157 TFEU (ex-Art. 141 EC) (11.8). This right to equal pay clearly does not depend on the nationality of the worker, but rather on work done or contracted in the Union;¹¹
- contains a “right of consumers to information, education and to organize themselves in order to safeguard their interests” without any reference to citizenship or even residence, Art. 169 TFEU (ex-Art. 153 EC);

⁸ At para 10.

⁹ Closa, CMLRev 1995, 487 at 510.

¹⁰ Case C-135/08 Janko Rottmann v Freistaat Bayern [2010] ECR I-1449 para 58; Kostakopoulou, in: H. Micklitz/B. De Witte (eds.), *The European Court of Justice and the Autonomy of Member States*, 2012, pp. 175 at 199 argues for an independence of Union citizenship even if national citizenship has been lost; in a similar spirit separating citizenship from the internal market (= cross border) logic: Kochenov/Plender, *ELRev* 2012, 369 at pp. 385..

¹¹ Case C-383/95 Petrus Wilhelmus Rutten v Cross Medical Ltd. [1997] ECR I-57.

- gives “any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State” the right to make complaints concerning instances of maladministration to the European Ombudsman, Art. 228 (1) TFEU (ex-Art. 194 EC);
- grants a right of access to European Parliament, Council and Commission documents to any citizen of the Union and any natural or legal person residing or having a registered office in a Member State, Art. 15 (3), 227 TFEU (ex-Art. 255 EC) (18.5).

Secondary Community law, for instance directives on worker, consumer, health, and safety protection, contain many subjective rights of citizens that depend not on nationality but on other criteria, such as residence or workplace. The same is true with international or European conventions, for example on jurisdiction, or on conflict of laws. The concept of residence or work supplements - and in certain cases supersedes - the traditional concept of nationality/citizenship as a basis for granting subjective rights to individuals. Only a rather limited number of rights depend on citizenship. These, though, are important - especially free movement and voting rights.

IV. VERTICAL ADDED VALUE TO CITIZENSHIP

5.6 How is the concept of citizenship important in the development of EC law after Maastricht? Has it given a new impulse to creating, extending or safeguarding citizens’ rights? Or has it merely given new rhetoric to old concepts of free movement?

In *Skanavi*,¹² its first judgment dealing with citizenship, the Court refused to discuss application of the then Art. 8 EC, which it considered to be residual. The first express use of citizenship by the Court to extend the rights of Union citizens was prepared from earlier obiter dicta by its AGs Léger and Ruiz-Jarabo Colomer.¹³ The Court applied it in the *Sala* judgment of 12 May 1998.¹⁴ The case concerned a Spaniard, resident in Germany, unemployed, and claiming a German child-raising allowance. Under German social security law, her application was refused because she did not possess a valid residence permit. The Court did not accept this limiting condition upon access to child allowance. A reading of Art. 17 (now Art. 20 TFEU) on Union citizenship, in conjunction with Art. 12 EC (now Art. 18 TFEU) on non-discrimination, put her under protection of the Treaty, which could not be denied by absence of a permanent residence permit.

In continuing the tradition as developed in *Cowan*, the Court used Art. 8/8a (now Art. 20 TFEU, ex-Art. 17/18 EC) to extend protection against discrimination based on nationality to every Union citizen; the former somewhat construed connection with one of the free movement rights was abandoned, so extending the scope of persons protected. This approach was used in the *Bickel and Franz* judgment of 4 November 1998.¹⁵ Both persons, Mr. Bickel being a lorry driver of Austrian nationality, Mr. Franz a German tourist, violated Italian law while in the province of Bolzano, where German is spoken. By special regulation based on an Italian-Austrian agreement concluded well before their membership in the EU, the German language is to have the same status as Italian in the Alto Adige region. This means that German-speaking Italian citizens are entitled to a court hearing in German. Could this also be extended to the defence of Mr. Bickel and Mr. Franz before a local court in the province of Bolzano? Both AG Jacobs and the Court were willing to extend the prohibition against discrimination to all nationals coming under the free movement rules. AG Jacobs referred to *Cowan* and extended it to the right of a Union citizen accused in criminal proceedings. Both the Ad-

¹² Case C-193/94 Criminal proceedings against Skanavi Chryssanthakopoulos [1996] ECR I-929.

¹³ See AG Léger in his Opinion in C-214/94 Boukhalfa v Bundesrepublik Deutschland [1996] ECR I-2253 at para 63 (where the status of a Belgian national working in the German embassy in Algiers had to be treated under the free movement rules); and AG Ruiz-Jarabo Colomer, Opinion in C-65 & 111/95 R v. Secretary of State for the Home Department ex parte Shingara and Radion [1997] ECR I-3343 at para 34.

¹⁴ Case C-85/96 Maria Martínez Sala v Freistaat Bayern [1998] ECR I-2691.

¹⁵ Case C-274/96 Criminal proceedings against H.O. Bickel und U. Franz [1998] ECR I-7637; comment Bulterman CMLRev 1999, 1325.

vocate General and the Court agreed that in refusing to allow German-speaking citizens from Austria or Germany to use their mother language in the province of Bolzano, where this was allowed to German-speaking Italians, amounted to a discrimination based on nationality. The Court said:¹⁶

In that regard, the exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a state on the same footing as its nationals.

This statement by the Court appears rather sweeping. However, two later judgments - *Calfa* and *Wijsenbeek*¹⁷ - were somewhat more restrictive in applying the concept of citizenship. Indeed, the Court used rather traditional approaches, even though the referring Greek and Dutch courts expressly mentioned citizenship as a basis for supplementary free movement rights, disregarding the economic status of the persons involved.

The free movement right of EU citizens includes the right to *leave the territory* of his home Member State unless such restriction is justified by reasons of public policy, public security, or public health; economic grounds like protection of creditors for the enforcement of a debt against a national are not sufficient.¹⁸

V. EXTENSION OF UNION CITIZENSHIP *RATIONE MATERIAE*

5.7 The analysis of the Court's early jurisprudence reveals some hesitancy in fully applying the concept of citizenship by extending citizens' rights. This is especially so in the area of free movement. The Opinions of the Advocates General seem to go much further, at least in rhetoric, although perhaps to a lesser extent in substance. The *Grzelczyk* case¹⁹ demonstrates the dynamism inherent in citizenship. The case concerned student benefits refused to a French national studying in Belgium. During the first three years, he earned money to pay for his studies. In the final year he wanted to concentrate on his exams, rather than spend time jobbing around. He therefore asked for a special benefit called *minimex*, available to Belgium citizens. The relevant statute basis, namely Art. 3 of Dir. 93/96 (4.15) expressly excluded entitlement to payment of maintenance grants. Could this limitation be overcome by directly applicable Community law, in the shape of *social citizenship* as a corollary to Union citizenship as already suggested by the German author Borchardt?²⁰ AG Alber took the traditional approach of linking Community rights to free movement of workers, as in *Calfa*. That is, he did not make the link with an autonomous concept of citizenship. According to his Opinion, a student as citizen might very well be entitled to non-discriminatory treatment concerning student benefits such as the *minimex*. However, the Member State is entitled to revoke these if the status of a resident is in doubt. The right of residence of the student would therefore not be absolute, but would, rather, be subject to reasonable limitations imposed by the host state. The full Court judgment²¹ is not concerned with whether or not Mr. Grzelczyk is a worker. Instead, the Court widens the path opened by *Sala* in developing a right of its own, namely of the Union citizen being entitled to non-discriminatory treatment with regard to social benefits. Moreover, it expressly rejects the submission

¹⁶ Para 16 of the judgment.

¹⁷ Case C-348/96 Criminal proceedings against Donatella Calfa [1999] ECR I-11; comment Costello CMLRev 2000, 817; C-378/97 Criminal proceedings against Florus Ariel Wijsenbeek [1999] ECR I-6207..

¹⁸ Case C-33/07 Jipa [2008] ECR I-5157 ; C-249/11 Byankov [2012] I-(4.12.201).

¹⁹ Case C-184/99 Rudy Grzelczyk v. le Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193; cf. Borchardt, NJW 2000, 2057.

²⁰ Borchardt at 2060.

²¹ For an analysis see Wollenschläger, Grundfreiheit ohne Markt, 2007, pp. 256-262 who talks of a "step-by-step-integration of non-working citizens" in the case law of the ECJ.

that “the concept of citizenship has no autonomous content” (para 21), as proposed by several Member States,²² including Belgium and Denmark. Instead the Court maintains that:

Union citizenship is destined to be the [fundamental status of nationals of the Member States], enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (para 31).

Grzelczyk is an important judgment insofar as it recognises for the first time that citizenship contains a positive element, in that it allows nationals of other Member States access to social benefits beyond existing secondary Community law. Recent judgments²³ extend the non-discrimination principle to assistance (subsidised loans or grants) provided to students lawfully resident in the host Member State to cover their maintenance costs, thus indirectly overruling the earlier *Lair* case (4.15). The country of residence may impose certain time limits (e.g. 3 or even 5 years of residence according to Dir. 2004/38, infra 5.11) without however making the exercise of this right impossible, provided that the student has established a genuine link with this state.

5.8 Recent, quite controversial case law tries to balance the rights of EU citizens to free movement and non-discrimination with the justified public interest of Member States in avoiding “benefit tourism.” The case law mostly rests on the *principle of proportionality* and is therefore not always consistent and easy to understand. To give some examples:

- The ECJ in *Collins*²⁴ allows Member States to impose a residence requirement for EU citizens before receiving social advantages under the non-discrimination principle of *Grzelczyk* if based on objective considerations that are independent of the nationality of the persons concerned. This is to avoid a potential abuse of access to non-contributory social benefits by persons who do not have a sufficiently close link with the country where they apply.
- The *De Cuyper* case²⁵ concerns the question whether national law can require residence of a person out of work to receive non-employment benefits. According to the judgment, “freedom of movement and residence, conferred on every citizen of the Union by Article 18 EC, does not preclude a residence clause ... which is imposed on an unemployed person over 50 years of age who is exempt from the requirement of proving that he is available for work, as a condition for the retention of his entitlement to unemployment benefit.” The “objective and proportionate justification” for such a restriction of free movement of a Union citizen lies in the fact that the “... effectiveness of monitoring arrangements which, ... are aimed at checking the family circumstances of the unemployed person concerned and the possible existence of sources of revenue which the claimant has not declared is dependent to a large extent on the fact that the monitoring is unexpected and carried out on the spot, since the competent services have to be able to check whether the information provided by the unemployed person corresponds to the true situation” (para 41). A more viable justification can be found in the fact that Member States are entitled to put certain limits on benefits based on social solidarity which may prevent their being exported, as AG Geelhoed had argued in his Opinion.
- Austria was condemned for introducing restrictions on admission of foreign students to its higher education institutions.²⁶ Applicants from other EU countries had to submit, in addition to their higher education diploma a certificate showing that they also complied with the

²² For presentation of the different Member States’ opinions, see *Grzelczyk*, supra note 19 at paras 21-25.

²³ Case C-209/03 *The Queen (on application of Dany Bidar) v London Borough of Ealing, Secretary of State for Education and Skills*, [2005] ECR I-2119; Case C-158/07 *Jacqueline Förster v Hoofdirectie van de Informatie Beheer Group* [2008] ECR I-8507.

²⁴ Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-2706.

²⁵ Case C-406/04 *Gérald de Cuyper v ONE* [2006] ECR I-6947

²⁶ Case C-147/03 *Commission v Austria* [2005] ECR I-5969

requirements of their home country, in particular a system of “*numerus clausus*” for medical students which did not exist in Austria. The Court found this to be an indirect discrimination in the sense of Art. 12 EC (now Art. 18 TFEU) because access to university education was within the scope of application of the Treaty according to Art. 149, 150 EC (now Art. 165, 166 TFEU) which wanted to encourage mobility of students. This indirect discrimination could not be justified by an alleged “safeguarding the homogeneity of the Austrian higher education system”. A potential abuse by foreign – mostly German – students of medicine would have to be assessed on an individual basis, not on a general preventive measure which was disproportionate. Finally, Austria could not justify this discrimination by reference to international treaties concluded before accession which may only be invoked against third countries, not intra-Community wide. As a follow-up, Austria was condemned in limiting reduced fares on public transport to students whose parents are in receipt of family allowances in one of its *Länder*. This indirect discrimination could not be objectively justified.²⁷

- The *Bressol* case concerned a French-Belgian quota system against applicants which were refused access to French higher education in the area of veterinary medicine and health training. While AG Sharpston flatly condemned the Belgian system as a non-justified (direct and indirect) discrimination based on nationality, the Court took a much more cautious view, allowing its possible justification based on health reasons which the national court had to verify on empirical evidence concerning future development of medical services in the French-Belgian Community.²⁸ The Court wrote:

It follows from the case-law that a difference in treatment based indirectly on nationality may be justified by the objective of maintaining a balanced high-quality medical service open to all, in so far as it contributes to achieving a high level of protection of health (para 62).

- The *Schwarz* case²⁹ concerned the denial of a tax deduction to parents who sent their children to a boarding school located in another Member state, while these benefits were available for national schools. According to the Court, “Article 18 EC precludes legislation which allows taxpayers to claim as special expenses conferring a right to a reduction in income tax the payment of school fees to certain private schools established in national territory, but generally excludes that possibility in relation to school fees paid to a private school established in another Member State.”
- The ECJ condemned a Polish law requiring beneficiaries of a disability pension granted to civilian victims of war or repression to continue residence in their home country.³⁰ Even though the pension scheme did not fall within the scope of EU law, Member States have to exercise their competence in respecting the free movement rule of Art. 18 EC by not deterring their citizens from moving abroad, like Ms. *Nerkowska* who had taken residence in Germany after studying and living in Poland for 20 years. Such restrictions may however be justified if based on “objective considerations of public interest independent on the nationality of the persons concerned and is proportionate to the legitimate objective of the national provision” (para 34). The Court recognised a “wide margin of appreciation” with regard to establishing a certain degree of connection with the home country, and the need to assure that the conditions for payment are fulfilled. The pure and simple residence requirement was regarded as being disproportionate to that objective because Ms. *Nerkowska* had already established her connection to Poland, and health checks could be undertaken in the host country upon request

²⁷ Case C-75/11 *Commission v Austria* [2012] ECR I-(4.10.2012).

²⁸ Case C-73/08, *N. Bressol et al. v. French Community of Belgium*, [2010] ECR I-2735; Opinion of AG Sharpston of 25.6.2009; critique Reich, *EuZW* 2009, 637; Damjanovic, in: Micklitz/de Witte, *The ECJ and the Autonomy of the Member States*, 2012, pp. 149.

²⁹ Case C-76/05 *Herbert Schwarz et al v Finanzamt Bergisch-Gladbach* [2007] ECR I-6849.

³⁰ Case C-499/06 *Halina Nerkowska v Zaklad etc.* [2008] ECR I-3993.

of the home country, “including on pain of suspension of payment of the benefit if there is an unwarranted refusal on the part of the recipient” (para 45).

- Finally, in *Huber*³¹ a German law was found to be discriminating against EU citizens by requiring centralised and individual registration of EU nationals for alleged reasons of supervision and crime fighting of foreigners. In referring both to data protection and to equal rights of citizens under Art. 12/17 EC (now Art. 18/20 TFEU) the Court found this requirement to be disproportionate to the objective pursued; only anonymous registration was compatible with EC law.

VI. EXTENSIONS RATIONE PERSONAE

5.9 In *D’Hoop*,³² the Court extended its reasoning to migrant nationals against their home Member State. Here, a student seeking first employment was denied a certain social benefit called “tideover allowance” because she had received her secondary education in another Member State. Normally the free movement rules do not apply to a Member State’s own nationals. Thus, the issue was whether Ms. D’Hoop, a Belgian national who had completed her *baccalauréat* in France, could be excluded from a benefit that was both available to Belgians having studied in Belgium and to foreigners under the same conditions. The Court wrote:

The situations falling within the scope of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Art. 18 EC.... By linking the grant of tide-over allowances to the condition of having obtained the required diploma in Belgium, the national legislation thus places at a disadvantage certain of its nationals simply because they have exercised their freedom to move in order to pursue education in another Member State (paras 29, 34).

This case law implies that a Member State’s own nationals, as well as nationals from other EU countries, are protected by the citizenship rules if they exercise their Union right to free movement. Citizenship has to fill the gaps with regard to free movement remaining in secondary EU law, or in Court practice. Interestingly enough, this use of the citizenship proviso avoids situations of reverse discrimination (12.3).

As was shown (4.9), a further extension of Union rights through the citizenship concept was achieved in *Baumbast*.³³ Here, a German national working in a third country but whose family lived in the UK did not, for these very reasons, fall under the free movement rules for workers or self-employed persons. Again, the Court used citizenship to fill gaps left by EU law’s rather static approach to free movement, as explained by AG Geelhoed in his Opinion of 5 July 2001. The Court accepted *direct effect of Art. 18 EC* with the following words:

As regards in particular the right to reside within the territory of the Member States under Art. 18 (1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr. Baumbast therefore has the right to rely on Art. 18 (1) EC.

5.10 These rights are of course subject to limitations. However, they must be reasonable and proportionate, as always in EU law. The case law has moved on in extending personal protection of EU-citizens in situations covered by EC law. To give some examples:

³¹ Case C-524/06 Heinz Huber/BRD [2008] ECR I-9705.

³² Case C-224/98 Marie-Nathalie D’Hoop v Office national de l’emploi, [2002] ECR I-6191.

³³ Case C-413/99 Baumbast, R and Secretary of State for the Home Department [2002] ECR I-7091.

- According to the somewhat surprising judgment in *Zhu*,³⁴ a child who immediately after birth becomes a national of one Member State (Ireland) also enjoys the rights of free movement under Art. 18 EC and Dir. 90/364 EC, provided there are sufficient funds in order not to become a burden to the social assistance system of the host state (UK). Member State law cannot impose an age limit. The caring parent will enjoy a derivative right of free movement and residence because otherwise the child's right of residence would be deprived of "any useful effect" (para 46).
- The personal element inherent in the citizenship concept was made clear in *Avello*.³⁵ The Court applied the non-discrimination rule to the change of surnames of children with dual Spanish-Belgian nationality, which were refused by the authorities of their country of residence (Belgium) but conformed to Spanish law.
- *Grunkin and Paul*³⁶ concerned the right of surnames of a German national born in Denmark where he was registered under the names of his father and his mother according to the *ius soli* principle. When he moved to Germany he wanted to maintain this double name which was refused to him because under German *ius nationalitatis* he (or his parents, or the court if they do not agree) should choose the name of only one parent to avoid lengthy surnames. The Court regarded this as an unjustified, non-proportional interference with the free movement rights of a Union citizen:

None of the grounds put forward in support of the connecting factor of nationality for determination of a person's surname, however legitimate those grounds may be in themselves, warrants having such importance attached to it as to justify, in circumstances such as those of the case in the main proceedings, a refusal by the competent authorities of a Member State to recognise the surname of a child as already determined and registered in another Member State in which that child was born and has been resident since birth (para 31).

- The *Sayn-Wittgenstein* judgment³⁷ concerned the abolishment of nobility titles by the Austrian Constitution which did not allow the Austrian plaintiff resident in Germany who had acquired the title of "Fürstin" by adoption to have it entered in her home register of civil status. The Court insisted that the Austrian provisions restricted Ms. Sayn-Wittgenstein's free movement rights, but somewhat surprisingly found that this was justified by public policy reasons "in order to ensure the attainment of the fundamental constitutional objective pursued by (the Austrian authorities)" (para 93).
- In *Morgan*,³⁸ the Court had to decide whether a (German) rule precluding the payment of a study grant for studies in another EU country if these studies were not a continuation of at least one year study in Germany ('the first-stage studies condition') unduly restricted free movement of students against Art. 17/18 EC. The Court found EC law to be applicable because the German plaintiffs were in a cross-border situation. Even if education is a reserved area for Member States, they must exercise this competence "in compliance with Community law" (para 24). The German rule was capable of discouraging (German) students to study abroad and to use their mobility rights; the imposed restriction was only acceptable if justified by legitimate and proportionate public interests, e.g. guaranteeing the financial equilibrium of the education system or making sure that the students had made the "right choice". The ECJ found the German 'first stages study condition' to be unnecessary and not proportionate to attain these legitimate goals; it might in effect be counterproductive in forcing students to artificially prolong their studies, in particular if no similar study program

³⁴ Case C-200/02 Kungqian Catherine Zhu et al. v Secretary of State for the Home Department [2004] ECR I-9925.

³⁵ Case C-148/02 Carlos Garcia Avello v Etat belge [2003] ECR I-11613.

³⁶ Case C-353/06 Grunkin and Paul [2008] ECR I-7639.

³⁷ Case C-208/09 Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien [2010] ECR I-13693; a similar reasoning was used in Case C-391/09 Runevic-Vardyn et al [2011] ECR I-(12.5.2011) concerning the transcription of names of a couple of mixed nationality to conform to the language of residence with reference to the "legitimate... (interest of a Member State) to ensure that the official national language is protected in order to safeguard the national unity and to preserve social cohesion" (para 84).

³⁸ Joined Cases C-11 + 12/06 R. Morgan et al v Bezirksregierung Köln et al [2007] ECR I-9161

to the one chosen abroad was available at home. The judgment may have far reaching consequences for the whole system of study grants which so far had been limited to studies in “home universities” but may in the future be extended also to studies abroad, thus indirectly subsidising foreign education systems on the basis of national grants.

- In the *Zambrano* case³⁹ AG Sharpston in her Opinion of 30 September 2010 in very strong words tried to dissociate the citizenship rights from prior free movement. The case concerned a Columbian national whose children were born and nationalised in Belgium and who was threatened to be deported. This would interfere with his fundamental rights to family protection which did not require a cross-border element; EU law also prohibits Member State action against its own nationals. The AG proposed to reconsider the concept of “reverse discrimination” as not falling in the ambit of EU law at least when linked to a fundamental right as recognised by the ECtHR. The AG in her argument also referred to *Rottmann* where the Court applied the EU citizenship provisions “to the situation of a citizen of the Union who ... is faced with a decision withdrawing his naturalisation ... and placing him ... in a position capable of causing him to lose his status conferred by Article 20 TFEU and the rights attaching (which) thereto falls, by reason of its nature and its consequences, within the ambit of EU law”. She proposed the recognition of a “free-standing right of residence”. In its judgment of 8 March 2011, the ECJ, against all intervening Member States and the Commission, basically followed the Opinion of the AG, “because Art. 20 TFEU precludes national measures which have the effect of depriving Unions citizens from the *genuine enjoyment of the substance of the rights* (italics NR) conferred by virtue of their status as citizens of the Union” (para 42). This is the case if the right of residence is refused to a third country national whose children are Union citizens and are dependent on him, even when living in their country of nationality.
- In *McCarthy*⁴⁰ the Court distinguished its prior case law in the case of a citizen of double nationality (UK and Irish) who had always lived in the UK, had never exercised her right of free movement, therefore had no factor linking her with any of the situations governed by EU law “... and the situation is confined in all relevant respects within a single Member State” (para 55). The refusal to grant a residence permit to her husband who is not a Union citizen does not deprive her “...of the genuine enjoyment of the substance of her rights as Union citizens..” (para 56), a legal consequence difficult to understand from the background of the citizen friendly *Zambrano*-judgment.

VII. DIRECTIVE 2004/38 ON RESIDENCE RIGHTS OF EU CITIZENS

5.11 In 2001, the Commission proposed a new “Directive on the Right of Citizens of the Union and their Family Members to Move and reside Freely within the Territory of the Member States.”⁴¹ Its basic premise is that Union citizens should be able to move between Member States on similar terms to Member State nationals moving within their own country. Any additional administrative or legal obligations should be kept to a minimum.

Although to some extent the proposed new directive merely restated the *acquis*, nonetheless it provided some interesting innovations in the proposal:

³⁹ C-34/09 Ruiz Zambrano v ONEM [2011] ECR I-(8.3.2011), referring to *Rottmann*, supra note 10, see Craig, CMLRev 2011, 395 at p. 433 concerning the Opinion of AG Sharpston; distinguished by Case C-256/11 M. Dereci et al v Bundesministerium des Inneren, [2011] ECR I-(15.11.2011) paras 65-67 for citizens which have not used their free movement right. For inconsistencies of the new case law see Kochenov/Plender, supra note 10 at pp. 387; Schulyok, Europättslig Tijdskrift 2012, 448 distinguishing between rights flowing out of Art. 20 TFEU (nature of citizenship as such like in *Rottmann*) and Art. 21 (free movement), at p. 453.

⁴⁰ Case C-434/09 Shirley McCarthy v Secretary of State for the Home Department, [2011] ECR I-(5.5.2011); critique Kochenov/Plender, at pp. 390 because of depriving Mrs. McCarthy of the “substance of her rights” by reference to the free movement paradigm.

⁴¹ Com (2001) 257 final; for a short description cf. Craig/de Búrca at 850.

- The definition of family members would be broadened to include unmarried partnerships, if recognised by the host country.
- A right of permanent residence would come into effect after the Union citizen has resided legally and continuously for four years in the host Member State.
- Family members, irrespective of nationality, would have the right to work, and the right to equal treatment.

After extensive debate in Parliament and the Council, Directive 2004/38/EC⁴² was adopted just before the entry of 10 new Member States. It consolidates and codifies the prior existing secondary law on free movement of persons. The most important changes in comparison to existing law concerns the concept of family members, which is extended to ‘a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State’, Art. 2 (2) b). The right of permanent residence - without being subject to the requirement that the applicant does not become an unreasonable burden to the social assistance system of the host state - accrues after *five consecutive years of continuous legal residence*, Art. 16, and is extended to family members, Art. 18. Continuity of residence is defined in Art. 21 and is broken by an expulsion, the conditions of which are narrowly defined. Member States had to comply with the directive by 30 April 2006. The accrual of the five year period was before the Court in *Lassal*⁴³ where it held:

continuous periods of five years’ residence completed before the date of transposition of Directive 2004/38, namely 30 April 2006, in accordance with earlier EU law instruments, must be taken into account for the purposes of the acquisition of the right of permanent residence pursuant to Article 16(1) thereof, and, absences from the host Member State of less than two consecutive years, which occurred before 30 April 2006 but following a continuous period of five years’ legal residence completed before that date do not affect the acquisition of the right of permanent residence pursuant to Article 16(1).

In *Ziolkowski*⁴⁴ that Court insisted on an “independent and uniform interpretation” of the concept of “legal residence” which must conform to the criteria specified in Dir. 2004/38, in particular its Art. 7; a residence right based on only national law would not be enough.

The Court based its citizen friendly interpretation on the purpose of Dir. and the *travaux préparatoires* to facilitate integration of EU nationals in their host country once there is evidence of a sufficient link.

Expulsion decisions are only allowed under the restrictive conditions of Art. 28 (2) of Dir. 2004/38, namely for citizens who have a right of permanent residence on its territory only when “based on serious grounds of public policy or security”; under para (3) after 10 years of residence a person can only be expelled if based “on imperative grounds of public security, as defined by Member States”. In its *Tsakouridis*-judgment⁴⁵ the Court recognised that the fight against crime in connection with dealing of narcotics of an organised group is covered by the concept of “imperative grounds” which however must be interpreted strictly. Concerning the expulsion of a person convicted of rape of a minor, the Court in *P.I.*⁴⁶ referred to the specific objective of EU and International Law to protect children against sexual abuse which may justify an expulsion decision, subject of the propensity of the individual concerned to act in the same way in the future and taking into account the integration of this person into the country of residence.

⁴² Directive of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ([2004] OJ L 158/77, corrigendum L 229/35).

⁴³ Case C-162/09 Secretary of State for Work and Pensions [2010] ECR I-9217.

⁴⁴ Joined Cases C-424 + 425/10 T. Ziolkowski, B. Szeja et al v Land Berlin [2011] ECR I-(21.12.2011) at para 32.

⁴⁵ Case C-145/09 Tsakouridis [2010] ECR I-11975

⁴⁶ Case C-348/09 P.I.v Oberbürgermeisterin der Stadt Remscheid, [2012] ECR I-(22.5.2012).

Art. 32 of Dir. 2004/38 contains a procedural protection of EU citizens to have an exclusion based on grounds of public policy or public security order reviewed. This was applied by the Court in *Byankov*⁴⁷ in favour of a Bulgarian citizen who was barred to leave his country because of unpaid debt (5.6). Since he had not contested this decision in the time limits prescribed which therefore became final, Bulgarian law did not allow a reopening of the procedure even if this decision violated EU law. The Court, under the principles of “procedural autonomy” of Member States vs. effective judicial protection (14.2), had to balance “legal certainty” against free movement rights. The Court wrote:

5.12 The interpretation of the concept of family reunification and company according to Art. 3 of Dir 2004/38 was before the Court in *Metock*.⁴⁸ It was handed down in an accelerated proceeding and concerned the Irish prior legal residence requirements of spouses from non-member countries to enjoy a residence and company right with Union citizens which the Court had affirmed in its prior *Akrich* judgment (4.10).

The Court based its reasoning on a broad interpretation of the relevant provisions of Dir. 2004/38 which do not expressly require prior legal residence before marrying a Union citizen. It clearly rejected the argument of many Member countries that under the Directive they retain the right to control and restrict entry and therefore may legitimately require prior legal residence before recognising a right of stay of the spouse of a non-member country. The Court expressly “reconsidered” its prior case law in *Akrich* (4.10) to the contrary (para 58). Its argument was based on the effectiveness of family reunion for the exercise of citizenship rights. It went on to say:

The refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State (para 64).

It also referred to the unacceptable consequences if the Member States could regulate entry of spouses of non-member countries which would lead to different conditions of free movement in the internal market against Art. 3 (1) (c) EC which requires the same conditions.

With regard to the right of company under Art. 3 (1) of Dir. 2004/38, the Court preferred a broad reading and rejected any attempts at a restrictive interpretation, depriving that provision of its effectiveness (para 84). Therefore, this right does not depend on the prior circumstances of marriage or entry. It wrote:

That interpretation is consistent with the purpose of Directive 2004/38, which aims to facilitate the exercise of the fundamental right of residence of Union citizens in a Member State other than that of which they are a national. Where a Union citizen founds a family after becoming established in the host Member State, the refusal of that Member State to authorise his family members who are nationals of non-member countries to join him there would be such as to discourage him from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country (para 89).

Abuses by a marriage of convenience can be avoided by reference to Art. 35 of Dir. 2004/38 (21.7).

VIII. THE FUTURE OF THE CITIZENSHIP CONCEPT: SOLIDARITY WITHOUT LIMITS?

⁴⁷ Supra note 18.

⁴⁸ Case C-127/08 *Metock et al v Minister for Justice* [2008] ECR I-6241; a narrower reading has been taken in *McCarthy*, supra note 39.

5.14 The citizenship concept has proven to be a very active instrument in the hands of the Court to guarantee both free movement and equal protection of EU citizens beyond the limits under which Member State law was willing to grant these rights to nationals from other EU countries. The inherent conflict points to the limits of solidarity within the Union⁴⁹ which has provoked critical reactions both from politics and from academia.⁵⁰ This is particularly true with rights to non-discriminatory access to social benefits and public education which under existing EU law were first only granted to “economic citizens”, namely workers (4.7). This critique is justified insofar as the Court in the beginning of its case law did not respect secondary legislation, in particular Dir. 2004/38 with its three step model of accruing citizenship rights. Recent case law however seems to recognise this inherent limit in the citizenship concept, in particular with regard to student loans and benefits after *Förster*.⁵¹ The same rules should also be applicable to access to other social benefits; insofar as the earlier *Grzelczyk* case must be regarded as overruled.

Still unsettled are questions of access to higher education institutions where the country of origin of students has imposed entry restrictions like *numerus clausus* or student fees, but the host country has a more liberal regime to which the students, not admitted to study in their home country, turn. There is a fear that the host country may simply be “flooded” by foreign students, taking away study places from their own nationals which are financed by the national taxpayer. In *Commission v. Austria*⁵² the Court condemned such entry restrictions as a non-justifiable discrimination. In *Bressol*, the problem was again before the Court in a similar Belgian situation.⁵³ In a comment to the Opinion of AG Sharpston invoking a strict discrimination test I have criticised this rigidity which does not take account of the situation in the country of origin which simply shifts its problems with financing studies like medicine and similar expensive disciplines to the host country; this could be regarded as a type of externality which the country of origin imposes on the host-country and which should not be allowed unless a mechanism of financial solidarity can be developed.⁵⁴ In its judgment of 13 April 2010, the Court seemed to be somewhat sensitive to the arguments of the host country concerning restrictions of entry to certain subject matters like medicine on the ground that such a measure may be justified to ensure the future stability of a balanced national health system. Based on proportionality arguments, it imposed strict requirements on the evidence to be produced by national authorities before the competent court.

On the other hand, the Court should be encouraged in its efforts to increase mobility rights of citizens like it did in the area of names (5.10). The controversial right to family reunification found an important development in *Metock*⁵⁵ by combining the fundamental rights to family protection with the status of Union citizenship which cannot arbitrarily be restricted or conditioned by Member States.

The uneasy state of Union law has been well summarised by the Opinion of 10 June 2003 of AG Colomer in *KB*⁵⁶ criticising the exclusion of a transsexual partner from a survivor’s pension (11.20):

If we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish it to be a legal system corresponding to the concept of

⁴⁹ For an analysis see Barnard, in: Dougan/Spaventa, *Social Welfare and EU Law*, 2005, 157; Ross, in: *Essays in Honour of A. Dashwood*, 2011, 283; Kostakopoulou, *supra* note 10 at pp. 180 .

⁵⁰ Heilbronner, *CMLRev* 2005, 1245; Hilpold, *Unionsbürgerschaft und Bildungsrechte*, in: Roth/Hilpold (Hrsg.), *Der EuGH und die Souveränität der Mitgliedstaaten*, 2008, 11; for an overall critical discussion see now Damjanovic, in: H. Micklitz/B. De Witte (eds.), *The European Court of Justice and the Autonomy of Member States*, 2012, pp. 149.

⁵¹ *Supra* note 23; see now Dougan, in: H. Micklitz/B. De Witte (eds.), *The European Court of Justice and the Autonomy of Member States*, 2012, pp. 113 at 131.

⁵² *Supra* note 26.

⁵³ *Supra* note 37.

⁵⁴ Reich, *EuZW* 2009, 637.

⁵⁵ *Supra* note 39.

⁵⁶ Case C-117/01 *KB v National Health Service Pensions Agency et al* [2004] ECR I-543.

social justice and European integration, not only of the economy but of the people, we cannot fail to live up to what is expected of us.

This well meant remark of course does not help in settling the financial follow-up problems created by a generous regime of mobility where a corresponding solidarity regime among Member States remains a hope for the future.

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