

The EU Citizenship in Purely Internal Situations and Reverse Discrimination

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The introduction of the EU citizenship in the Maastricht Treaty should be conceived as a qualitatively new phase in the EU integration, characterized by the departure from the “purely economic union”. The powerful ethos embodied in the word citizen endowed the inhabitants of the Member States with a new status, since they were no longer perceived as workers, as a mere labor force, but as something more, as equal members of a transnational polity.¹ On the backdrop of a completed single market, the citizenship fit neatly under the overarching principle of ever-closer union providing the CJEU with a new impetus to proceed further in its achievements. Truly, the CJEU picked up that gauntlet and it has with nearly a missionary zeal incrementally carved out in its case-law the concept of the EU citizenship *destined to be the fundamental status of the nationals of the Member States.*² As a result, the EU citizenship, once fully dependent on the national citizenship has gradually reached a nearly self-standing status; one can even say predator-like form which has been aggressively encroaching into the realm of the nation state.³

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¹ Bosniak, Linda S., *Citizenship Denationalized*, Indiana Journal of Global Law Studies, Vol. 7, P. 447, 2000. Available at SSRN: <http://ssrn.com/abstract=232082> or <http://dx.doi.org/10.2139/ssrn.232082> (last visited 04.02.2012), 486

² Case C-184/99 Grzelczyk, para. 35

³ Shaw, Jo, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism* (April 7, 2010). U. of Edinburgh School of Law Working Paper No. 2010/14. Available at SSRN: <http://ssrn.com/abstract=1585938> or <http://dx.doi.org/10.2139/ssrn.158593836> (last visited 04.08.2012), 33

Evolution of the EU citizenship

A citizenship is a multi-faceted concept which could be approached from the different perspective. From the legal point of view, it is a vertical bond between “*Motherland or Vaterland*” on one hand and between the citizen on the other, characterized by the reciprocity of duties and rights.⁴ Yet the advent of the EU citizenship and its further development reshuffled this traditional order since the citizen can claim certain rights from the member state other than his own, while he is not obliged to fulfill any duties.⁵ This had a far-reaching consequences as “the member states find themselves in a situation where privileging their own nationals vis-à-vis other EU nationals citizens is illegal.”⁶

Originally, the border-line between the EU law and the national law was more clear-cut. The category of persons covered by the EU law was precisely defined and limited to those participating in the development of the internal market, yet the advent of the EU citizenship dramatically blurred these distinctions.⁷ From Maastricht on, every single person having a nationality of the Member State gained EU citizenship which technically speaking brought them within the remit of the EU law while vesting them with a set of rights. The EU citizenship has therefore three distinct features: Firstly, it is attached to the national citizenship. Secondly, it exists in two phases: dormant and

⁴ Rubenstein, Kim, *Globalisation and Citizenship and Nationality*. JURISPRUDENCE FOR AN INTERCONNECTED GLOBE, Catherine Dauvergne, ed., Ashgate 2003. Available at SSRN: <http://ssrn.com/abstract=530382> (last visited 06.04.2011), 5

⁵ Davies, Gareth T. and Rostek, Karolina, *The Impact of Union Citizenship on National Citizenship Policies*, European Integration online Papers (EIOP), Vol. 10, No. 5, July 2006. Available at SSRN: <http://ssrn.com/abstract=913960> (last visited 04.02.2012), 8

⁶ Kochenov, Dimitry, *Double Nationality in the EU: An Argument for Tolerance* (July 16, 2010). European Law Journal, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1641090> or <http://dx.doi.org/10.2139/ssrn.1641090> (last visited 07.04.2012), 333

⁷ Kochenov, Dimitry, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe* (August 19, 2011). Columbia Journal of European Law, Vol. 18, No. 1, pp. 56-109, 2011. Available at SSRN: <http://ssrn.com/abstract=1912925> (last visited 04.06.2012), p. 64

active. Several rights are active in a dormant phase⁸, but to get fully under the veil of EU demands its awakening. Once the citizenship is triggered by relevant cross-border situation, it remains active virtually forever.⁹ Thirdly, it serves as a source of rights providing the protection against Member State of one's nationality and against Member State other than the one of applicant's nationality. Recently, all three aspects have been eroded reaching even degree of legal uncertainty. As AG Jacobs said: "The case law of the CJEU on citizenship is complex, rapidly evolving and often highly technical."¹⁰ Transferring his euphemistic observation to the ordinary language, the case law of the CJEU on citizenship is complicated, unstable and factual, rather than doctrinal. To sum up, "lottery rather than logic would seem to be governing the exercise of EU citizenship rights."¹¹

The evolution (or mutation) of the EU citizenship has been characterized by the incremental lowering of requirements necessary for its activation which lead to the obscure argumentation undermining the credibility of the CJEU. The Court found in the *Carpenter*¹² case that the EU citizenship rights could be transferred from the national of the MS to his/her husband who itself is a Third Country National ("TCN"). The sufficient link with the EU law was provided since Mr. Carpenter has occasionally traveled abroad to sell journal advertisements. In *Zhu Chen*¹³, the child of the Chinese parents born in Ireland acquired the EU citizenship on the basis of *ius sanguini* principle. As a result, the EU citizenship of the children granted their parents residence

⁸ see Art. 20 - Art. 24 TFEU

⁹ Case C-403/03 *Egon Schempp*

¹⁰ Jacobs, Francis G., *Citizenship of the European Union - A Legal Analysis*, European Law Journal, Vol. 13, No. 5, pp. 591-610, September 2007. Available at SSRN: <http://ssrn.com/abstract=1005501> or <http://dx.doi.org/10.1111/j.1468-0386.2007.00385.x> (last visited 04.02.2012), 593

¹¹ OPINION OF ADVOCATE GENERAL Sharpston, Case C 34/09 *Zambrano*, para. 88

¹² Case C-60/00 *Carpenter*

¹³ Case C-200/02 *Zhu and Chen*

permits whereas the only connection with the EU law was the movement of parents between the Ireland and the England (so called passport movement).¹⁴ Surprisingly, the requirement which made the acquisition of the EU citizenship conditional upon the previous legal residence of the TCN married to the EU citizen was struck down by the CJEU in the *Metock*¹⁵. Interestingly, this case overruled *Akrich*¹⁶ case which was decided only few months before.

Apparently remote from the cross-border logic is the decision *Martínez Sala*¹⁷, where the CJEU ruled that unemployed Spanish citizen residing in Austria has a right to child allowances despite the lacking residence permit. *Grzelczyk*¹⁸ went in similar vein when it confirmed the right of the French student to Belgian allowance. The chosen cases confirm how intrusive the new citizenship is. *Carpenter*, *Zhu Chen* and *Metock* (*Carpenter Group*) interfered within the emblematic element of state's sovereignty – the right to decide who will reside within its territory should yield to the human rights protection.¹⁹ *Martinez Sala* and *Grzelczyk* (Sala Group) demonstrates the willingness of the CJEU to stretch the protection even to the field of the social security law which is also eminent state domain and even applying it to the subjects, which are not economically active. Another similarity is that the CJEU has based its reasoning on two main lines of arguments: a. non-discrimination (Sala Group) and b. family life

¹⁴ Tryfonidou, A., *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law?* Available at: <http://www.jus.uio.no/ifp/forskning/prosjekter/markedsstaten/arrangementer/2011/free-movement-oslo/speakers-papers/tryfonidou.pdf> (last visited 22.03.2012), 22

¹⁵ Case C-127/08 *Metock*

¹⁶ Case C-109/01 *Hacene Akrich*

¹⁷ Case C-85/96 *Martínez Sala*

¹⁸ Case 184/99 *Grzelczyk*

¹⁹ Sharpston, para. 141

protection (Carpenter Group). Nevertheless the CJEU disregarded in recent case-law both of these well-established paths and decided to take a leap of faith.

New Hope

*Ruiz Zambrano*²⁰ was landmark decision which was widely acclaimed by scholars as a decisive turn in the development of the EU citizenship. Mr. Zambrano was a Colombian national and the asylum seeker in Belgium. Two of his children was born in the Belgian territory and earned a Belgian Citizenship. However, Mr. Zambrano and the rest of the family faced deportation. Therefore he lodged an application in which he claimed that the Belgian nationality of his children gives his family entitlement to the residence permit whereas this right is inferred from the right to family.

In present case, there was no cross-border element, even remote one, which could provide a bridge with the EU law; therefore the situation was purely internal matter. “In its traditional case-law in this area, the Court has ruled that situations that did not involve the exercise of inter-State movement were purely internal to a Member State and thus were not governed by EU law.”²¹ Despite this fact, the CJEU ruled in favor of Mr. Zambrano granting him not only residence permit, but also work permit. To sum up, the underlying rationale behind decision was the fact that the refusal to grant a residence permit to Colombian members of family would force them to leave the territory of the EU which would consequently deprave the children with Belgian nationality of the genuine enjoyment of the EU citizenship. ²² Put differently, had the family to leave the territory; it is natural that their children which are EU nationals

²⁰ Case C 34/09, *Zambrano*

²¹ Tryfonidou, *What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the 'restriction' and 'discrimination' concepts in EU free movement law?*, 11

²² Guild, E., *The Court of Justice of the European Union and Citizens of the Union: A Revolution Underway?*, Available at: <http://cmr.jur.ru.nl/cmr/docs/Zambrano.pdf> (last visited on 26.02.2012), 2

would leave as well. Interestingly, the CJEU has not applied right to family (as was claimed by Mr. Zambrano), but rather it took as decisive factor the degree of interference within EU citizen's rights.²³ Thus the CJEU proclaimed that the EU citizenship alone is self-standing value which should be protected rather than a mere attachment to the national citizenship.²⁴ Apparently, the *Ruiz Zambrano* served as a test case by which the CJEU tried to harass the wall between the EU and national law in order to liberate the EU citizenship from its servitude.

*Rottman*²⁵ fleshed out other features of the EU-citizenship although it was regarded even by AG Maduro as an emblematic example of “*wholly internal situation*”²⁶. Janko Rottman was an Austrian national who applied for the German citizenship whereas the consequence of the conferral of German citizenship is the loss of the Austrian one. When Mr. Rottman was applying for German citizenship, he concealed the fact that at that time he was being prosecuted in Austria. The concealment of such a fact was regarded as a reason to recall the already conferred citizenship. Thus the result would have been the “extinguishment” of the EU citizenship since the Austrian one had already ceased to exist. The CJEU held that the member states should take into account the importance of the EU citizenship and therefore the proportionality analysis (usually reserved for fundamental rights cases) should be thoroughly applied when making such a decision.²⁷

²³ Van Elsuwege, Peter and Kochenov, Dimitry, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights* (September 18, 2011). *European Journal Migration & Law*, Vol. 13, 2011. Available at SSRN: <http://ssrn.com/abstract=1929765> (last visited 04.04.2012), 3

²⁴ Kochenov, Dimitry, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, 59

²⁵ Case C-135/08 *Janko Rottman*

²⁶ Shaw, Jo, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, 18

²⁷ Hailbronner, Michaela and Iglesias Sánchez, Sara, *The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status* (September 14, 2011). *Vienna Journal on International Constitutional Law*, Vol. 5, Issue 4, pp. 498-537, December 2011. Available at SSRN: <http://ssrn.com/abstract=1927198>, 507

How the *Rottman* fits into the new established scheme? First of all, the CJEU, although timidly, touched upon the exclusive competence to decide by whom national citizenship will be acquired.²⁸ The way how the CJEU stressed its importance endowed it with nearly self-standing status. To sum up, if *Rottman* would be deprived of his German nationality, he would not be able to execute his EU citizenship rights *ratio personae* whereas the Ruiz Zambrano's child would fall short *ratione loci*.²⁹

U-Turn

The CJEU shaped its position taken in *Ruiz Zambrano* more precisely in the *McCarthy* case where the UK national claimed that her Jamaican husband has a right to residence inferred from the EU citizenship. The CJEU obviously held that a long-distance relationship is a viable option how to lead a harmonious family life and refused to grant a residence permit. Again, the doctrine of deprivation of genuine content of the EU citizenship was applied. The CJEU apparently deduced that Mrs. McCarthy would not follow her husband to Jamaica³⁰; thus the CJEU concluded that the genuine enjoyment of citizenship is more valuable than to live with the husband. The AG Sharpston rightly pointed out that “it would be paradoxical (to say the least) if a citizen of the Union could rely on fundamental rights under EU law when exercising an economic right to free movement as a worker, but could not do so when merely “residing” in that Member State.”³¹ Yet despite her convincing reasoning, the CJEU reached this obscure result by feverously repeating the mantra of missing link with the EU law. But would e.g. visit of a

²⁸ Davies, Gareth T. and Rostek, Karolina, *The Impact of Union Citizenship on National Citizenship Policies*, 6

²⁹ Sharpston, para. 99

³⁰ Hailbronner, Michaela and Iglesias Sánchez, Sara, *The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status*, 512

³¹ Sharpston, para. 84

Lochness lake in the Scotland trigger an EU law protection? If we take into account *Zhu Chen* case, definitively yes.

Having *McCarthy* and *Ruiz Zambrano* side by side, the problem of reverse discrimination is being revealed in its entirety. “Where it was previously already controversial in the national arena to treat European citizens who have come from another member state more favorably than nationals, it appears unacceptable in the light of public opinion to maintain non-mobile nationals as the least favorable treated group, if benefits in terms of family reunification are extended to TCN.”³² Current situation undermines the core values upon which the EU rests upon – human rights, non-discrimination and equality which can disrupt any attempt to create loyalty towards the EU and its institutions.³³ One must bear in mind that this phenomena is a result of “disloyal position of the state towards its own citizens, where it aims to pursue certain policies that diverge negatively from what is mandated at EU level with regard to nationals of other States which is apparent in the area of EU family migration rights.”³⁴ *Dereci* could be regarded as example of judicial self-restraint and reaction to the anger of the Member States which was stirred up by *Ruiz Zambrano* accentuated the problem of reverse discrimination. In fact, the situation of appellants was akin to the situation of Mrs. McCarthy where TCN desire to live with their family relatives who are EU citizens whereas they have never exercised their right to free movement. In a nutshell, the CJEU had to resolve, whether the refusal to grant residence permit to third country nationals

³² Wiesbrock, A., *The Right to Family Reunification of Third-Country Nationals under EU Law; Decision of 4 March 2010, Case C-578/08, Rhimou Chakroun v. Minister van Buitenlandse Zaken*, European Constitutional Law Review, p. 478

³³ Show, Jo, *EU citizenship and the edges of Europe*, The University of Edinburgh, Working Paper 2012/19, 7 http://www.law.ed.ac.uk/file_download/series/372_eucitizenshipandtheedgesofeuropa.pdf (last visited 02.06.2013)

³⁴ Hailbronner, Michaela and Iglesias Sánchez, Sara, *The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status*, 514

would deprave their family members the genuine enjoyment of the EU citizenship.³⁵ The CJEU endorsed the view of the AG who stated that “*Ruiz Zambrano* and *McCarthy* judgments are based on the premises that “the substance of the rights attaching to the status of European Union citizen’ does not include the right to respect for family life enshrined in Article 7 of the Charter of Fundamental Rights of the European Union and in Article 8(1) of the ECHR.”³⁶ This means that when one of the parents, who is a third country national, has to leave the territory of the state, his family relatives having EU citizenship could not rely on it, as happened in the *Dereci* case. It is cynical at best what the CJEU asserts: that the minor child could fully enjoy his citizenship within the territory of the EU without one of his parent. Such a concept of citizenship without any qualitative content rings hollow. Furthermore it was opined that the protection granted by the national level, EU level and by the ECHR are in nature partially overlapping and partially exclusive. Since no connection with the EU was proved, current case falls within the remit of national law which should grant a protection to the family life. If such a protection proves to be insufficient, then the ECtHR, not the CJEU should step in.³⁷ Abovementioned line of argumentation self-contradicts to the principles of the EU law which should be permeated by the human rights, yet it complies with the structure of the EU being perceived as multi-level government.³⁸ Nevertheless, the authorities of member states acclaimed such an interpretation and now they are practically shattering the families consisting of parents where the one is the EU national and the second one the TCN. As a result, the CJEU has dramatically changed the course in the *Dereci* and

³⁵ Case C-256/11 *Dereci*, para. 66, para 33

³⁶ OPINION OF ADVOCATE GENERAL Kokott, Case C-256/11 *Dereci*, para. 37

³⁷ Kokott, para. 39-42

³⁸ see Art. 2, TFEU and case 29-69 *Stauder*, case 11/70 *Internationale Handelsgesellschaft*

McCarthy case since it has realized that further emancipation of the EU citizenship would result in defiance from the side of the Member States.

Thus we cannot speak about the establishment of a new paradigm; rather it is a confirmation of the old status-quo where the four market freedoms are in the center³⁹, whereas the human rights are located on the periphery.⁴⁰ This could be inferred from the reasoning where the Court implies that only economically active EU citizens deserve the right to family life which runs afoul the very idea of the citizenship.⁴¹ On the other hand, the CJEU did not shy away to invoke human rights principles or even invent them in other situations.⁴²

Return of Reason?

Currently, we could in the EU observe the hierarchy of the persons within the EU. The highest part of the ladder is occupied by the EU citizens who have been connected even tenuously with the internal market. Second position is occupied by the EU citizens who are minors whereas both of their parents are TCN. Third place is reserved for the static EU citizens partially shared with TCN. The existence of such a scheme undermines one of the main principles of the EU law – the principle of equality and non-discrimination.

The AG Sharpston proposed a medicine to treat the plague of reverse discrimination.

First, the claimant should be a static EU citizen whose situation is comparable to the

³⁹ see *C-341/05 Laval un Partneri* [2007] ECR I-11767 and *C-438/05 The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779

In both cases, the market freedoms prevailed over human rights protection

⁴⁰ Douglas-Scott, *The European Union and Human Rights after the Treaty of Lisbon*, 11 Hum. Rts. L. Rev., 20

⁴¹ Van Elsuwege, Peter and Kochenov, Dimitry, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, 16

This approach has been also criticized

see Sharpston, para. 84

⁴² case C-144/04 *Mangold*

dynamic citizen.⁴³ Second, reverse discrimination would considerably violate his fundamental rights whereas to degree of severity could be based on the Strasbourg case-law.⁴⁴ Third, the remedy granted by the EU would be only subsidiary, and would apply only if equivalent national measure is not at hand. Thus the division between the EU law and national law would be maintained yet the fundamental rights would be effectively protected.⁴⁵ The proposal of the AG seems to be logical, but is based on factual basis which disallows to provide a predictable doctrine how to tackle systematically with this problem. More radical solution calls for the elevation of the fundamental rights to the “federal” status.⁴⁶ But this would enable the CJEU to interfere in unprecedented extent to the realm of member states.⁴⁷ Thus to completely transform the citizenship from dynamic to purely static would hollow the concept of national citizenship to even greater extent resulting in the federalization of the union. However the German Constitutional prohibits in the Lisbon judgment any “strictly federal development because of its own view of democratic legitimacy that presupposes the maintenance of the national sovereignty, particularly in determining those nationals who are entitled to eventually choose such a federal future.⁴⁸” Therefore the solution will be the legislative action taken by Members States and setting the general guidelines which should rely on existing case-law. This would promote the genuine political integration able to alleviate legitimacy deficit of the EU citizenship which came into existence after constant judicial

⁴³ Sharpston, para. 146

⁴⁴ Sharpston, para. 147

⁴⁵ Sharpston, para. 148

⁴⁶ Hailbronner, Michaela and Iglesias Sánchez, Sara, *The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status*, 516

⁴⁷ See Sharpston, para. 172

AG compares effects of such an approach to the decision *Gitlow v. New York*, 268 U.S. 652 (1925) which allowed US Supreme Court to protect certain rights on the state law.

⁴⁸ Goldoni, Marco and Mindus, Patricia, *Between Democracy and Nationality: Citizenship Policies in the Lisbon Ruling (May 30, 2011)*, European Public Law, Vol. 18, No. 2, 2012. Available at SSRN: <http://ssrn.com/abstract=1855566> (last visited 30.03.2012), 14

intervention.⁴⁹ Such a reflexive approach based on voluntary basis would make MS more willing to participate and allow them to come up with solutions best fitting their needs.⁵⁰ Otherwise the dissatisfaction with growing supranational power will result in the decreasing popular support of the EU project.⁵¹

The power of EU citizenship's rhetoric has gradually turned into the rhetoric of power cunningly undermining the position of the national citizenship. Yet this process is not straight-forwarded since it involves complex interactions between various institutional layers. CJEU is well aware that it has to carefully balance all clashing forces and the *Dereci* and *McCarthy* are vivid examples of its sensitivity in the process of adaptation and growth of the EU law.

Seemingly it is only a matter of symbolic importance to transmute citizenship from dynamic to static. But symbols do matter. Although the reality is that the line between the EU law and the national law in many EU citizenship cases is now just a smokescreen which could be easily surpassed with the application of simple "legal engineering." However, it is still able to produce paradoxical situations such as cases where the potential move⁵² is enough to trigger the EU law, whereas the actual detrimental effect on family life (*Dereci*, *McCarthy*) is not sufficient.⁵³ And these cases truly symbolize yet unfulfilled promise of the self-standing EU citizenship based on human rights, equality and non-discrimination.

⁴⁹ Show, Jo, *EU citizenship and the edges of Europe*, 6

⁵⁰ Davies, Gareth T. and Rostek, Karolina, *The Impact of Union Citizenship on National Citizenship Policies*, 10

⁵¹ Majone, Giandomenico, *Rethinking European Integration after the Debt Crisis*, UCL European Institute, Working Paper No. 3/2012, 19
<http://www.ucl.ac.uk/european-institute/analysis-publications/publications/WP3.pdf> (last visited at 09.06.2013)

⁵² see case C-148/02, *Garcia Avello*

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