



On the CJEU's post-Brexit case-law on European citizenship. The recovery of the identity Ariadne's thread?

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ABSTRACT: The CJEU over the years has helped to forge a concept of citizenship directed to be the “fundamental status of the nationals of the Member States”. However, since the Dereci ruling of 2011, the proactivity of the CJEU concerning the development of European citizenship seemed to have gradually exhausted itself, mostly as far as the so-called social citizenship. It happens, nonetheless, that this crucial moment the European Union faces demands the enhancement of its vertical relation with the citizenry – it is either this or fragmentation. And perhaps this is the subliminal message from the CJEU in three post-Brexit rulings that, decided in the Grand Chamber, surprisingly recover and develop the most emblematic case-law about the European citizenship – namely the Rottmann and Zambrano rulings – whose political potential and/or identity potential seemed irrevocably muted. The rulings Rendón Marín, CS and Petruhhin point to the connection between European citizenship and the fundamental rights protection in the EU and possibly even represent an attempt to recover the identity dimension of European citizenship, nourished by a sense of belonging to a community of rights and obligations.

KEYWORDS: EU citizenship – identity – fundamental rights – CJEU.

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I. From the Union based on the rule of law to the political Union: the political/identity potential of citizenship

It is not worth preserving illusions: the European Union as we knew it has ceased existing after *Brexit*. The unexpected result of the referendum, in spite of the manipulation and abuse which so embarrassingly preceded it, has been converted into the symbol of popular exhaustion concerning the absence of consistent responses to the problems that affect individuals' everyday life. This crucial moment that the Union faces demands the enhancement of its vertical relation with the citizenry – it is either this or fragmentation. The legal basis for such is found in Article 9 of the Treaty on the European Union (TEU). According to it, the Union respects the principle of the equality of its citizens in all its activities, from which it follows that they should benefit from equal attention and treatment by the European institutions, organs and organisms. The concept of nationality naturally creates this vertical relation between citizens and the public power, based on a sentiment of belonging to a certain political community which is reflected in the idea of identity. Yet, such verticality may also exist coming from the status of the Union citizenship, with the perk of this being objective whilst nationality is subjective. Hence, through fundamental rights protection it is possible to establish that vertical relation between citizens and the European public power.

All in all, European citizenship has always been related to the imperative of equality of nationals from the different Member States – who must enjoy rights and be subject to the same obligations provided for in the Treaties. Inextricably bound to the fundamental rights protection,¹ European citizenship has offered the legal basis for plugging the gaps of protection – and, in that regard, to the deepening of the integration process. Conceived as a market citizenship (focused on the rights of economic actors that moved), it soon evolved to a social citizenship (focused on the dimensions of social solidarity associated with the exercise of the economic freedoms), in order to reach prospectively a republican citizenship (founded upon the secure exercise of fundamental rights and the active involvement of the citizens). Thus, more than a status in a static perspective, the European citizenship started being noticed as a process of juridical-constitutional range.² That is why authors in general had difficulties sizing it up in terms of legal doctrine.

And to this evolution came a large contribution from the Court of Justice of the European Union (CJEU) that over time has shaped a concept of European citizenship aimed at being the “*fundamental status of the nationals of the Member States*”³ – a status which would allow them to obtain, regardless their nationality, the same legal treatment. Therefore, being an EU citizen essentially makes one the holder of rights protected in the EU legal order, including fundamental rights. In this sense, one might argue that the substance of EU citizenship is based on the fundamental rights

¹ The rights traditionally associated with European citizenship [paragraphs a, b, c and d, Article 20(2), TFEU] are formally recognised today as fundamental rights in the Charter of Fundamental Rights of the European Union, which is clear in Articles 45, 39, 40, 46, 44, 43, 41.

² Niamh Nic Shuibhne and Jo Shaw, “General report”, in *Union Citizenship: Development, Impact and Challenges. The XXVI FIDE Congress in Copenhagen 2014*, ed. U. Neergaard, C. Jacqueson and N. Holst-Christensen, Congress Publications, vol. 2 (Copenhagen: DJOF Publishing, 2014), 66: “*As both a status and an ideal, Union citizenship stands at the interface of integration and constitutionalism, and is a barometer for key trends and influences at the current crossroads between the Member States and the European Union*”.

³ See Judgment *Grzeleczyk*, case C-184/99, recital 31.

recognised by the Treaties.⁴ As Eleanor Sharpston has put it, “*it may perhaps seem obvious that the Court would necessarily bear in mind fundamental rights when interpreting the Treaty provisions on citizenship of the Union*”,⁵ whether it states this expressly in its reasoning or not. As the former CJEU Judge, José Cunha Rodrigues – rapporteur for some of the most relevant judgments on citizenship – claims, the most sensitive effect of this interaction between citizenship and fundamental rights lies in the application of the European Union law in situations that were until then considered as purely internal.⁶ This does not mean, of course, that the notion of EU citizenship entails, by itself, a widening of the scope of application of the Charter of Fundamental Rights of the European Union (CFREU) beyond the boundaries of EU law.⁷

However, since the ruling *Dereci* of 2011,⁸ the proactiveness of the CJEU as far as the development of the European citizenship seemed to have gradually exhausted its potential, particularly with so-called social citizenship. The CJEU’s pre-Brexit case-law on the supposed phenomenon of “*social tourism*” (*Dano*,⁹ *Alimanovic*¹⁰ and finally *European Commission v. United Kingdom*)¹¹ came up as indefensible and was widely criticised by the doctrine.¹² Not only because the risk of “*social tourism*” was refuted a long time ago by statistics released by the European Commission¹³ – according to

⁴ José Cunha Rodrigues, “A propos European citizenship: the right to move and reside freely”, in *Constitutionalising the EU judicial system: essays in honour of Pernilla Lindh*, ed. Parcal Cordonnel, Allan Rosas e Nils Wahl, (Oxford and Portland, Oregon: Hart Publishing, 2012) 206: “[European citizenship] was closely linked to fundamental rights. In a certain sense, the origin and the common destinies of citizenship and fundamental rights constituted the values on which the Union should be based. The perception of this evolution is essential to the interpretation of current events and to understanding of the instruments used to date for the broadening of the concept of European citizenship”.

⁵ Eleanor Sharpston, “Citizenship and fundamental rights – Pandora’s box or a natural step towards maturity?”, in *Constitutionalising the EU judicial system: essays in honour of Pernilla Lindh*, ed. Parcal Cordonnel, Allan Rosas and Nils Wahl (Oxford and Portland, Oregon: Hart Publishing, 2012) 267: “*Whilst a civilized society extends the protection afforded by fundamental rights guarantees to all those who are present on their territory, this does not alter the fact that the people who (par excellence) have rights – including, of course, fundamental rights – are citizens... Viewed in that light, it becomes clear that it would be unthinkable for the Court to interpret the scope and content of the citizenship provisions of the Treaty without recourse to fundamental rights*”.

⁶ José Cunha Rodrigues, “*Sobre a abundância de direitos em tempo de crise*”, *Revista de Finanças Públicas e Direito Fiscal* (2012), 19.

⁷ José Luís da Cruz Vilaça and Alessandra Silveira, “The European federalisation process and the dynamics of fundamental rights”, Dimitry Kochenov (ed.), *EU citizenship and federalism - the role of rights* (Cambridge: CUP, 2017).

⁸ Judgment *Dereci*, case C-256/11.

⁹ Judgment *Dano*, case C-333/13.

¹⁰ Judgment *Alimanovic*, case C-67/14.

¹¹ Judgment *European Commission v. United Kingdom*, case C-308/14.

¹² See Sandra Mantu and Paul Minderhoud, “Exploring the limits of social solidarity: welfare tourism and EU citizenship”, *UNIO - EU Law Journal*, vol. 2 (June/2016); Daniela Guimarães, “The right of free movement and the access to social protection in the EU: the economical dimension. Notes on the case *Elisabeta Dano v Jobcenter Leipzig*, C-333/13”, *UNIO - EU Law Journal*, vol. 1 (July/2015) (<http://www.unio.cedu.direito.uminho.pt>).

¹³ See the report of 14th of October 2013 (DG Employment, Social Affairs and Inclusion via DG Justice Framework Contract) entitled “*A fact finding analysis on the impact on the Member States’ social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*” and whose summary reads: “*it can be concluded that the share of non-active intra-EU migrants is very small, they account for a similarly limited share of SNCB recipients and the budgetary impact of such claims on national welfare budgets is very low. The same is true for costs associated with the take-up of healthcare by this group. Employment remains the key driver for intra-EU migration and activity rates among such migrants have indeed increased over the last 7 years*”.

which the financial impact of economically inactive citizens is insignificant – but mostly because such case-law represents a clear setback in the citizenship acquis, resulting from the pressure made by Member States over the European institutions, in view of the populist and xenophobic menaces that increasingly poison national public opinions and electoral results.¹⁴

In any case, in the current post-*Brexit* period it has become clearer that access to social justice through the CJEU's case-law, regardless of the *erga omnes* effect of the decisions under the reference for a preliminary ruling procedure, was not capable of promoting by itself a global/political consideration of the issues associated with citizenship. Neither did it meet the demands of the most vulnerable citizens instead of only (or mostly) of the dynamic, economically active citizens. Although the role of the CJEU was indispensable in a given historic time, assuring rights of social citizenship in small doses turned out to be insufficient for the mobilisation of a political community as a whole – and this is what the European Union needs at the present stage of integration. The current need is for a qualitative leap from a Union based on the rule of law to a political Union.

And perhaps this is the subliminal message from the CJEU in three post-Brexit rulings that, decided in the Grand Chamber, surprisingly recover and develop the most emblematic case-law about the European citizenship – namely the *Rottmann*¹⁵ and *Zambrano*¹⁶ rulings – whose political potential and/or identity potential seemed irrevocably muzzled. In the rulings *Rendón Marín*¹⁷ and *CS*¹⁸, the core issue involved the expulsion and the automatic refusal of the concession of residence to third state nationals who have a dependent minor European citizen – in both cases due to the parent's criminal records. The CJEU recovered the *Zambrano* assertion, according to which Article 20 of the Treaty on the Functioning of the European Union (TFEU) precludes national provisions that have the effect of depriving citizens of the Union of the “*genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union*”¹⁹ – and, in this sense, it must be attributed the derived right of residence to the national from a third State, under this risk of the “*useful effect of the European citizenship*” being affected, if the minor is forced to leave the territory of the Union to follow his/her parent.²⁰ In both rulings, as we will see, the novelty is the way the CJEU appreciates, in the light of the fundamental rights of the European citizen, the possibility that a Member State may introduce limits to such derived rights of residence which arise from Article 20, TFEU.

In the *Petruhhin*²¹ ruling the legal issue was an extradition request presented by Russian authorities to Latvian authorities concerning an Estonian national. The referring national court basically intended to know whether the lack of protection for Union citizens against extradition, namely when they move to a Member State different

¹⁴ See Alessandra Silveira, “Cidadania social na União Europeia – *quo vadis?* Avanços e recuos entre forças de coesão e fragmentação”, in *União Europeia: reforma ou declínio*, coord. Eduardo Paz Ferreira (Lisboa: Nova Vega, 2016).

¹⁵ Judgment *Rottmann*, case C-135/08.

¹⁶ Judgment *Zambrano*, case C-34/09.

¹⁷ Judgment *Rendón Marín*, case C-165/14.

¹⁸ Judgment *CS*, case C-304/14.

¹⁹ See Judgment *Zambrano*, ..., recital 42, Judgment *CS*, ..., recital 26, Judgment *Rendón Marín*, ..., recital 71.

²⁰ See Judgment *Zambrano*, ..., recitals 43 and 44, Judgment *CS*, ..., recital 29, Judgment *Rendón Marín*, ..., recital 74.

²¹ Judgment *Petruhhin*, case C-182/15.

from the one of their nationality, would or would not be contrary to the essence of the European citizenship – or, more concretely, to the Union citizens’ right to the equivalent protection that the host Member States nationals have there. Turning to the *Rottmann*²² ruling, the CJEU recognised that, in the absence of an international agreement between the Union and a third country, the rules in the matter of extradition are within the Member States’ competences, but that does not prevent that in situations comprised by the EU law the internal law complies with it.²³ Hence, Articles 18 and 21 of the TFEU require that the Member State recipient of an extradition request by a third State *i)* inform the Member State of the nationality of the European citizen and *ii)* upon request of this Member State, surrender its national in compliance with the rules of the Council Framework Decision 2002/584/JHA (on the European arrest warrant and the surrender procedures between Member States, as amended by the Framework Decision 2009/299/JHA), as long as the Member State of the nationality is competent to criminally proceed against such citizen for acts committed out of its territory.²⁴ The novelty in this case is how the CJEU appreciates, in the light of the fundamental rights of the European citizen, the possibility that the Member State of execution may extradite the national from another Member State at request of a third State.

Such post-Brexit rulings highlight the connection between European citizenship and the fundamental rights protection in the EU – which, all considered, the rulings *Rottmann* and *Zambrano* themselves opted not to point out. They might represent an attempt to recover the identity dimension of the European citizenship, nourished by a sense of belonging to a rights and obligations community. In the absence of the nationality link, the European identity was built upon the exercise of rights – that is, as a “*citizenship of rights*”. Yet, the avalanche of challenges that the EU has been confronted with undermined the safe exercise of fundamental rights – what weakens the mentioned link between the Union and its citizens. The dynamics of European integration depends largely on the CJEU case-law, but have been inevitably influenced by political-economic dynamics of each historical moment. The CJEU, in its constitutional court clothing, has made “*politics by law lines*”.²⁵ We will only be able to assess whether this politics is good or bad with distance of time. What remains to be ascertained are the consequences that the EU will face for what it sacrificed for the sake of the United Kingdom – which, as we have seen, did not prevent Brexit. Will the CJEU, with its post-Brexit case-law, recover the Ariadne’s thread of identity that will lead it again to the evolving route of European citizenship?

II. On the *Rottmann* judgment and its repercussions on *Petruhhin*

Were we to determine the “*point of no-return*” in the evolution of the understanding of the European citizenship, we would by necessity have to indicate the *Rottmann* judgment. As certain as it is that the European citizenship depends on the nationality of a Member State and adds to the national citizenship without replacing it – “[e]very person holding the nationality of a Member State shall be a citizen of the Union” [Article 20(1), TFEU] – it is likewise certain that the *Rottmann* ruling reframes the extension of the discretionary

²² See Judgment *Rottmann*, ..., recital 41.

²³ See Judgment *Petruhhin*, ..., recitals 26 and 27.

²⁴ See Judgment *Petruhhin*, ..., recital 50.

²⁵ The expression is authored by Gomes Canotilho, referring to the Portuguese constitutional court case-law, in Conferência comemorativa do XX aniversário do Tribunal Constitucional, Lisboa, 2003.

power Member States have to determine who their citizens are. The acquisition and loss of the nationality (and, therefore, the Union citizenship) are not regulated by the EU law. Nonetheless, the conditions of acquisition and loss of the nationality must be compatible with the European rules and respect the rights and duties of the European citizen, by virtue of the principle of European loyalty, evident in article 4(3), TEU.

As the Advocate General Poiares Maduro explains in his opinions on the *Rottmann* judgment, insofar as the possession of the nationality of a Member State fixes the possession of Union citizenship – and, thus, the benefit of rights and freedoms that are expressly linked with it as well as the social benefits it allows acceding – Member States cannot reject the useful effect of the obligation of complying with the EU law when they exercise their competences in matters of nationality.²⁶ In his words: “[t]hat obligation is therefore bound to place some restriction on the State act of depriving a person of nationality, when such an act entails the loss of Union citizenship; otherwise the competence of the Union to determine the rights and duties of its citizens would be affected”.

The conclusion the CJEU reached in this ruling then shuffles what traditionally was understood as primary and secondary in the relations between nationality and European citizenship: the maintenance of the European citizenship demanded the maintenance of the nationality of a Member State – whether German or Austrian.²⁷ Moreover, it reveals on which grounds the European citizenship changes, somehow unpredictably, the idea of nationality as basis for citizenship. As of the moment when nationals from other Member State may benefit, in the host Member State, from rights previously reserved for their own nationals, the very notion of nationality as main criteria of belonging is challenged. And it is also challenges the exclusivity of the relation between nationality and citizenship – upon which the Nation-State was built.²⁸

For it, the *Rottmann* judgment seems to clarify the meaning of the formulation insistently repeated by the CJEU whereby the European citizenship is the “*fundamental status of the nationals of the Member States*”. In this process, we must remember, the CJEU was confronted with the situation of an Austrian citizen (from birth) who acquired the German nationality (by naturalisation), having lost his original citizenship as a consequence. Once the German nationality was fraudulently obtained, Janko Rottmann had his naturalisation revoked at German first instance courts – which took the Administrative Supreme Court to address the CJEU in order to know if the statelessness and the correspondent loss of the European citizenship would be compatible with the Union law.

It must be noted that in question was not the exercise of freedoms of movement that would allow the connection with the fundamental rights safeguarded by the European legal order²⁹ – Rottmann was a German national living in Germany to whom

²⁶ See the Opinion AG in the judgment *Rottmann*, case C-135/08, recital 26.

²⁷ Eva-Maria Poptcheva, “The multilevel context of Union citizenship. The right to consular protection as a case in point title”, in *Citizenship and solidarity in the European Union: from the Charter of Fundamental Rights to the crisis, the state of the art*, ed. Alessandra Silveira, Mariana Canotilho and Pedro Madeira Froufe (Bruxelles/Bern/Frankfurt am Main/New York/Oxford/Wien: Peter Lang, 2013) 257: “the multilevel design of Union citizenship is evidenced by its incursion into nationality rules bringing forward the constructive potential of Union citizenship reflected to some extent in its capacity to penetrate national citizenship. This constitutional constructive potential of Union citizenship found expression for instance in the *Rottmann* case where the Court of Justice raised the objective dimension of Union citizenship to a routing criterion to be observed by the Member States when deciding on the withdrawal of nationality of a Member State”.

²⁸ Sandra Mantu, *Contingent citizenship. The law and practice of citizenship deprivation in international, European and national perspectives*, doctoral dissertation (Nijmegen: Radboud Universiteit Nijmegen, 2014), 109.

²⁹ On the CJEU case-law involving internal norms of nationality (or directly related to it) in

was issued an administrative act from a German authority – but indeed the loss of the European citizenship. The German and the Austrian governments, supported by the Commission, claimed that the fact that the interested person had exercised his free movement right before the naturalisation could not constitute *per se* a cross-border element susceptible of influencing the revocation of such naturalisation.³⁰ It was not for any different reason that the Advocate General Poiares Maduro suggested that the EU law was not contrary to the loss of the Union citizenship because the revocation of the naturalisation had not been motivated by the exercise of rights and freedoms arising from the Treaties nor it was based on other cause prohibited by the EU law.³¹

Nevertheless, the CJEU framed the question in other terms, excluding any relevance of the cross-border element – that is, Rottmann's exercise of free movement in the past – to the preliminary ruling. The CJEU began by rejecting the argument of a purely internal situation. The reasoning was the understanding that the situation of a Union citizen facing a national decision susceptible of causing the loss of the status of the European citizenship and its pertaining rights is, by its very nature and its consequences, encompassed by the EU law.³² Hence, the fact that nationality matters are under the competence of Member States does not prevent, in circumstances embraced by the EU law, the national norms from being as a consequence subject to jurisdictional control in light of the EU law.³³

Even if we accept in principle the legitimacy of a decision to revoke the fraudulently acquired naturalisation (in the light of international law),³⁴ the CJEU recalled that it is up to the judicial organ referencing for a preliminary ruling to evaluate if the decision follows the principle of proportionality (in the light of the EU law). Therefore, given the importance the primary EU law attributes to the status of citizenship, the consequences for the interested person and potentially his or her relatives of such a decision should be considered, as far as the loss of rights at disposal of any European citizen. In this respect, it matters essentially to verify whether that loss is justified, considering *i*) the seriousness of the infraction committed; *ii*) the time elapsed between the naturalisation decision and the revocation decision and *iii*) the possibility of the interested one to reacquire his/her original nationality. That is why, prior to the decision to revoke the naturalisation taking effect, a reasonable time for the person to attempt the reacquisition of the nationality of the Member State of origin must be conceded.³⁵

For all those reasons, the CJEU decided in *Rottmann* that EU law, namely Article 20, TFEU, is not contrary to a Member State revoking the nationality it granted by naturalisation to a Union citizen who obtained it fraudulently, “*as long as the decision*

supposed conflict with the freedoms of movement, see Judgments *Airola*, Case 21/74; *Micheletti*, Case C-369/90; *García Avello*, Case C-148/02; and *Grunkin and Paul*, Case C-353/06.

³⁰ See Judgment *Rottmann*, ..., recital 38.

³¹ See the Opinion AG in the judgment *Rottmann*, ..., recital 35.

³² See Judgment *Rottmann*, ..., recital 42.

³³ See Judgment *Rottmann*, ..., recitals 41, 45 and 48; Opinion AG in the judgment *Rendón Marín and CS*, cases. C-165/14 e C-304/14, recitals 113 and 114.

³⁴ See Judgment *Rottmann*, ..., recitals 52 and 54. The CJEU refers to the Convention on the reduction of Statelessness, whose Article 8(2) states that an individual can be deprived of the nationality of a contracting State if he has obtained it through false declarations or any other fraudulent act. Likewise, Article 7(1)(3) of the European Convention on Nationality does not prohibit a signatory state of depriving an individual of his nationality, even if he becomes stateless, when it was acquired following fraudulent acts, through false information or concealment of any relevant facts attributed to the applicant.

³⁵ See Judgment *Rottmann*, ..., recitals 55 to 58.

to revoke complies with the principle of proportionality”, under the terms defined by the EU law.³⁶ And it concluded by reiterating that the principles related to the Member State’s competence in matters of nationality – especially the obligation to exercise this competence in accordance with the Union law – are applicable both to the Member State of naturalisation (in this case, Germany) and the Member State of the original nationality (in this case, Austria).³⁷

What is striking in the *Rottmann* judgment as far as the evolution of the citizenship *acquis* is above all the disregard towards the previous movement of Rottmann and the circumscription of the issue under the Article 20, TFEU, thus contributing to the definition of the scope of application of the European citizenship. In spite of Rottmann having moved in the past, from Austria to Germany – thus exercising his freedom of movement – his situation was appreciated as if he had been a static citizen (and not dynamic), and his status of citizenship was defended in this fashion. Besides serving to refute the argument of a purely internal situation, European citizenship served as a foundation to safeguard the rights and freedoms of a static citizen – something that would later be confirmed in the *Zambrano* judgment, published in the following year (see below).³⁸

As the Advocate General Maciej Szpunar explains in his recent opinions for *Rendón Marín* and *CS*, the likeness between the situation of Rottmann, subject to provoking the “loss of the status conferred by Article (20, TFEU) and the relating rights” and that of one of Zambrano’s descendants (susceptible to depriving the genuine “enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”) is no simple coincidence, as both concepts have similar extents. The concept of “the substance of the rights” used by the CJEU hints at the concept of “essential substance of rights”, particularly fundamental rights, well-known to the constitutional traditions of the Member States as well as to the European Union law. All in all, Article 52(1), CFREU admits the introduction of limits to the exercise of rights, as long as those limits are legally provided for, observe the essential content of such rights and freedoms and, pursuant the principle of proportionality, are necessary and effectively match the objectives of general interest recognised by the Union, or the need to protect rights and freedoms of third parties. In that sense, the Advocate General concludes, the respect of the essential rights that derives from the fundamental status of citizen of the Union operates, as in the case of respect for the essential content of fundamental rights, “as [a] last and insurmountable limit to any possible restriction to the exercise of rights associated to it”, or in other words, as a “limit of limits”.³⁹

Thus, in the same way that European citizenship served in the *Rottmann* judgment to enclose the national competences of revocation of a fraudulent naturalisation, in the *Petruhhin* judgment it serves to curb the extradition of European citizens to third countries with which the European Union has not signed an international convention. As seen, the European citizenship emerged to promote the levelling trend of the juridical positions of the nationals of Member States irrespective of where they find themselves. The principle of non-discrimination on grounds of nationality (Article 18, TFEU) is by force of the Treaties indissociably tied to citizenship status. It is for no other reason that Part II of the TFEU is entitled “non-discrimination and citizenship of the Union”. For it,

³⁶ See Judgment *Rottmann*, ..., recital 59.

³⁷ See Judgment *Rottmann*, ..., recital 62.

³⁸ See Opinion AG *Rendón Marín* and *CS*, cases C-165/14 and C-304/14, recital 115.

³⁹ See Opinion AG *Rendón Marín* and *CS*, ..., recitals 126 to 130.

the CJEU's case-law has recognised juridical-constitutional characteristics in the current Article 18, TFEU which have been revealed as faithful to the economy of the Treaty and more suitable to the European construction.⁴⁰ As the former CJEU Judge José Cunha Rodrigues explains, such constitutional dimension, based on a new juridical-political reality and oriented to the recognition of rights, has marked the transition from the personal status of simple recipient of norms into the centre of reference in the process of the European construction.⁴¹ Indeed, the perception of this evolution is essential for interpreting the present and understanding the instruments used so far in the densification of the concept of European citizenship.⁴²

Under this premise of intrinsic relation between citizenship and non-discrimination, in the *Petruhhin* ruling the referring jurisdictional organ asks the CJEU if Articles 18 and 21, TFEU ought to be interpreted in such a way that, for application effects of an extradition agreement negotiated between a Member State and a third State, the nationals of another Member State should benefit from the rule that forbids the extradition of nationals of the host Member State. In forbidding “any discrimination on grounds of nationality”, Article 18, TFEU imposes equal treatment towards persons who find themselves in a situation comprehended in the scope of application of the Treaties.⁴³ In the main lawsuit, by moving to Latvia, the Estonian national Petruhhin exercised his freedoms of movement. Therefore the situation in question is within the scope of application of the Treaties in the significance given by Article 18, TFEU. Consequently, the unequal treatment in allowing the extradition of a Union citizen who is a national of another Member State consists of a restriction to his/her freedom of movement under the Article 21, TFEU.⁴⁴

What is effectively relevant in the *Petruhhin* judgement, though, is the recognition that in the domain of extradition to third countries, EU Member States' nationals access the Union's fundamental law standard through European citizenship, which assures a higher level of protection, including against his/her own state of nationality in case it admits the extradition of nationals to third countries. The CJEU decided that if an addressed Member State intends to extradite a national of another Member State upon request from a third country it must be verified if the extradition infringes the rights enshrined in Article 19, CFREU. The CJEU has also established the criteria for such verification. According to Article 19, CFREU, no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. That is why the CJEU points out that the accession to international human rights treaties are not sufficient *per se* to ensure a proper protection against the risk of degrading treatment when trustworthy sources report practises manifestly contrary to human rights perpetrated by the addressing authorities of the extradition – or are tolerated by them. In order to assess the real risk in this regard, the competent authority in the addressed Member State must ground its decision on objective, reliable, precise and duly updated elements – that may result namely from judicial rulings and other documents

⁴⁰ See José Cunha Rodrigues, “Comentário ao artigo 45.º da CDFUE”, in *Carta dos Direitos Fundamentais da União Europeia Comentada*, ed. Alessandra Silveira and Mariana Canotilho (Coimbra: Almedina, 2013), 525.

⁴¹ *Idem*.

⁴² *Idem*.

⁴³ See Judgment *Petruhhin*, ..., recital 29.

⁴⁴ See Judgment *Petruhhin*, ..., recital 33.

prepared by organs of the Council of Europe or part of the United Nations system.⁴⁵

In the light of the *Rottman-Zambrano* case-law – and in spite of the CJEU not referring to it in *Petruhhin* as it had done in *Rottmann* – the principles relating to the Member States' competence in extradition matters, especially the obligation to observe European Union law, are binding insofar as the addressed Member State (in this case, Latvia) and to the Member State of the nationality (in this case, Estonia). Therefore, the CJEU recalls that, in lieu of EU law rules regulating the extradition between the Member States and a third country, it matters to preserve Union's citizens from measures susceptible of depriving them of their citizenship rights. That should be done by using all existing mechanisms of cooperation and mutual assistance in criminal matters due to the European Union law⁴⁶ and then preventing, as much as possible, the risk of the infraction at stake going unpunished.⁴⁷

III. On the *Zambrano* judgment and its repercussions on *Rendón Marín* and *CS*

The *Rottmann* judgment opened the way for the *Zambrano* ruling, such that the CJEU could sustain the interpretation (even though this is not explicit in the reasoning) that static European citizens, who have never moved and only lived in one Member State, could benefit from the European jus-fundamentality standard via the status of European citizenship. As the Advocate General Eleanor Sharpston explains in her opinion in the *Zambrano* judgment, it would be (to say the least) paradoxical that a European citizen could invoke the fundamental rights protected by the Union *i)* when he/she exercises economic freedoms, *ii)* when he/she invokes the secondary law of the Union, or *iii)* when the national law applicable integrates the scope of application of the Treaties; but he/she would not be able to do it when simply remaining in his/her Member State of birth – via European citizenship alone. The right to reside established in Article 21, TFEU must be considered autonomous, “*rather than a right that is linked by some legal umbilical cord to the right to move*”.⁴⁸

Indeed, the referred questions articulated by the national judge in *Zambrano* clearly related European citizenship to fundamental rights.⁴⁹ Therefore, the core issue in the *Zambrano* judgment was the definition of *i)* the scope of application of fundamental rights in the European Union and *ii)* the access of the citizens to a jus-fundamentality standard such that an inadmissible unequal treatment between so-called dynamic citizens (who exercise their classic European rights/economic freedoms and, for that reason, would benefit from the European jus-fundamentality standard) and static citizens (who do not exercise freedoms of movement and thus do not benefit from the European jus-fundamentality standard). In *Zambrano*, the CJEU faced the impact of fundamental rights (particularly the right of protection of family life) in the definition of the meaning and the reach of the European citizenship. The CJEU was challenged to give

⁴⁵ See Judgment *Petruhhin*, ..., recitals 53 to 60.

⁴⁶ See Judgment *Petruhhin*, ..., recital 47.

⁴⁷ See Judgment *Petruhhin*, ..., recital 49.

⁴⁸ See Opinion AG *Zambrano*, Case C-34/09, recital 84.

⁴⁹ See Opinion AG *Zambrano*, ..., recital 52: “*The national court has made it very plain in the order for reference that it seeks guidance as to whether the fundamental right to family life plays a role in the present case, where neither the Union citizen nor his Colombian parents have moved outside Belgium. That question raises in turn a more basic question: what is the scope of EU fundamental rights? Can they be relied upon independently? Or must there be some point of attachment to another, classic, EU right?*”

a practical utility to the European citizenship, essentially concerning the protection of fundamental rights in the Union. In other words, the CJEU was compelled to convert European citizenship into a platform that permits the access of a national of a Member State to the European jus-fundamentality standard. In that way, it prevented the citizen to look for fictional or hypothetical nexus with the freedoms of movement in order to benefit from the jus-fundamental standard.⁵⁰

Had we to identify what the *Zambrano* case-law adds to the citizenship *acquis*, we could argue that after this ruling arises that *i*) the European citizenship is not subject to the previous exercise of a freedom of movement and *ii*) through the European citizenship it is possible to go into the European jus-fundamentality standard when there is no other evident link with the European Union law. For this reason *Zambrano* carries the germ of a theory of the fundamental rights in the European Union to the degree that it confronts the European legal order with everything that is most unsettling in the domain of fundamental rights protection in a Union (reputedly) based on the rule of law.

The factual situation that is behind such case-law evolution is largely known: a Colombian couple arrived in Belgium in 1999 with a visa issued by the Belgian authorities in Bogota with the expectation to get asylum after receiving death threats by private militias and having faced the kidnap of their three year-old son for a week. The Belgian authorities deny them asylum but do not repatriate them – considering the civil war situation in the country of origin. Afterwards a saga of systematically denied residence authorisation requests followed. In the meantime, the two Belgian children of the *Zambrano* couple are born. In concrete terms it mattered, therefore, to know if the rules of the TFEU concerning the European citizenship confer the parent of a minor European citizen the right of residence in the Member State of which his/her child is a national. In broader terms it was the case for testing the extension of the citizenship (which rights does it imply?) of a static European citizen (who has never exercised freedom of movement, having never left the Member State where he/she was born and of which he or she is a national).

All governments that presented written observations to the Court – and also the Commission – alleged that it was a purely internal situation. Insofar as the Belgian children of the *Zambrano* couple reside in the Member State of their nationality and never left it, to them the freedoms of movement and residence fixed by European Union law would not be applicable. Nor would the higher level of protection of fundamental right to family life to which they would have access via the exercise of those freedoms. Ruiz *Zambrano* contested this argument by stating that the exercise of European citizenship does not presuppose the movement of his children to the outside of the Member State where they reside – thereby he could invoke himself, as a member of the family, the right to reside pursuant the European Union law.⁵¹

In order to illustrate the incoherence of insisting on the requirement of a physical movement to a different Member State from the one of which someone is a national before invoking the right of residence as a Union citizen, the Advocate General Eleanor Sharpston projected the following hypothetical situation in her opinion in the *Zambrano* judgment: “[s]uppose a friendly neighbour had taken Diego and Jessica on a visit or two to Parc Astérix in Paris, or to the seaside in Brittany. They would then have received services in another Member State. Were they to seek to claim rights arising from their ‘movement’ it could not be

⁵⁰ See Opinion AG *Zambrano*, ..., recital 167.

⁵¹ See Judgment *Zambrano*, ..., recital 38.

suggested that their situation was ‘purely internal’ to Belgium. Would one visit have sufficed? Two? Several? Would a day trip have been enough; or would they have had to stay over for a night or two in France?⁵² And she goes on: “[i]t is difficult to avoid a sense of unease at such an outcome. Lottery rather than logic would seem to be governing the exercise of EU citizenship rights”.⁵³ For that reason the Advocate General defended that the Zambrano’s children’s rights derived from the EU citizenship would be susceptible of being invoked notwithstanding the fact that the children had not left yet the Member State of which they were nationals (and as a consequence, Ruiz Zambrano could invoke a right of residence derived from his children’s rights as EU citizens).

Underlying the argument enunciated by Ruiz Zambrano is a reframing of the notion of what a purely internal situation is (understood as a situation without any connection to European Union law) whose original meaning has weaknesses in the current stage of the integration. When scrutinising similar situations, the CJEU opines about the application of EU law in situations that are in principle internal (because they relate to internal products, in internal market conditions and in compliance with internal rules) but susceptible to presenting a link with situations subject to European Union law. As explained by the Advocate General Eleanor Sharpston, the question of knowing if a situation is internal is conceptually distinct to the question of knowing if there is a connection with the European Union law. It matters which situations, internal or not, should be considered as not having any link with the European Union law. Yet, the answer cannot be that the so-called “*internal situations*” are automatically stripped of any connection to the European Union law.⁵⁴

It is not surprising, then, that the concrete situation in *Zambrano* raised the following perplexities in the national court: *i*) is it necessary for movement to take place for TFEU rules on European citizenship to be applicable?; *ii*) does Article 18, TFEU protect static citizens against inverse discrimination caused by the exercise of citizenship rights by dynamic citizens?; *iii*) what role do the fundamental rights play in determining the meaning and the reach of the European citizenship? In response, the CJEU upheld Ruiz Zambrano’s claim in half a dozen recitals whose historical relevance cannot be measured in this ruling with rapporteur by José Cunha Rodrigues.

The CJEU began by recognising that the Directive 2004/38/CE did not apply in the main proceedings. This Directive is only applicable to EU citizens who move or reside in a Member State that is not the one of their nationality – and it was not the case. There was not, thus, an exercise of freedoms of movement. However, the status of EU citizen (Article 20, TFEU) hinders national actions that have the effect of depriving the European citizens of the genuine enjoyment conferred by such status.⁵⁵ The refusal of residence of a national from a third country that is responsible for European citizens in their early age ends up producing this effect: if the children were to be obliged to leave the territory of the European Union they would be prevented of exercising the substance of the rights assured by the status of citizens of the Union.⁵⁶ It cannot be otherwise since the access to fundamental rights in the Union must not depend on the exercise of freedoms of movement nor the European Union should go along the idea

⁵² See Opinion AG *Zambrano*, ..., recital 86.

⁵³ See Opinion AG *Zambrano*, ..., recital 88.

⁵⁴ See Opinion AG *Government of the French Community and Walloon Government v Flemish Government* Case C-212/06, recital 136.

⁵⁵ See Judgment *Zambrano*, ..., recital 42.

⁵⁶ See Judgment *Zambrano*, ..., recital 44.

that only economically active citizens are entitled to the protection of family life.

Recently, in the judgments *Rendón Marín* and *CS*, the CJEU recovers the *Zambrano* case-law and further develops it as it appreciates in the light of the fundamental rights of the European citizen the possibility of limits over such derived right of residence which result from Article 20, TFEU. In the *CS* judgment the United Kingdom government disputed that the practise of a criminal infraction by the parent with the effect custody of the European citizen could exclude him of the scope of protection defined in the *Zambrano* ruling. It alleged that the decision to remove *CS* was based on public order grounds because he/she represented a clear threat to a legitimate interest of that Member State, namely the respect for social cohesion and the values of its society. Moreover, Articles 27 and 28 of the Directive 2004/38 provide for the possibility of the Member States to expel from their territories a citizen of the Union who commits a criminal infraction. In that regard, not acknowledging the limits of a derived right of residence that results directly from Article 20, TFEU would be to admit, according to the United Kingdom, that a national of a third country has a higher protection against the removal from the territory of the Union than a European citizen. Consequently, a Member State should be given the right of *i)* derogating the derived right of residence that results from Article 20, TFEU and *ii)* expelling from its territory the national of a third country if a criminal infraction of some seriousness is committed. That is so even if it implies that a minor and European citizen has to leave the territory of the Union.

In both rulings *Rendón Marín* and *CS* – in fact published on the same day – the CJEU adopted an identical reasoning, though in the first case the question was about the refusal to concede a residence permit and in the second, the removal from the territory of a Member State always in accordance with the criminal records of the parents. The CJEU considered that Article 20, TFEU did not affect the possibility that the Member States might invoke an exception linked with the maintenance of the public order and the safeguarding of public security. Yet, those concepts ought to be understood in a strict sense, wherefore its reach cannot be determined unilaterally by each of the Member States without control by the Union's institutions. All in all, the CJEU has interpreted that the concept of “*public order*” presupposes, in any case, besides the disturbance of the social order that all legal infraction causes, the existence of a real, current and sufficiently serious threat against a fundamental interest of the society. Only in these circumstances is the expulsion decision compliant with European Union law. This conclusion cannot be reached automatically only based on the criminal records of interested parties. It can only result from a concrete appreciation by the referring court of all current and appropriate circumstances of the case under analysis, in light of the principle of proportionality, of the best interest of the child and the fundamental rights whose respect is ascertained by the CJEU. Such appreciation must take into consideration *i)* the behaviour of the interested, *ii)* the length and the legal character of the residence in the territory of the Member State, *iii)* the nature and the seriousness of the infraction committed, *iv)* the current degree of danger of the interested party to society, *v)* the age of the child and his/her health condition and *vi)* his/her respective economic and family situation.⁵⁷

As the situation of *CS* is encompassed by the European Union law, its appreciation must take into account the right to respect for private and family life, as laid down in Article 7, CFREU. This right has to be read in conjunction with the obligation of considering the best interest of the child, enshrined in Article 24(2) of the Charter.

⁵⁷ See Judgment *CS*, ..., recital 42 and Judgment *Rendón Marín*, ..., recital 86.

As seen, the mere existence of criminal records cannot justify an expulsion order susceptible of depriving the descendants of third country nationals from the genuine enjoyment of the rights granted by the status of citizen of the Union. In this way, in both judgments, the CJEU concluded that Article 20, TFEU is to be interpreted as meaning that it precludes the legislation of a Member State which imposes *i*) the expulsion of a third country national who was criminally convicted⁵⁸ and *ii*) the automatic refusal of the concession of a residence permit to a third country national by the simple reason that the interested person has a criminal record,⁵⁹ even if the parent in question provides the effective custody of minors of early age, who are nationals of this Member State, where they have resided since birth without having exercised their free movement rights, when the above-mentioned expulsion or refusal of residence permit obligate the children to leave the territory of the Union, stripping them of the genuine enjoyment of their citizenship rights.

IV. Conclusion

Since the delivery of the *Zambrano* judgment we have been arguing that the CJEU has found in European citizenship the definitive link to the safeguarding of the higher level of fundamental rights protection that it is its duty to guarantee by virtue of Article 53, CFREU. If European citizenship (and the rights it contains) falls within the scope of material application of the European Union law, it allows that the fundamental rights protected by the European Union are invoked by the European citizen without any other nexus with European Union law beyond the citizenship itself. The basic rationale underlying this argument is the following: *i*) the situation of a citizen of the Union who did not use the freedom of movement alone cannot be considered free of connection with the European Union law;⁶⁰ *ii*) the status of citizen of the Union tends to be the fundamental status of the Member States nationals – what permits to invoke, even concerning the Member State of nationality, the corresponding rights of such status;⁶¹ *iii*) if the referring court considers that the situation *sub judice* is encompassed by the European Union law via European citizenship, it must examine whether the fundamental rights are respected as the Union legal order values them.⁶²

All considered, the CJEU has attempted to clarify that the goal of the protection of fundamental rights in the European Union law is to care that such rights are not infringed in the domains of activity of the Union, either as a consequence of action by the Union or of the application of the European Union law by the Member States.⁶³ In the Court's view, the pursuit of this objective is justified by the need of avoiding that the fundamental rights protection, sensitive to the national law at stake, harms the unity, primacy and effectiveness of the European Union law.⁶⁴ The CJEU establishes, therefore, a clear connection between the fundamental rights protection – as the CFREU shapes them – and the imperative of effectiveness of the European Union law. What is manifest here is the idea that dissonances in the fundamental rights protection in the different Member States can compromise the legal equality of the European

⁵⁸ See Judgment *CS*, ..., recital 50.

⁵⁹ See Judgment *Rendón Marín*, ..., recital 87.

⁶⁰ See Judgment *Dereci*, ..., recital 61.

⁶¹ See Judgment *Dereci*, ..., recitals 62 e 63.

⁶² See Judgment *Dereci*, ..., recital 72.

⁶³ See Judgment *Siragusa*, Case C-206/13, recital 31.

⁶⁴ *Idem*.

citizens – and ultimately the very survival of a Union based on the rule of law.

In fact, it is not anything new, but simply the application, in the scope of the citizenship and the fundamental rights it implies, of the renowned formula of the internal market visible in the *Dassonville* judgment.⁶⁵ Any national action which may harm intra-community commerce produces an effect equivalent to quantitative restrictions and is therefore prohibited. Thus, either in the scope of application of the internal market or the European citizenship, the CJEU establishes the links with the European Union law as of the effectiveness of the rights in question, focusing on the negative effects/impacts (current or potential) that the controversial national measure provokes in the rights of the individuals.⁶⁶ What is at stake, then, is ability or inability of benefiting from the rights associated with European citizenship. The European Union law will apply insofar as the substance of those rights is under threat. Even though European citizenship does not enlarge the scope of material application of the Treaties to internal situations without connection with the European Union law,⁶⁷ such a connection is (necessarily) created upon the negative effects that the national actions might cause over it.

That is why the Advocate General Maciej Szpunar recalls that the *Zambrano* judgment belong within a case-law logic that aims at the recognition of rights claimed by nationals of Member States who, as citizens of the Union, express their need of legal protection and their request for integration not only in the host Member State but also in their own Member State. Indeed, the fact that Member States nationals also have a status as fundamental as that of European citizenship implies that the European Union law precludes national actions that have the effect of depriving them of the genuine enjoyment of the substance of the rights conferred by virtue of this status.⁶⁸ Affirming that Member State nationals are citizens of the Union creates expectations by defining rights and obligations.⁶⁹ In the post-Brexit judgments, the CJEU has seemed to recover that stance with new vigour. It is its competence to do so, in order for the European citizenry in general (but especially those are static, the vast majority) feel they are not abandoned to their own destinies and, consequently, more vulnerable to the populism and xenophobia that haunt the European Union. Unfortunately, Europe is not free of the eruption of a collective bestiality. Its culture and civilisation, as Freud explained, are like a thin layer always in danger of being upended at any time by the destructive forces of the underground world.⁷⁰

⁶⁵ Judgment *Dassonville*, Case 8/74.

⁶⁶ Jože Štrus and Nina Peršak, “The Charter of Fundamental Rights and EU citizenship: the link with EU Law re-examined”, in *The Reconceptualization of European Union citizenship*, ed. Elspeth Guild, Cristina Gortázar and Dora Kostakopoulou (Leiden/Boston: Brill Nijhoff Publishers, 2014), 326.

⁶⁷ See Judgments *Uecker*, joint cases C-64/96 and C-65/96, recital 23; *García Avello*, ..., recital 26; *Schempp*, Case C-403/03, recital 20.

⁶⁸ See Opinion AG *Rendón Marín* and *CS*, ..., recital 116.

⁶⁹ See Opinion AG *Rendón Marín* and *CS*, ..., recital 117.

⁷⁰ See Stefan Zweig, *O mundo de ontem: recordações de um europeu* (Porto: Assírio & Alvim, 2014) 22.