Mice or horses? British citizens in the EU 27 after Brexit as "former EU citizens"

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*E.L. Rev. 589 **Abstract**

This contribution examines the situation of British citizens who are living in the EU 27 at the Brexit date; it challenges the assumption that those UK citizens can be treated as third-country nationals (albeit very privileged ones, should a Withdrawal Agreement enter into force). Instead, this contribution argues that British citizens in the EU 27 must be considered as "former EU citizens", and be protected accordingly. Such protection is demanded by the constitutional nature of EU citizenship; and it is supported by case law and secondary legislation protecting changes in status. To do otherwise is not only to renege on promises made, it is also to consign to history the very notion of EU citizenship.

Introduction

The process of European integration, even before the introduction of Union citizenship, has slowly and rather successfully allowed Union citizens to benefit from layered (and multiple) identities, freeing individuals from the confine of a purely "national" identity. Indeed, even more than the rights and benefits deriving from Union membership, this progressive evolution in the way we, and especially migrants, construe ourselves is perhaps the most profound change brought about by European integration for individuals. In this context, Brexit has been a traumatic shock to many EU citizens' sense of identity: all of a sudden, EU citizens in the UK and UK citizens in the EU have found themselves being "othered", being construed and made to feel like "foreigners", as aliens in, and aliens to, the UK/EU. [1] Of course, the impact of Brexit on citizens goes much beyond the emotional shock—rights and lives will inevitably change, despite assurances to the contrary. However, Brexit will also put the very concept of Union citizenship to the test because, after all, what is the value of a status which can be erased, literally, at the stroke of a pen?

In this contribution, I want to explore the strength of Union citizenship, to perform a stress-test on it so to speak; to do this I will focus on the situation of British citizens residing in the EU at the time of Brexit both in relation to the Draft Withdrawal Agreement and in the event of a no-deal. [2] This is so, not *E.L. Rev. 590 because I underestimate the plight of EU citizens in the UK, but rather because after Brexit the territorial scope of application of EU law will no longer include the UK. [3] EU citizens in the UK will not lose their Union citizenship, unlike their British counterparts; however, also unlike their British counterparts, their only protection, lacking an agreement, will rest with domestic law. [4]

My main aim is to challenge the idea that British citizens in the EU will lose all "European" credentials at the time of Brexit: if Union citizenship means anything at all, then it has to be relevant when thinking about post-Brexit UK citizens. In this respect, I argue that, regardless of whether a Withdrawal Agreement enters into force, British citizens resident in the EU 27 at the time of Brexit will enjoy a special status, that of "former EU citizens". This status is both practically and conceptually important: practically, because it supplements the protection afforded by the Draft Withdrawal Agreement, should the latter enter into force; and it extends most of the protection in Directive 2004/38 to former EU citizens in a no-deal scenario. It is conceptually important because it recognises that Union citizenship continues to be a status relevant to the individual even when it is lost by virtue of a state's withdrawal from the European Union.

In relation to the Withdrawal Agreement, the main thrust of my argument is that those British citizens who live in another Member State at the time of Brexit are protected also by art.21 TFEU. This is important since it would address those cases in which British citizens cannot demonstrate economic activity or full economic independence. In the case of no deal, the main thrust of my argument is that, whereas the existing legal framework is silent about the consequences of withdrawal for affected Union citizens, it does deal with the consequences of loss of "status". In particular, this contribution will argue that the framework provided by Directive 2004/38 for former family members of a Union citizen should, and can, be applied by analogy to the situation of British citizens in the EU.

Recognising the category of "former EU citizens" is of paramount importance not only for the British citizens affected but because it acknowledges the constitutional nature of EU citizenship, which requires that a Union citizen who is exercising her free movement rights at the time of withdrawal cannot be considered like a third-country national who has no link to Treaty-based rights. The alternative is to accept that Union citizenship is nothing, only a shorthand to describe those minimal rights "granted" in secondary legislation. This positivist interpretation runs contrary to the "fundamental status" case law, which is *E.L. Rev. 591 underpinned by a constitutional interpretation going much beyond positive rights. Similarly, the case law on circular migration overcomes the limitation to the personal scope of Directive 2004/38 through a teleological interpretation of

the Treaty, [5] so not recognising the uniqueness of former Union citizens cannot be accepted without also calling into question the very foundations of Union citizenship. The issue is therefore a fundamental one: baby and bathwater spring to mind.

We will start with a brief description of the situation for British citizens should the UK withdraw from the EU with and without an agreed deal. I will then turn to analyse the protection that in any event should be afforded to British citizens who are residing in the EU 27 at the time of Brexit. [6]

The current framework and the risks of no deal for British citizens

It is trite to say that Brexit is an unprecedented situation, and one for which we were utterly legally, practically and, perhaps more importantly, emotionally unprepared. Yet, legal systems do not easily tolerate vacuums; when a solution is not explicitly provided for, then it needs to be found using all the hermeneutic tools available to the interpreter. The situation of UK citizens in the EU 27 post-Brexit is one such case. Here, it has been uncritically accepted that, at midnight on Brexit day, British citizens who are exercising Treaty rights would turn into (normal or special) third-country nationals, much as the horses turned back to mice in *Cinderella*. [7] This of course would mean that, very much like the mice in the fairy-tale, British citizens (and by implication *all* EU citizens) had never been "real" citizens: rather, they enjoyed a mere temporary status, one purely instrumental to serve the (political) narrative of the day. In this view Union citizenship would be limited to those rights explicitly conferred by secondary legislation—far from being a *constitutional* status, it is a mere positivistic construct. Consequently, in the case of a deal, British citizens are protected only to the extent to which protection is granted by the Draft Withdrawal Agreement (DWA), whereas in the case of no deal their status would be regulated either by national law or by the Long Term Residence Directive, when and if applicable.

In a nutshell, the DWA replicates the conditions for residence status provided for in Directive 2004/38 and seeks to ensure continuity of rights for the life-time of those affected. However, it also reduces existing rights by allowing for systematic criminality checks; and by easing the conditions for deportation pursuant to public policy concerns. ***E.L. Rev. 592** [8]

In the case of no deal on the other hand, the situation would be governed by national law, unless the British citizen had resided in the host state longer than five years, in which case they would be protected by the Long Term Residence Directive. [9] The latter would be available throughout the EU, except for Denmark, which currently hosts 18,500 UK citizens who would be subjected solely to national law [10]; and Ireland, where British citizens are, however, covered by the Common Travel Area which gives them preferential status above the rights of EU citizens (unconditional national treatment in relation, inter alia, to residence and welfare provision). As we shall see further below, long-term residence conferred on third-country nationals by virtue of Directive 2003/109 is in no way comparable to the right to permanent residence conferred by Directive 2004/38. [11]

British citizens who have yet to complete the five-year residence period would be, in the prevailing view, subject only to national law. Here, all Member States have published their intended regimes for British nationals residing in their territory at the time of Brexit, should the Withdrawal Agreement not come into force. [12] The regimes vary considerably from state to state, and only Cyprus has explicitly recognised the "uniqueness" of the British nationals' situation as EU citizens who have moved exercising free movement rights. [13] The other Member States, by and large, propose to treat UK citizens as "special" third-country nationals, with various degrees of generosity in the extent to which residence will be recognised post-Brexit. For instance, at the less generous end of the spectrum there is Luxembourg, which proposes a case-by-case assessment of Britons' residence applications; whereas, at the more generous end, there is Cyprus, which unilaterally implements the regime provided for in the DWA; the Netherlands, which provides for a transitional arrangement with attesting documents sent directly to individuals' homes, minimum bureaucratic requirements and an automatic conversion of residence from EU to third-country national; Spain, which also provides for an automatic conversion of residence; and Portugal, which only requires a declaration of honour for transition to a third-country national residence permit. Mostly, and beside Luxembourg, Member States are ready to recognise the right to stay and work of British nationals until they can apply for long-term residence, although some Member States (e.g. France and Romania) make those rights conditional upon reciprocity, hence regressing to a standard international law approach.

As far as it can be made out from the snapshot information provided to the Commission, most, if not all, national regimes make recognition of privileged residency status for British citizens conditional upon either being already registered (a normal requirement in continental Europe) or meeting the conditions provided for by EU law, namely economic activity or economic

independence. Presumably, those would be assessed having regard to the normal conditions to register residence, i.e. without providing a more **E.L. Rev. 593* generous regime for British nationals that recognises the special situation determined by loss of EU citizenship. [14] We shall analyse why this is a problem (also in the context of the DWA) further below.

The no-deal situation poses an immediate threat to pensioners, who rely, for their comprehensive health insurance, on social security co-ordination. Whereas the EU has put in place contingency measures for accrued rights in relation to pensions, [15] health provision is not included. In this respect, the UK will seek (and has sought) bilateral arrangements [16]; for instance Spain, the country of choice for UK pensioners, has undertaken to continue to provide health cover to British pensioners provided two conditions are satisfied: reciprocity; and the guarantee that the UK will reimburse treatment under the same conditions as now. [17] In France and Italy the situation should be similar, and it is to be hoped that in practice pensioners will not see their lives unduly disrupted. However, it should be noted that this will depend on bilateral agreements, which are yet to be concluded (and indeed cannot be concluded before Brexit), and which will ensue in a very volatile political situation.

The post-Brexit no-deal scenario is therefore not an easy one for affected citizens; it is true that, in most Member States, British citizens would see their residence confirmed so as to enable, where necessary, a transition to long-term residence status. Many Member States have also ensured a lighter administrative burden, with expedited and privileged processes.

Yet, risks remain: first of all, and as mentioned above, long-term residence status is less generous than the permanent residence regime under Directive 2004/38, so there would be an immediate loss of rights to British citizens in the EU; secondly, some British residents might find it difficult to prove entitlement to stay, a risk present also under the Draft Withdrawal Agreement.

This said, in my opinion by far the biggest risk for British citizens resident in the EU in the case of no deal would be the assumption that, up until when (and if) the Long Term Residence Directive applies, their situation is regulated solely by national law so presumably there would be no jurisdiction of the Court of Justice, no application of the general principles of EU law and no application of the Charter. If the Draft Withdrawal Agreement should enter into force, then the situation for British citizens would fall within the scope of EU law; and yet, the question remains as to whether the DWA exhausts the rights of UK citizens or whether Union citizenship, and the constitutional principles that inform it, remain relevant.

In this respect, both with or without agreement, the assumption seems to be that British citizens can simply be treated as any other third-country nationals, special third-country nationals if protected by the DWA, but third-country nationals nonetheless, and this is what I dispute on both legal and moral grounds. In particular, to accept this view is to negate any relevance to the idea of Union citizenship as a meaningful status. After all, British citizens have exercised rights conferred directly by the Treaty: they have exercised their own European citizenship rights which have been lost through no fault of their own. Before accepting this relegation in the legal standing of our own Union citizens, we should reflect carefully and more broadly, focusing in particular on how Union law deals with loss and change of status. **E.L. Rev. 594*

Here, three strands of case law are immediately relevant: the case law of the Court on (individual) loss of Union citizenship status at the behest of the state of nationality; the case law on derivative rights of family members when the main right holder has obtained residence through fraud; and the treatment of family members of Union citizens who have exercised Treaty rights, when the family link is dissolved. Taken together, these three strands clearly indicate that loss of Union citizenship, the fundamental status of Union citizens, does not automatically lead to loss of all rights connected to that status.

Union citizenship—a positivist or constitutional status? 歐盟公民身份——實證主義還是憲法地位？

Union citizenship is not a static concept—indeed from its very creation there has been a tension between two different ways to conceptualise it, a tension which is also visible in the case law of the Court. In particular, initially most Member States believed that Union citizenship was merely cosmetic, in that it was simply a codification at Treaty level of the rights conferred in the (then) three residence directives. [18] In this view, the reference in art.21 TFEU to the limitations and conditions contained in other Treaty provisions and secondary legislation curtailed the significance of Union citizenship, which granted no new rights to Union citizens. Others, instead, focused on the significance of using such resonant language at Treaty level: surely the very choice of words meant that Union citizenship could not be conceptualised as the mere sum of existing rights, holding in its term the promise of a more inclusive Europe which stepped out of its economic boundaries?

The Court to a certain extent has wavered between these two competing visions of Union citizenship—in the first, and constitutive, period of interpretation it construed Union citizenship as something more than the sum of existing rights; indeed, as is well known, it talked of Union citizenship as *the* "fundamental status" of Union citizens. [19] This interpretation then meant that Union citizens did indeed gain an additional layer of protection, so that their actual situation (as in *Baumbast*) had to be taken into account before refusing the right to reside. [20] The principle of proportionality demanded a departure from the normal immigration rules based on box-ticking: a Union citizen had to be protected as a *citizen* of the European Union, and her personal situation, rather than abstract rules, was determinant of her rights. The widespread application of the principle of proportionality was of course not without its problems, [21] but it did add something meaningful to the rights conferred on EU citizens by the Treaty.

However, the broad and teleological interpretation of Union citizenship diminished following the adoption of Directive 2004/38 [22]: in particular, in the *Dano* case the Court refused to recognise the residual relevance of art.21 TFEU in determining the right to equal treatment of Union citizens. [23] Thus, either the Union citizen resides lawfully pursuant to Directive 2004/38, i.e. satisfies in full the criteria of economic independence/activity, or she will not be protected by EU law. This approach could be termed a "positivistic" approach to Union citizenship which, far from being the fundamental status of Union citizens, ***E.L. Rev. 595*** is just a sum of the rights conferred by secondary legislation. If we were to follow this positivistic route then there would be little hope for British citizens—after all, Union citizenship is limited (for the time being) to those who hold the nationality of a Member State, and there is no specific provision for citizens of withdrawing Member States. In this view, after Brexit, British citizens simply lose all protection that is not positively granted, yet this view negates the fact that, even after *Dano*, the significance of Union citizenship goes far beyond the rights granted in secondary legislation.

Here it should be recalled that Union citizenship can be invoked also against the home state, provided, in the latter case, that a trans-border element can be established. [24] For instance, in circular migration cases, [25] the Court overcomes the express limitation to the personal scope of Directive 2004/38, which only applies to a state different from that of nationality, to extend its provisions to migrants returning to their state after having exercised their free movement rights. Domestic rules also fall within the scope of Union law if they have a European specificity, affecting democratic participation by restricting or negating voting rights in European elections. [26]

Furthermore, in "extreme" circumstances, Union citizenship is relevant in cases with no trans-border (or electoral) element at all: if action by the Member State has the effect of depriving Union citizenship of its substance, then the matter falls within the scope of Union law and within the jurisdiction of the Court of Justice. So far, this has happened in relation to deprivation of national citizenship, [27] and in relation to denial of residency rights to third-country national parents of Union citizens. [28] The unifying thread, in this respect, is the acknowledgment that European Union citizenship bestows on its beneficiaries a wealth of unique rights, which not only constitute the "fundamental status" of Union citizens, but are there to be enjoyed at any moment during the lifetime of the citizen. For this reason, when a Member State's action, by depriving the individual of nationality or residence, has the effect of depriving them of the, even purely potential, [29] enjoyment of EU law rights in the future, then such an action falls within the scope of EU law. In those cases, then, the discretion of Member States is limited by EU law: the domestic rule and its application in the specific case must be justified pursuant to a legitimate interest, and must also be compatible with the Charter and the principle of proportionality.

This case law has been, of course, the subject of intense debate [30]: and yet, whereas, as mentioned above, in *Dano* the Court has been willing to retreat from other elements of its purposive interpretation of Union ***E.L. Rev. 596*** citizenship, [31] it has not retreated from the "substance of the rights" doctrine, restating the strength of this right in more delicate cases, such as those involving criminal convictions of third-country national parents seeking the right to reside by virtue of the EU citizenship rights of their minor child. [32] It appears then clear, if ever there was a need to restate this, that Union citizenship, for all its failings, adds something very significant to the legal heritage of Union citizens who acquire an additional level of protection against their own Member State, even when a core element of sovereignty—that of deciding who can be part of the polity—is at stake.

We shall return to this case law below, but what I would like to stress here is that a positivist interpretation of Union citizenship is not only inconsistent with the *Ruiz Zambrano* case law, but also with those instances, like the circular migration cases, where the Court relies on art.21 TFEU to bestow rights on Union citizens who, by an explicit political decision, were not included within the scope of secondary law. Even following the ruling in *Dano*, [33] it is difficult to maintain that Directive 2004/38 exhausts the rights provided for by Union Citizenship. [34]

It is the *Ruiz-Zambrano* approach, read together with fundamental rights case law, that led Roeben at al. to argue that the withdrawal of a Member State cannot lead to the automatic loss of Union citizenship, even for non-migrant British citizens. [35] My approach, however, is more nuanced—here I argue that withdrawal of a Member State cannot lead to automatic loss of *all* rights pertaining to Union citizenship: in particular, those who, at the time of withdrawal, are exercising Union law rights, i.e. are working or otherwise resident (even not pursuant to Directive 2004/38) in another Member State, should be protected as "former" Union citizens. In this respect, I make two claims: first of all, British citizens resident in the EU at the time of Brexit fall within the scope of EU law; secondly, in the case of no deal, British citizens are protected, at least to some extent, by Directive 2004/38, which applies by analogy. This latter claim has important consequences since it would provide equal protection across the EU also in the case of no deal; and would ensure that, rather than the regime provided by the Long Term Residence Directive, the more advantageous permanent residence status applies. We will start by analysing a no deal situation, then also look at the consequences of this new category should the Draft Withdrawal Agreement enter into force.

"Former EU citizens"—protecting British citizens in the case of no deal

The Commission, whether for political expediency or for genuine short-sightedness, has put the situation of British citizens in the case of no deal firmly in the hands of Member States, [36] limiting its interference to urging a generous approach from domestic legislatures. However, there is no doubt in my mind that the treatment of British citizens residing in the EU at the time of Brexit is a matter that falls squarely within the scope of EU law for the obvious reason that, when those UK citizens moved, they were EU citizens exercising rights conferred upon them directly by the Treaty. Furthermore, the withdrawal process is regulated (even though in minimalistic terms) by art.50 of the EU Treaty.

To further reinforce this claim, which to me is self-evident, we can pursue two different avenues. The first is a straightforward application of the *Rottmann* case law as suggested by Roeben et al.: in particular, they make a comparison between the loss of Union citizenship by virtue of a (discretionary) act of the state; and the loss of Union citizenship by virtue of withdrawal of a Member State from the EU. [37] I do not share this interpretation since, in this case, we would be in a situation where either loss of Union citizenship by virtue of withdrawal would be considered automatically justified; or else we would have a situation where such a loss would have to be justified having regard to every single case individually or would not be justified at all, in which case citizens of the withdrawing Member State would retain the benefits of membership without, quite literally, paying the cost of it.

The second possibility is to look at different sources of law: not only *Rottmann* /*Ruiz-Zambrano*, as described above, to highlight the absolute constitutional status of Union citizenship; but also the case law on legal certainty for residence purposes; and the way Directive 2004/38 regulates change of family status of third-country national family members. Building on those strands, I argue that it is impossible to maintain that the situation of a former EU citizen who has exercised her right to free movement does not fall within the scope of Union law.

Legal certainty and residence rights

In the context of third-country national residency rights, the Court has considered the impact of loss of residence status in relation to the derivative rights of family members of the main right holder. It found such situations to fall within the scope of EU law, and consequently held that the constitutional principles of the EU applied.

In the *Altun* case, the residence permit of a Turkish migrant had been withdrawn because he had lied about his circumstances. [38] The issue was the effect of this change of status on Mr Altun's family, and in particular on the rights of residence, entirely derivative, of his son. The Court found that, since by the time the fraud had been uncovered the son had already acquired rights under the Turkey Association Agreement, those could not be called into question by irregularities committed by the main right holder. The Court then held that:

"Any other solution would be contrary to the *principle of legal certainty* which, as is clear from settled case-law, requires, particularly, that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences on individuals." [39]

This approach was reaffirmed more recently in *YZ*,[40] where the Court limited, on fundamental rights grounds, the extent to which fraud committed by the third-country national sponsor to gain a residence permit could have effects on the residency rights gained by his family through the Family Reunification Directive first,[41] and the Long Term Residence Directive after that.[42]

Those cases are interesting to our analysis for two different reasons: first of all, they confirm that, even when residence has been attained irregularly, through fraudulent behaviour of the main right holder, there ***E.L. Rev. 598** are stringent limits to the possibility for Member States to terminate the residence of those who were not party to, or aware of, the fraud. Secondly, it confirms that those cases fall within the scope of EU law. Whereas it is clear that the material and legal context in both cases mentioned above is very different from the situation of British citizens post-Brexit, what is relevant for our purposes is the stress put on the need to ensure legal certainty as well as fundamental rights even when residence has been obtained through (indirect) fraud. It is impossible to think that such protection would apply to third-country nationals, and not to British citizens who have exercised a Treaty right and whose status is changing through no fault of their own.[43]

We can then confidently argue that, even absent a deal, the situation of British citizens in the EU falls within the scope of EU law. This is of paramount importance because it triggers not only the jurisdiction of the Court of Justice, but also the direct applicability of the Charter (including of course the right to private and family life), the principle of proportionality and the principle of legal certainty. Furthermore, it can be argued that art.21 TFEU, read in light of the ruling in *Altun*, is enough to ensure that the residence of British nationals who have moved before Brexit cannot be changed in national law following Brexit, even absent a deal. This result is further strengthened by the analogical application of Directive 2004/38, hence providing both certainty and clarity as well as uniform application of the conditions for residence post-Brexit throughout the EU.

The loss of family status—the case of former spouses

As mentioned above, there is no provision in EU law that regulates the rights of Union citizens upon withdrawal from the European Union of their Member State of nationality. However, Directive 2004/38 does address the problem of loss of status in relation to family members of Union citizens. It might be recalled that family members of a migrant Union citizen who is either economically active or economically independent have a derived right to reside and work in the host Member State.[44] Even though this right is "derived", i.e. entirely dependent on the exercise of the right to move of the Union citizen, Directive 2004/38 provides that the family member retains her status even when her family circumstances have changed and she has no longer any family ties with the Union citizen. This is the case when the main right holder dies or when the spouse is divorced from the Union citizen.[45] In those cases, the family member acquires her own autonomous right to reside in the host state (regardless of nationality), conditional upon satisfying the requirements of economic activity/independence provided for by the Directive. Former family members of a migrant Union citizen then acquire exactly the same rights as migrant Union citizens —they have a continued right to reside in the host country; the right to work/pursue an economic activity as self-employed; a right to equal treatment in relation to all matters covered by primary and secondary legislation, and accrue the same right to permanent residence as Union citizens. ***E.L. Rev. 599**[46]

It is therefore clear that the Union legislature has accepted that, once Union law protection has been triggered, it should continue regardless of a change in family circumstances of the third-country national spouse.[47] The Commission's original proposal explained that the new regime for divorced partners aimed at "providing equitable solutions that respect family life and *human dignity*".[48] This recognises that in moving with an EU citizen, the third-country national spouse establishes a life in the host country and has a legitimate expectation to be able to continue that life and not be at the mercy of events or the whim of their EU national spouse. In this respect, the treatment of the third-country national former spouse of a Union citizen is the closest we can get to the situation of Brexit citizens. UK nationals who have moved to another Member State before Brexit have done so exercising their own Treaty rights, so, legally, they have an even stronger claim to be protected by EU law than former family members. Like former family members, former EU citizens have built lives, relationships and connections: they might have jobs, or not, and might have been in the host Member State for a long time. It is the contention of this contribution then that former EU citizens should be treated at least as favourably as former family members: the provisions of Directive 2004/38 therefore apply by analogy to former EU citizens who have exercised their right to move before Brexit in case of a no deal.

It could be objected that the personal scope of Directive 2004/38 is defined therein, so that it cannot be applied to situations, such as that of former EU citizens, that have not been anticipated by the legislature. However, this is not the case: as mentioned above, in circular migration cases, the Court has extended the scope of application of Directive 2004/38 by analogy. In particular, the Court has found that returning Union citizens benefit from the same rights to family reunification in their Member State

of nationality as those they enjoyed in the Member State where they moved prior to returning home.[49] The justification for this interpretation rests with the now distant *Singh* ruling[50]: individuals might be discouraged from moving if they are not guaranteed, at a later stage, the right to return to their Member State of nationality with their families. This case law is interesting for two reasons: first, it clarifies that also in the case of Union citizenship, barriers that *might* have the effect of discouraging movement fall within the scope of Union law; secondly, it also clarifies that the rights granted by Directive 2004/38, so carefully crafted by the legislature to be limited to those who are litigating with a Member State other than their own, are to a certain extent elastic and sensitive to the actual needs of the migrant Union citizen.

In this way, art.21 TFEU defines the personal scope of application of Union law, whereas, in circular cases, the material scope of Union law is defined with reference to Directive 2004/38 which is applied by analogy. Furthermore, as the ruling in *Coman* demonstrates,[51] the Court's interpretation of the family reunification rights of circular migrants is as broad and purposive as it would be in pure Directive 2004/38 cases; and obviously in these cases the Charter and the principle of proportionality both apply, even in determining the extent of the right in question and whether the situation really falls within the scope of the Treaty.
E.L. Rev. 600

My claim then is that the provisions of Directive 2004/38 relating to family members of Union citizenship when the family link has been severed must be applied by analogy to UK citizens already residing in the EU at the time of Brexit, and much as it is the case in circular migration, the analogical application is based on the interaction between art.21 TFEU and the provisions of the Directive.

Here it should be noted that when UK citizens moved before Brexit they exercised their Treaty rights, and two different (if related claims) can be made: one, following a similar claim by Roeben et al. for different purposes,[52] is that EU citizens could be discouraged from exercising their rights to move if, after having moved, their status and their protection are at the mercy of political changes. Here, the rationale for analogical interpretation would be the same as that enshrined in the *Singh* interpretation, which justifies the analogical interpretation of Directive 2004/38 in circular migration cases. A second, and in my opinion even stronger, claim also recognises that if Union citizenship is a fundamental status of Union citizens, and if that fundamental status confers special rights and privileges in relation to the EU territory, then, following *Rottmann*, some protection must be granted to Union citizens against the loss of rights connected in case of state withdrawal.

Rights of British citizens in the EU as "former citizens" in the case of no deal

I have argued that while there is no express provision to deal with the plight of migrant Union citizens who are affected by the withdrawal from the EU of a Member State, they cannot be treated as third-country nationals. Rather the constitutional interpretation given to Union citizenship, together with the case law on loss of status and the provisions on former family members in Directive 2004/38, indicate that Union law is not neutral in relation to changes of circumstances, so that regardless of a deal the situation of former EU citizens falls within the scope of EU law. Indeed, the claim of this contribution is that former EU citizens must be treated at least as well as third-country nationals who enjoy full protection under Directive 2004/38 by virtue of their former status as family members. It is now time to assess what this protection would imply and how different categories of former citizens might be treated.

Pursuant to art.13 Directive 2004/38, divorced spouses maintain on a personal basis a right to reside under the same conditions that have to be satisfied by the Union citizen, i.e. economic activity; or economic independence (sufficient resources and comprehensive health insurance). Hence, for several British citizens the transition from Union Citizenship to "former Union citizenship" status would not have an impact on the conditions to be satisfied in order to continue to reside in the host State.

This would have important implications for both short-term and long-term residents: first of all, and perhaps most importantly, it would recognise the constitutional importance of Union citizenship as a status that has some permanence to it even when the Member State of nationality withdraws from the EU. Secondly, it would ensure that even absent a deal, the situation of British citizens in the EU 27 post-Brexit is regulated by EU law, and not by national law alone. This in turn would ensure uniformity of treatment across the EU 27, including Denmark; it would ensure the applicability of the EU constitutional principles (of which more later); the full jurisdiction of the Court of Justice; and legal certainty and continuity. Thirdly, the application by analogy of Directive 2004/38, and the recognition of a category of former Union citizens, would protect British citizens from political risks and in particular from reciprocity requirements.

The recognition of continued relevance of the provisions of Directive 2004/38 would also have important consequences for those who have acquired, or will acquire, the right to permanent residence. In particular, it would challenge the Commission's assumption that even those British citizens who have gained the right to permanent residence before Brexit would be transitioned to Long Term Residence Status after a no-deal Brexit (and national equivalent in Denmark); and that those who have not yet fulfilled the five ***E.L. Rev. 601*** years' legal residency requirement at the time of Brexit would apply, when eligible, directly for long-term residency (or national equivalent). However, and quite naturally, the regime under the Long Term Residency Directive is considerably less advantageous than permanent residence under Directive 2004/38, with a consequent loss of rights for both new applicants and existing permanent residents. For instance, in the case of permanent residence under Directive 2004/38, the applicant must only prove to have resided legally for five years under the conditions provided for therein; there is no minimum income or prospective health insurance requirement, so that the passage of time is enough to bestow the right on the EU citizen (and her family members).

On the other hand, in order to gain long-term residence pursuant to Directive 2003/109, the applicant has to prove that she has resources sufficient to maintain herself and her family without recourse to the social assistance system of the host Member State. [53] This immediately raises the problem of those British citizens who are in part-time or atypical contracts of employment who would be covered by Directive 2004/38 regardless of access to welfare, but might not be covered by the Long Term Residence Directive. Furthermore, the latter also requires health insurance: this is a great hurdle, especially for vulnerable categories and for pensioners.

The Long Term Residence Directive is also less generous in terms of rights granted: for instance, Member States might legitimately reserve certain posts to their own and EU citizens, with the exclusion of long-term residents, and the right to equal treatment in relation to social assistance and social protection can be lawfully limited to core benefits. [54] This means that even if Member States automatically transitioned existing permanent residents to long-term residence status (i.e. without checking resources and health insurance), there would be a loss of rights associated with the change from permanent residence to long-term residence. This, following the *Altun* case, is very problematic.

On the other hand, recognising British citizens as former EU citizens covered by analogy by Directive 2004/38 would ensure continuity of status and of rights: current permanent residents would continue to enjoy the same rights as now; and perspective permanent residents would fall within the regime provided for in Directive 2004/38 therefore having to prove only five years' lawful residence.

"Former EU citizens" and residency requirements under the Draft Withdrawal Agreement and Directive 2004/38

I have argued above that British citizens who, at the time of Brexit, are exercising their Treaty rights must be considered as "former EU citizens" and not as mere third-country nationals. This new categorisation, together with an analogical application of Directive 2004/38, allows meaningful protection of former EU citizens even should the UK withdraw from the EU without a deal. It is now time to assess whether anchoring the rights of former EU citizens within the Treaty has broader implications in relation to those British citizens who reside in one of the Member States but do not meet the requirements of economic activity/economic independence provided for in Directive 2004/38 and in the DWA.

Here, and before starting our legal analysis, it should be noted how Union citizens might exist in another Member State in a situation which is neither wholly lawful, nor wholly unlawful, and that lives and careers are not always as linear as black-letter law might require. For instance, Union citizens might have not applied for residence status at all; they might have not been aware of the need to register with the unemployment office in order to retain workers status in the case of involuntary unemployment [55]; they ***E.L. Rev. 602*** might have been rightly or wrongly denied residence [56]; they might have been in and out of employment; or they might simply be unaware of the legal requirements since, being EU nationals, their stay in the host country is not conditional upon visas. Within the context of Union citizenship those breaches matter up to a point since EU citizens are not subject to immigration law, so that sanctions for breaches are limited to proportionate and non-discriminatory penalties. [57] Even repatriation for those who do not meet the economic activity/independence requirements has limited effect since, bar a public policy justification, the host state cannot prevent re-entry. [58] In any event, in most cases, [59] the irregular residence status would de facto only surface if the Union citizen applied for welfare provision, and possibly if they required health care and could not be covered by their European Health Insurance Card. Not all British citizens living in the EU 26 will therefore be able to meet the requirements of economic activity/independence. Furthermore, the risk of not meeting the criteria is higher for women and vulnerable citizens: for women, because statistically they are more likely to be in part-time employment

and have a non-linear path of economic activity owing to the taking-up of unpaid caring roles within the family context; and for vulnerable citizens, since those with a disability or a long-term health condition (including mental health issues) are more exposed to interruption in employment status (where economically active) and/or might have found it prohibitively expensive (if at all possible) to secure comprehensive health insurance on the private market.

The question is then whether and to what extent British citizens who do not meet the black-letter requirement of economic activity/sufficient resources and comprehensive health insurance are protected by EU law. Here, once again, we find ourselves in front of an hermeneutic dichotomy: if we adopt a positivist interpretation then the rights of British citizens are contingent upon meeting the black-letter requirements of Directive 2004/38 as incorporated in the DWA. If, on the other hand, we adopt a constitutional interpretation, anchored in art.21 TFEU, then the protection granted to British citizens in the other legal instruments can be supplemented having regard to the EU constitutional principles. In many ways, whether the former or latter is the correct legal solution hinges on the way we read the ruling in *Dano*.

The Dano ruling and its impact on residence rights of Union citizens

I have mentioned above that in the *Dano* case the Court narrowed the interpretation previously given to the Union citizenship provisions. In particular, it held that the right to equal treatment provided for in Directive 2004/38 was conditional upon the citizen meeting the requirements provided for in art.7 of either economic independence or economic activity. The Court also held that there was no residual role for art.18 ***E.L. Rev. 603*** TFEU, since art.24 Directive 2004/38 is *lex specialis*. The question is then whether the interpretation in *Dano*, which excludes the residual relevance of the Treaty provisions and with them the application of the constitutional principles of the EU, in particular proportionality and fundamental rights, is limited to the right to equal treatment in relation to welfare benefits; or whether it is of broader significance, so that the residual role of the Treaty is now irrelevant also in relation to the right to reside in (or the right not to be expelled from) the host Member State. In the Brexit context this is crucial since if *Dano* is interpreted as depriving the Treaty provisions of any relevance in relation to the right to move and reside in another Member State, then it would mean that British citizens who do not meet the black-letter requirements of economic activity or self-sufficiency would lose their right to reside in the host Member State. A black-letter interpretation of the DWA and of Directive 2004/38 would then have important consequences, not least since, once residence is lawfully denied, the British citizen has little choice but to leave the host state. Furthermore, and as mentioned above, a strict application of the art.7 requirements has potentially discriminatory effects.

It can be questioned whether such an interpretation is warranted by the *Dano* ruling: the ruling is carefully crafted and there is no reference as to the significance of black-letter rules for the right to reside. I have argued elsewhere that the *Dano* ruling, read together with the ruling in *Brey*, [60] does not signify that the *Baumbast* approach has been overruled. [61] In *Baumbast*, the Court held that the refusal of residence for lack of compliance with the black-letter law requirements falls, by virtue of art.21 TFEU, within the scope of EU law. For this reason, termination of residence must be proportionate and, one would expect, also respect fundamental rights as detailed in the Charter. In *Brey*, the Court refines and restates the *Baumbast* ruling to the extent to which personal circumstances continue to be relevant (even though perhaps less relevant) in assessing whether denial of residence is compatible with EU law. What *Dano* indicates, though, is that when the Union citizen might not be deported because of proportionality and fundamental rights considerations, her right to equal treatment in relation to social assistance can be lawfully curtailed if she does not meet the criteria of economic activity or financial independence.

If the interpretation above is correct, then the *Dano* ruling is no bar to a constitutional reading of EU citizenship, which recognises that former EU citizens who have moved exercising Treaty rights cannot be treated, ever, as third-country nationals. Rather their special status is guaranteed both by the DWA and by the Treaties. In practical terms, this means that in denying residence to British citizens who do not meet the economic activity/independence conditions, national authorities would have an obligation to act in a proportionate way according to EU constitutional principles. This goes much beyond the DWA, which only requires, within the process of judicial and administrative redress, that the decision denying residence is "not disproportionate", imposing on the authority a negative duty to not act in a disproportionate way rather than a positive obligation to act in a proportionate way. [62] If a true proportionality and fundamental rights scrutiny is applied, then the authorities would have to weigh denial of residence against the fact that British citizens whose residence is not recognised will no longer have a right to re-entry. The almost absolute presumption should therefore be that British citizens should be granted residence if they have formed a meaningful link with the host state and if they have at least some resources. [63] This reasoning ***E.L. Rev. 604*** applies regardless of whether the DWA comes into force or not, since the status of "former EU citizen" is grounded in the Treaty, and not in a Withdrawal Agreement or in reciprocity arrangements.

Conclusions

UK and EU citizens have not been treated well within the Brexit process: all parties promptly declared that rights would be preserved and that citizens would not be negatively impacted, and yet this has been far from the case. The EU in this respect has fared particularly badly: if the inclusion in the DWA of the conditions provided by Directive 2004/38 might be justified by legal (and political) constraints, in that it would have been difficult to provide for a more favourable treatment of former citizens than that accorded to current EU citizens, the refusal to grant free movement rights to British citizens cannot be explained but for the desire to use citizens as bargaining chips in relation to the future trade deal.

Furthermore, there has been a wilful or accidental lack of imagination—the citizens affected repeatedly asked for the citizens' rights agreement to be severed from the rest of the Withdrawal Agreement so as to guarantee, come what may, residency rights and legal certainty. Of course, the UK would have probably refused the jurisdiction of the Court of Justice outside a broader agreement, but at least the substantive provisions on citizens' rights could have been ring-fenced. Now that we face the tangible prospect of a no-deal Brexit, we cannot but regret this lack of imagination. Citizens affected rightly fear that no safety net has been provided to guarantee them in case of a crash withdrawal. This sense of loss has been made much worse by the institutional presumption that UK citizens in the EU would overnight become (almost) normal third-country nationals. But to treat former EU citizens as third-country nationals would hammer a big nail in the coffin of EU citizenship: not only would it mean that EU citizenship is far from being a fundamental status, it would make it very difficult to defend cases, such as *Ruiz Zambrano*, in which the fundamental status narrative is instrumental to grant new rights, much beyond what posited in secondary legislation.

It is this constitutional reading of Union citizenship that justifies a new category—that of former EU citizens. British citizens fall within the scope of the Treaty because when they moved they were exercising Treaty rights; they have a legitimate expectation that their residence will continue to be protected by EU law (*Altun*), and that their rights would be at least equivalent to those of former family members of Union citizens (analogical application of Directive 2004/38), which in practice means the continued application of Directive 2004/38. If the DWA comes into force, then British citizens will be better protected by that agreement than by an analogical application of Directive 2004/38; however, even in that case the recognition of British citizens as "EU former citizens" is both conceptually and practically important since it guarantees that denial of residence must be proportionate (and not merely disproportionate). Given the severity of the situation, this means that the burden to justify the proportionality of depriving former EU citizens of their status, a status that cannot be regained once lost, falls primarily on the national authorities. As importantly, this new category recognises the centrality of EU citizenship in the EU integration project—it is a status that might be lost upon withdrawal of the Member State of nationality, but it is a status that will remain relevant to those citizens who have exercised their Treaty rights before withdrawal. To argue otherwise is to negate the relevance of EU citizenship not only for British citizens but for us all.

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Footnotes

1 See *R. Behr, "Brexit rots our rights: How can Theresa May ignore the stench?" (13 September 2017), The Guardian*, https://www.theguardian.com/commentisfree/2017/sep/13/brexit-rights-theresa-may-eu-uk-brexit-identity [Accessed 3 September 2019].

2 For a detailed analysis of the rights of UK/EU citizens within the Draft Withdrawal Agreement, see E. Spaventa, "Update of the study on The impact of Brexit in Relation to the right to petition and on the competences, responsibilities and activities of the Committee on Petitions" (in-depth analysis requested the European Parliament's Committee on Petitions (April 2018), http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604959/IPOL_IDA(2018)604959_EN.pdf [Accessed 3 September 2019].

3 For a different view of the reach of Union citizenship for UK citizens after Brexit, see V. Roeben, P. Minnerop, P. Tells and J. Snell, "Revisiting Union Citizenship from a Fundamental Rights Perspective in the Time of

Brexit" (2018) 5 E.H.R. Rev. 450, who argue that Union citizenship should be construed as a fundamental right which is able to survive withdrawal of the Member State of nationality; the authors, however, fail to specify whether all rights pertaining to Union citizenship (movement, residence in any Member State, voting for the European Parliament, working in any country, etc.) would survive withdrawal; of course if all those rights were to survive we would be in the bizarre situation whereby withdrawal from the EU would not end most of the benefits of membership, also in terms of access to the internal market (which would then be free of charge), and that citizens not affected by EU legislation would be able to vote for the European Parliament.

4 The UK has already started the implementation of a transitional regime for EU citizens, most of which applies regardless of whether the Withdrawal Agreement comes into force or not (settled status); see generally UK Government, "Apply to the EU Settlement Scheme (settled and pre-settled status)", https://www.gov.uk/settled-status-eu-citizens-families [Accessed 3 September 2019]. Of course, the crucial difference between the WA regime and the domestic regime lies with the standard and effectiveness of protection since in the latter case there is not going to be any jurisdiction of the Court of Justice. Furthermore, in the case of a no deal the protection of EU citizens would be enshrined in national law which can be modified at any stage by subsequent parliaments. For a critical appraisal of the Home Office attitude towards EU citizens post-referendum, see E. Guild, "Brexit and the Treatment of EU citizens by the UK Home Office", CEPS Policy Insights No.2017–33 (September 2017), SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3053812 [Accessed 3 September 2019]. For an interesting "historical" account of the troubled English (and I use this term on purpose) relationship with Union citizenship see, by the same author, *Brexit and its Consequences for UK and EU Citizenship or Monstrous Citizenship (Leiden: Brill, 2016)*.

5 E.g. *O v Minister voor Immigratie, Integratie en Asiel (C-456/12) EU:C:2014:135; [2014] 3 C.M.L.R. 17*; *S v Minister voor Immigratie, Integratie en Asiel (C-457/12) EU:C:2014:136; [2014] 3 C.M.L.R. 18*; *Coman v Inspectoratul General pentru Imigrari (C-673/16) EU:C:2018:385; [2019] 1 W.L.R. 425*. On circular migration, see E. Spaventa, "Family Rights for Circular Migrants and Frontier Workers: O and B, and S and G" (2015) 52 C.M.L. Rev. 753.

6 I will refer to EU 27 throughout, even though British citizens in Ireland will be protected also (and mainly) through the Common Travel Area, which affords near full equal treatment (with the only exception of the franchise for referenda and the election of the President). The analysis below is therefore not directly relevant to the situation of British citizens in Ireland; and yet there might be some advantages in being also protected by EU law.

7 Some of the scholarship has challenged this: Minnerop, Tells and Snell, "Revisiting Union Citizenship from a Fundamental Rights Perspective in the Time of Brexit" (2018) 5 E.H.R. Rev. 450; *J. Shaw "EU Citizenship: Still a Fundamental Status?" EUI Working Papers, RSCAS 2018/14*, https://cadmus.eui.eu/bitstream/handle/1814/52224/RSCAS_2018_14.pdf?sequence=1 [Accessed 3 September 2019], hints at the fact that the fundamental status might be relevant for British citizens but does not articulate in what way.

8 In what I consider one of the most dangerous elements of the DWA for EU and UK citizens affected, for behaviour that occurred after the end of the transitional period, the UK (and the other Member States) will be able to justify deportation on public policy grounds having regard to national rather than EU law (DWA art.20(2)). Coupled with the systematic criminality check allowed when conferring special residence status, this will allow Member States to identify "undesirables" and act accordingly. This is a particular concern for EU citizens in the UK since the latter has implemented a "hostile environment" towards migrants; see for instance the targeting of rough sleepers (which also resulted in a High Court case, see below fn.58); see also *M. Townsend, "Secret plan to use charities to help deport rough sleepers" (6 July 2019), The Guardian*, https://www.theguardian.com/politics/2019/jul/06/home-office-secret-plan-charities-deport-rough-sleepers [Accessed 3 September 2019].

9 Council Directive 2003/109 concerning the status of third-country nationals who are long term residents [2004] OJ L16/44 (Directive 2003/109).

10 Equally, Council Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L157/1 does not apply to Denmark.

11 For a full comparison of the two statuses see E. Spaventa, "The Impact of Brexit in Relation to the Right to Petition, and on the Competences, Responsibilities and Activities of the Committee on Petitions", Study for the European Parliament's Committee on Petitions (June 2017), esp. table at p.36, http://www.europarl.europa.eu/cmsdata/121323/PETI%20-%20Brexit%20Study%20-%2014.6.2017.pdf [Accessed 3 September 2019].

12 For an overview (not always crystal clear), of national rules to be applied in a no-deal scenario, see *European Commission, "UK nationals' residence rights in the EU27"*, https://ec.europa.eu/info/brexit/brexit-preparedness/residence-rights-uk-nationals-eu-member-states_en [Accessed 3 September 2019].

13 It should also be noted that Cypriot and Maltese citizens, because of the Commonwealth benefit of special treatment in the UK, have, for instance, the right to vote in all elections.

14 The UK on the other hand has implied that it will not require proof of comprehensive health insurance; it is not crystal clear whether this is going to be the case in practice.

15 Regulation 2019/500 establishing contingency measures in the field of social security coordination following the withdrawal of the United Kingdom from the Union [2019] OJ L851/35.

16 See Stephen Hammond (Minister of State for Health), Written statement to the House of Commons (19 March 2019), https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-03-19/HCWS1429 [Accessed 3 September 2019]; the UK has committed to reimburse treatment planned or started before exit day for up to one year after Brexit day; for pensioners lacking bilateral agreements it has undertaken to allow use of the NHS in the UK.

17 Information available on the Spanish Government website, https://www.lamoncloa.gob.es/lang/en/brexit/howtoprepare/Paginas/190109socialsecurity.aspx [Accessed 3 September 2019]; from that information it also seems that the right to access Spanish health care would be residual, which would mark a considerable difference from now ("Finally, it is important to note that the right to receive healthcare from the British National Health Service will be a priority with respect to any possible right to healthcare derived from residence or a stay in Spain").

18 See, e.g., the submissions of the Member States in *Sala v Freistaat Bayern (C-85/96) EU:C:1998:217*.

19 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve (C-184/99) EU:C:2001:458; [2002] 1 C.M.L.R. 19*.

20 *Baumbast v Secretary of State for Home Department (C-413/99) EU:C:2002:493; [2002] 3 C.M.L.R. 23*.

21 See also the debate on the "real link", e.g., C. O'Brien "Real Links, Abstract Rights and False Alarms: the Relationship between the ECJ's 'Real Link' Case Law and National Solidarity" (2008) 33 E.L. Rev. 643.

22 See, e.g., *Jobcenter Berlin Neukölln v Alimanovic (C-67/14) EU:C:2015:597; [2016] 1 C.M.L.R. 29*; *Alokpa v Ministre du Travail, de l'Emploi et de l'Immigration (C-86/12) EU:C:2013:645; [2017] 1 C.M.L.R. 40*; and most strikingly the case law on expulsions justified on public policy/security grounds, *Land Baden-Württemberg v Tsakouridis (C-145/09) EU:C:2010:708; [2011] 2 C.M.L.R. 11*; *PI v Oberbürgermeisterin der Stadt Remscheid (C-348/09) EU:C:2012:300; [2012] 3 C.M.L.R. 13*; *Onuekwere v Secretary of State for the Home Department (C-378/12) EU:C:2014:13; [2014] 2 C.M.L.R. 46*; for a slightly more refined approach on the impact of imprisonment on enhanced protection, *B v Land Baden-Württemberg (C-316/16) EU:C:2018:256; [2018] 3 C.M.L.R. 24*.

23 *Dano v Jobcenter Leipzig (C-333/13) EU:C:2014:2358; [2015] 1 C.M.L.R. 48*.

24 See, e.g., *De Cuyper v Office national de l'emploi (C-406/04) EU:C:2006:491; [2006] 3 C.M.L.R. 44*; *Garcia Avello v Belgian State (C-148/02) EU:C:2003:539; [2004] 1 C.M.L.R. 1*.

25 E.g. *O v Minister voor Immigratie, Integratie en Asiel (C-456/12) EU:C:2014:135*; *S v Minister voor Immigratie, Integratie en Asiel (C-457/12) EU:C:2014:136*; *Coman (C-673/16) EU:C:2018:385*.

26 See *Eman v College van burgemeester en wethouders van Den Haag (C-300/04) EU:C:2006:545; [2007] 1 C.M.L.R. 4*; *Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde (C-650/13) EU:C:2015:648; [2016] 2 C.M.L.R. 1*; *Fremoluc NV v Agentschap voor Grond- en Woonbeleid voor Vlaams-Brabant (C-343/17) EU:C:2018:754*; it is open to Member States to confer EP voting rights to non-EU nationals, see *Spain v United Kingdom (C-145/04) EU:C:2006:543; [2007] 1 C.M.L.R. 3*.

27 *Rottman v Freistaat Bayern (C-135/08) EU:C:2010:104; [2010] 3 C.M.L.R. 2*; *Tjebbes v Minister van Buitenlandse Zaken (C-221/17) EU:C:2019:189; [2019] 2 C.M.L.R. 35*.

28 *Ruiz Zambrano v Office national de l'emploi (C-34/09) EU:C:2011:124; [2011] 2 C.M.L.R. 46*; *Secretary of State for the Home Department v CS (C-304/14) EU:C:2016:674; [2017] 1 C.M.L.R. 31*; *Chavez-Vilchez v Raad van bestuur van de Sociale verzekeringsbank (C-133/15) EU:C:2017:354; [2017] 3 C.M.L.R. 35*.

29 The importance of the potential future enjoyment of citizenship rights actually predates the *Ruiz Zambrano* case law and it arguably originates more directly from *Garcia Avello v Belgian State (C-148/02) EU:C:2003:539*. Of course the notion of potential barrier is also prominent in internal market case law, already from the *Dassonville* case, and then in the services/establishment case law with the notion of potential client/provider abroad. In the context of the internal market this case law first aimed at acknowledging the market foreclosing effect that might ensue from the very existence of a given regulation, and then at weakening the intra-EU link necessary to trigger the Treaty.

30 See recently, e.g., H. Kroeze, "The Substance of Rights: New Pieces of the Ruiz Zambrano Puzzle" (2019) 44 E.L. Rev. 238; M. Van den Brink, "EU Citizenship and Fundamental Rights: Empirical, Normative and

Conceptual Problems" (2019) 25 E.L.J. 21; S. Iglesias Sanchez, "Fundamental Rights and Citizenship of the Union at a Crossroads: a Promising Alliance or a Dangerous Liaison?" (2014) 20 E.L.J. 464.

31 See, e.g., *Dano (C-333/13) EU:C:2014:2358*; *Alimanovic (C-67/14) EU:C:2015:597*; *Alokpa (C-86/12) EU:C:2013:645*.

32 *Secretary of State for the Home Department v CS (C-304/14) EU:C:2016:674*; *Chavez-Vilchez v Raad van bestuur van de Sociale verzekeringsbank (C-133/15) EU:C:2017:354*.

33 *Dano (C-333/13) EU:C:2014:2358*.

34 *Wightman v Secretary of State for Exiting the European Union (C-621/18) EU:C:2018:999; [2019] 1 C.M.L.R. 29*.

35 Roeben, Minnerop, Tells and Snell, "Revisiting Union Citizenship from a Fundamental Rights Perspective in the Time of Brexit" (2018) 5 E.H.R. Rev. 450.

36 See recently the reply of Mr Barnier to the request by Steve Barclay (Secretary of State for Exiting the EU) that citizens' rights be guaranteed in the event of a no deal, where Mr Barnier, rejecting Mr Barclay's request, refers to the fact that the Member States would act in a responsible manner; M. Barnier, letter to Steve Barclay (18 June 2019), https://ec.europa.eu/commission/sites/beta-political/files/reply_from_michel_barnier_to_steve_barclay_-_citizens_rights.pdf [Accessed 3 September 2019].

37 Roeben, Minnerop, Tells and Snell, "Revisiting Union Citizenship" (2018) 5 E.H.R. Rev. 450.

38 *Altun v Stadt Böblingen (C-337/07) EU:C:2008:744*.

39 *Altun (C-337/07) EU:C:2008:744* at [60] (emphasis added).

40 *Staatssecretaris van Veiligheid en Justitie v Y.Z. (C-557/17) EU:C:2019:203; [2019] 3 C.M.L.R. 7*.

41 Council Directive 2003/86 on the right to family reunification [2003] OJ L251/12.

42 Directive 2003/109.

43 Similarly otherwise Union citizens and their family members who have obtained rights under Directive 2004/38 (Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96) through fraud would be better protected than British citizens since the former situation falls within the scope of Directive 2004/38 by virtue of art.35 of the same Directive.

44 Directive 2004/38 art.3(1).

45 Directive 2004/38 arts 12 and 13 respectively; the Court has given a restrictive interpretation of art.13 of Directive 2004/38 requiring that the main right holder resides in the host state at the time of divorce: see *Secretary of State for the Home Department v A (C-115/15) EU:C:2016:487; [2017] 1 C.M.L.R. 12*; this is particularly objectionable given that this provision was included in the Directive also with a view of depriving the EU citizen of the possibility to blackmail a TCN spouse into staying in the relationship to avoid loss of residency rights. Now the EU citizen simply has to threaten to leave the host country instead.

46 Directive 2004/38 art.12(2) for widowers and art.13(2) for divorcees.

47 In order to avoid the risk of this provision being used to circumvent Member States' immigration rules, the marriage must have lasted at least three years, of which one should be in the host Member State; or there must be a minor child; or a case of domestic violence. Those caveats are not relevant to our discussion.

48 Commission Proposal for a European Parliament and Council 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, COM 2001/257/final, para.2.4 (Preamble) (emphasis added). See also Preamble to the Directive, Recital 15.

49 More recently, signalling perhaps a more cautious approach see *Altiner v Udlændingestyrelsen (C-230/17) EU:C:2018:497; [2019] Imm. A.R. 1*; see *Secretary of State for the Home Department v Banger (C-89/17) EU:C:2018:570; [2019] 1 C.M.L.R. 6*.

50 *R. v Immigration Appeal Tribunal and Surinder Singh, Ex p. Secretary of State for Home Department (C-370/90) EU:C:1992:296; [1992] 3 C.M.L.R. 358*.

51 *Coman (C-673/16) EU:C:2018:385*.

52 Roeben, Minnerop, Tells and Snell, "Revisiting Union Citizenship" (2018) 5 E.H.R. Rev. 450.

53 This requirement can be interpreted quite strictly; in the case of the family reunification Directive see, e.g., *Khachab v Subdelegación del Gobierno en Álava (C-558/14) EU:C:2016:285; [2016] 3 C.M.L.R. 29*.

54 Directive 2003/109 art.11(3)(a) and art.11(4).

55 See Directive 2004/38 art.7(3); the status of worker is retained even if the period of employment has been very short (in this case two weeks): see *Tarola v Minister for Social Protection (C-483/17) EU:C:2019:309*; residence status is also maintained by self-employed people on the same basis as workers, see e.g. *Gusa v Minister for Social Protection (C-442/16) EU:C:2017:1004; [2018] 2 C.M.L.R. 23*.

56 In a comparative study conducted at the request of DGEMPL, we found that Member States' compliance with EU law in relation to residency rights of workers is patchy at best: in particular, part-time workers and workers in atypical contracts might well find that requirements such as minimum hours worked and/or minimum wage earned (both incompatible with EU law) place them outside the scope of the national legislation and denied residence status and access to welfare provision, see *C. O'Brien, E. Spaventa and J. de Coninck, The concept of worker under Article 45 TFEU and certain non-standard forms of employment (European Commission Comparative Report 2015, published in April 2016)*, available at https://ec.europa.eu/social/main.jsp?pager.offset=0&catId=1098&langId=en&moreDocuments=yes [Accessed 3 September 2019].

57 Directive 2004/38 art.8(2).

58 Although the UK had introduced a prohibition to re-enter within one year for those it considered to have "misused" the Treaty freedoms; the misuse category led to systematic deportation of rough sleepers and was declared unlawful by the High Court in *R. on the application of Gureckis v Secretary of State for Home Department [2017] EWHC 3298 (Admin); [2018] 4 W.L.R. 9*, https://www.judiciary.uk/wp-content/uploads/2017/12/r-gureckis-v-sshd-ors-20171214.pdf [Accessed 3 September 2019].

59 With some notable exceptions: see for instance the expulsions of Italian citizens from Belgium; of homeless EU citizens from the UK (even when economically active); of EU citizens of Roma origin from Italy and France.

60 *Pensionsversicherungsanstalt v Brey (C-140/12) EU:C:2013:565; [2014] 1 C.M.L.R. 37*.

61 *E. Spaventa "Once a Foreigner always a Foreigner: Who does not belong here anymore? Expulsion Measures" in H. Verschueren (ed.), Residence, Employment and Social Rights of Mobile Persons: On how EU Law Defines Where they Belong? (Cambridge: Intersentia, 2016), p.89*.

62 The first version of the Withdrawal Agreement was drafted differently, requiring the administrative/judicial authority to ensure that the decision to deny residence was proportionate (see Draft Withdrawal Agreement, 28 February 2018); this was then changed in the following draft (15 March 2018) to the wording currently in place; all documents can be found at https://ec.europa.eu/commission/brexit-negotiations_en [Accessed 3 September 2019].

63 See, e.g., *Trojani v Centre public d'aide sociale de Bruxelles (CPAS) (C-456/02) EU:C:2004:488; [2004] 3 C.M.L.R. 38*.

