



ARTICLES

SPECIAL SECTION – EU CITIZENSHIP IN TIMES OF BREXIT

EU CITIZENSHIP, ACCESS TO “SOCIAL BENEFITS” AND THIRD-COUNTRY NATIONAL FAMILY MEMBERS: REFLECTING ON THE RELATIONSHIP BETWEEN PRIMARY AND SECONDARY RIGHTS IN TIMES OF BREXIT

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ABSTRACT: In a series of recent cases on the rights of mobile EU citizens who do not perform an economic activity, the Court of Justice of the EU “deconstitutionalised” its understanding of key aspects of the free movement of EU citizens. The Court moved the discussion to the secondary law level, having kept it at the primary law level for many years. This line of cases sheds light on the ability of the Court to reframe the interplay between primary and secondary law as well as between the judicial and political guidance. The post-*Brey* case law provides a remarkable, if not unique, example of deconstitutionalisation following a period of intense constitutionalisation. The practical implications of this process are well illustrated in the context of the debate on Brexit that tests the relationship between treaty and legislative rights. This *Article* makes an enquiry into

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whether the trend towards a broader deference to political guidance in EU citizenship case law has been mirrored in other areas of citizens' rights having been subject to controversy in the context of Brexit, such as the status of third-country national family members.

KEYWORDS: EU citizenship – constitutionalisation – settlement for the UK – Brexit – *Metock* – *Brey*.

I. INTRODUCTION

It is often observed that EU law is highly “constitutionalised”. The embedding of many EU rights in its “constitutional charter”,¹ in other words the EU treaties, has two related effects. It allows for the granting of a high degree of protection to selected rights. Simultaneously, it limits the ability of the EU legal order to process disagreement on the content and scope of such rights through ordinary political channels. Academic writings regularly and critically examine the high level of legal protection afforded to economic rights in the EU, in particular the four freedoms.²

To date, little attention has been devoted to non-economic rights enshrined in EU constitutional norms. As illustrated by the reservations of the United Kingdom (UK), Poland and the Czech Republic on the justiciability of the “Solidarity” title of the Charter of Fundamental Rights of the European Union (Charter), owing to its Protocol no. 30,³ the legal status of non-economic rights in the EU legal order is often lower than that of economic rights. Furthermore, and precisely for that reason, the argument usually is that the legal rank of non-economic rights should be upgraded to act as a counter-weight to EU economic rights.⁴

Yet, the EU “constitutional charter” does include provisions protecting a number of non-economic rights, in particular those of EU citizens. These have been actively used over the past few years. How do these constitutional norms protecting non-economic rights⁵ interact with related EU legislation in this field?

¹ Court of Justice, judgment of 23 April 1986, case 294/83, *Parti écologiste “Les Verts” v. European Parliament*, para. 23.

² E.g. F.W. SCHARPF, *The Double Asymmetry of European Integration; Or: Why the EU Cannot Be a Social Market Economy*, in *Max Planck Institute for the Study of Societies Working Papers*, no. 12, 2009, p. 5.

³ Art. 2 of Protocol no. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom and Protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic, in Annex 1 of European Council Conclusions of 29-30 October 2009.

⁴ For recent overviews and critical discussions of the matter see: S. GARBEN, *The Constitutional (Im)balance Between “the Market” and “the Social” in the European Union*, in *European Constitutional Law Review*, 2017, p. 23 *et seq.* and D. SCHIEK, *Towards More Resilience for a Social EU – The Constitutionally Conditioned Internal Market*, in *European Constitutional Law Review*, 2017, p. 611 *et seq.*

⁵ The material scope of the research is defined by reference to the UK Settlement, see *infra*.

This *Article* investigates the relationship between primary rights, understood as rights enshrined in the EU treaties or in EU law having the same rank, and secondary rights, understood as rights enshrined in EU legislation, by analysing some of the most controversial aspects of EU citizenship law over the past few years. This will serve as a basis for reflection on how high-level political disagreement on such non-economic rights,⁶ as exemplified in the campaign in favour of Brexit,⁷ is addressed within the EU legal order.

I.1. MAPPING OUT THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK FOR EU CITIZENSHIP LAW

At the outset, it is useful to briefly map out the key legal provisions and the relationship between them as provided in EU primary law. Art. 18 TFEU prohibits any discrimination on grounds of nationality within the scope of application of the treaties and *without prejudice to any special provisions* contained therein. The scope of application of the treaty is *inter alia* determined by Art. 21, para. 1, TFEU on the EU citizens' right to move and reside freely, but this right is also *subject to limitations and conditions laid down* in the treaties and measures adopted to give them effect (i.e. legislation for our purpose, as will be explained below). The same holds true for Art. 20 TFEU, which establishes EU citizenship, lists a set of related rights and refers to the *conditions and limits defined* by the treaty and by the measures adopted thereunder.

Adding to the constitutional dimension of EU citizens' rights, the prohibition of nationality discrimination within the scope of application of the treaties and without prejudice to any of their specific provisions is mentioned in the Charter in Art. 21, para. 2. The right to move and reside freely within the territory of the Member States is also “re-affirmed” as a fundamental right in Art. 45, para. 1, of the Charter.⁸ Interestingly for our discussion below, Art. 45, para. 2, of the Charter states that “freedom of movement and residence may be granted, in accordance with the treaties, to nationals of third countries legally resident in the territory of a Member State”.

Art. 21 TFEU on EU citizenship has been read in conjunction with Art. 18, para. 1, TFEU to prohibit discrimination on the grounds of nationality against certain non-economic actors.⁹ It has also been asserted that “Union citizenship is destined to be the fundamental status of nationals of the Member States”¹⁰ and Art. 21, para. 1, TFEU is directly effective.¹¹ The Court of Justice has repeated on multiple occasions that the

⁶ It is acknowledged that political disagreement also related to economic rights; these however are not the focus of the present *Article* as explained above.

⁷ See for instance the thoughts of C. BARNARD, S.F. BUTLIN, *The Future of Free Movement of Persons in the UK (Part 1)*, in *EU Law Analysis*, 19 June 2018, eulawanalysis.blogspot.com.

⁸ E.g. Court of Justice, judgment of 7 October 2010, case C-162/09, *Lassal*, para. 29.

⁹ E.g. Court of Justice, judgment of 12 May 1998, case C-85/96, *Martínez Sala v. Freistaat Bayern*.

¹⁰ Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31.

¹¹ Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast and R*, para. 86.

treaty provisions on EU citizenship shall only be relied upon if it is not possible to rely on the economic freedoms,¹² although it does not always examine the applicability of economic freedoms in detail before turning to Art. 21 TFEU. In the present analysis of the non-economic rights of EU citizens, much of our attention will be devoted to Art. 21, para. 1, TFEU.¹³ Furthermore, impediments to the right conferred by Art. 21 TFEU to move and reside freely within the territory of the Member States ought to be checked before relying on Art. 20, para. 1, TFEU.¹⁴ Art. 20, para. 1, TFEU is thus a “fall back” category to which little attention will be devoted in the present *Article*.

As will be further explained and as naturally derives from the wording of the treaty and Charter provisions thereby identified, the rights of non-economically active citizens are closely intertwined with EU legislation. The main legislative instrument is Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. It amends and replaces a set of earlier instruments¹⁵ but it is the first legislative instrument designed to comprehensively regulate the rights of EU citizens as such. It also co-exists with Regulation 492/2011 (formerly 1612/68) of the European Parliament and of the Council on freedom of movement for workers within the EU.¹⁶

Clarifying the relationship between the Directive, treaty provisions on citizenship and other legislative instruments, the Court of Justice made clear that Directive 2004/38 “aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right, so that Union citizens cannot derive fewer rights from that directive than from the instruments of secondary legislation which it amends or repeals”.¹⁷ The Court has therefore given a distinctly positive and forward looking role to Directive 2004/38. The Directive is understood as a development on pre-existing legislation, giving expression to the primary citizenship rights.¹⁸

¹² Court of Justice, judgment of 12 March 2014, case C-457/12, *S. and G.*, para. 45.

¹³ On the rights of economic migrants as provided for in the EU treaties see: Art. 45, para. 2, Art. 49, para. 1, and Art. 56, para. 1, TFEU.

¹⁴ Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy*, paras 48-49.

¹⁵ As is clear from the title of Directive 2004/38, *cit.*, itself.

¹⁶ Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

¹⁷ E.g. *Lassal*, *cit.*, para. 30. See also Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock*, para. 59.

¹⁸ Note that a number of EU directives give expression to the fundamental right not to be discriminated against; see further: E. MUIR, *EU Equality Law: The First Fundamental Rights Policy of the EU*, Oxford: Oxford University Press, 2018, ch. IV.

1.2. THE MULTIPLE CONSTITUTIONAL FUNCTIONS OF ART. 21 TFEU

The constitutional anchorage of EU citizens' rights as just briefly described has important implications. Treaty articles such as Art. 21 TFEU perform three functions in the EU legal order.¹⁹ First, Art. 21 TFEU can be seen as a benchmark against which the activities of EU and national organs falling within the scope of EU law may be reviewed, and in light of which such activities must be interpreted. In that respect, this treaty provision largely overlaps with relevant Charter provisions and corresponding general principles. In addition, Art. 21, para. 1, TFEU defines the scope and content of EU regulatory intervention in domestic policies to the extent that it is directly effective.²⁰ Thirdly, Art. 21, para. 2, TFEU constitutes a legal basis for the adoption of further legislation. This multiplicity of functions distinguishes this source of rights and obligations from other categories of instruments which only perform some of these functions. This also explains why the dividing line between secondary legislation and primary rights in this field is not always clear, as will be further illustrated below.

Such ambivalence is not uncommon in the EU legal order.²¹ The normative content of the EU treaty performs the function of a constitutional benchmark (in the same way as the Charter). Meanwhile, as a "derivative" legal order,²² the exercise of EU powers depends upon the allocation of specific competences so that the EU constitutional charter provides a set of provisions defining the scope of EU regulatory intervention. The process of European integration has resulted in embedding an atypical amount of normative content in the very same provisions that define the scope for EU regulatory intervention. This means that the scope and content of EU intervention are often actually merged, leading to the high level of constitutional protection mentioned above.

The existence or absence of legislation as referred to in the treaty provisions on citizenship may also mark the cut-off point of active intervention by the EU. The interpretation of the content and scope of legislation has direct implications on the relationship between domestic and EU competences. The judicial interpretation of the parameters of EU

¹⁹ Reflecting on the different functions on treaty provisions on non-discrimination: E. MUIR, *EU Equality Law*, cit., ch. III.A.

²⁰ On the first two functions, see *Baumbast and R*, cit., para. 86: the application of the limitations and conditions acknowledged in Art. 18, para. 1, TFEU in respect of the exercise of that right of residence is subject to judicial review. Consequently, any limitations and conditions imposed on that right do not prevent the provisions of Art. 18, para. 1, EC from conferring on individuals rights which are enforceable by them and which the national courts must protect (see, to that effect, Court of Justice, judgment of 4 December 1974, case 41/74, *Van Duyn*, para. 7).

²¹ E.g. In relation to EU sex equality law see for instance Art. 157 TFEU; e.g. T.K. HERVEY, *Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards*, in *Maastricht Journal of European and Comparative Law*, 2005, p. 307.

²² N. WALKER, *Human Rights in a Post-National Order: Reconciling Political and Constitutional Pluralism*, in T. CAMPBELL, K.D. EWING, A. TOMKINS (eds), *Sceptical Essays on Human Rights*, Oxford: Oxford University Press, 2001, p. 129.

legislation giving expression to EU citizens' rights is a delicate exercise: the process by which political institutions have thought to circumscribe EU intervention may be reviewed against the very primary right that the legislation is intended to shape. The CJEU's views on the primary law version of the right at hand thus more ostensibly competes with those expressed by political authorities. There is also a risk of hindering or swaying political debate by significantly interfering with the content and scope of rights defined in legislation through the interpretation of EU constitutional norms. In a derivative legal order such as that of the EU, the interpretation of legislation adopted at the supranational level therefore unquestionably raises questions of a constitutional nature.

As a consequence, by its very nature, Art. 21 TFEU places the constituent powers and the CJEU as well as the EU legislature in a position to jointly drive EU citizenship forward. This form of institutional collaboration is particularly interesting as it relates to the fleshing out of the concept of EU citizenship that is intended to legitimise the edifice of the European Union. However, the way forward may be bumpy: how does EU law address disagreement on such a symbolic concept?

1.3. TENSIONS BETWEEN PRIMARY AND SECONDARY LAW: THE UK SETTLEMENT AS AN ILLUSTRATION

The Settlement for the UK from 2016 (UK Settlement)²³ offered an occasion to test the relationship between the primary and secondary rights of EU citizens. It explored the boundaries of what could be adjusted within EU law in order to address the concerns of the UK with minimal constitutional impact. The nature of this exercise may remind us of similar sorts of "constitutional dialogues":²⁴ such as that leading to the adoption of the Barber protocol²⁵ or the insertion of Art. 157, para. 4, in the TFEU.²⁶ Although the UK Settlement did not enter into force,²⁷ it is the latest illustration of the ability to organise a political response to challenges to EU citizens' rights within existing EU primary law.²⁸

²³ Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, in Annex 1 of European Council Conclusions of 18-19 February 2016.

²⁴ See further: E. MUIR, *EU Equality Law*, cit., ch. III.

²⁵ Protocol no. 2 concerning Art. 119 of the Treaty establishing the European Community. See further: D. CURTIN, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, in *Common Market Law Review*, 1993, p. 17.

²⁶ It was inserted by the Treaty of Amsterdam, see also Declaration no. 28 on Art. 119, para. 4, of the Treaty establishing the European Community. See E. HOWARD, *The European Year of Equal Opportunities for All-2007: Is the EU Moving Away from a Formal Idea of Equality?*, in *European Law Journal*, 2008, pp. 175-176; M. MADURO, *La Cour de justice des Communautés européennes et la législation d'anti-discrimination*, in *Revue du droit Européen Relatif à la Non-Discrimination*, 2005, p. 25 *et seq.*

²⁷ Section E.2, of the Decision of the Heads of State or Government of 18-19 February 2016, cit.

²⁸ The objective was "to settle, in conformity with the Treaties, certain issues raised by the United Kingdom": Decision of the Heads of State or Government of 18-19 February 2016, cit.

The UK Settlement therefore provides a most useful opportunity to reflect on the constitutional design of EU citizenship law.²⁹

It is noteworthy that of the various controversial aspects of the debate surrounding the Brexit referendum and in the UK Settlement, two were related to the non-economic rights of EU citizens and tested the relationship between primary and secondary law in that respect – more specifically the relationship between Art. 21 TFEU and Directive 2004/38. These aspects will be the focus of the present article. Selected excerpts from the UK Settlement are reproduced here for the ease of the reader.³⁰

The first aspect of the UK Settlement of interest to this *Article* relates to the rights of non-economically active persons and sought to address concerns about the burden on the social assistance system of the host Member State that these persons represent.³¹ Annex I, Section D on "Social benefits and free movement", point 1, of the UK Settlement reads as follows:

"(b) Free movement of EU citizens under Article 21 TFEU is to be exercised subject to the limitations and conditions laid down in the Treaties and the measures adopted to give them effect.

The right of economically non-active persons to reside in the host Member State depends under EU law on such persons having sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State, and on those persons having comprehensive sickness insurance. Member States have the possibility of refusing to grant social benefits to persons who exercise their right to freedom of movement *solely* in order to obtain Member States' social assistance although they do not have sufficient resources to claim a right of residence" (emphasis added).

The second aspect of the UK Settlement relates to the rights of third-country national family members of an EU citizen with no prior lawful residence, with a view to countering fears of circumvention of national immigration rules. Annex VII of the UK Settlement reads as follows:

"The Commission intends to adopt a proposal to complement Directive 2004/38 on free movement of Union citizens in order to exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying a Union citizen or who marry a Union citizen only after the Union citizen has established residence in the host Member State. Accordingly, in such cases, the host

²⁹ Case law developed exclusively on the basis of treaty provisions is left aside as it leaves little room for interaction with legislation. See for instance the line of cases developed on the basis of Art. 20 TFEU and the ruling in Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*.

³⁰ Others related to the free movement of workers (e.g. the indexation of child benefits, alter and safeguard mechanism) and the notions of public policy or public security.

³¹ Other important aspects of the UK Settlement such as the safeguard mechanism related to in-work benefits for workers are not discussed in this *Article* devoted to the rights of non-economic actors.

Member State's immigration law will apply to the third country national. This proposal will be submitted after the above Decision has taken effect" (emphasis added).

The two themes thereby addressed by the UK Settlement and related to Art. 21 TFEU provide interesting case studies for the purpose of examining the relationship between primary and secondary rights in the context of intense political disagreement on non-economic rights. The challenges thereby identified – on the one hand, free movement of EU citizens *v.* fear of burdens on the social assistance system, and on the other, free movement of EU citizens *v.* national immigration law – have been framed in two different if not opposing ways in EU constitutional law.

On the one hand, on the issue of access to social benefits for non-economically active persons (section II), the case law of the CJEU has progressively proceeded to a “de-constitutionalisation” process (i.e. shifting attention from the right enshrined in primary law to the rights provided for in secondary law) on which the UK Settlement could subsequently comfortably rely. The UK Settlement could indeed rely on an interpretation of Directive 2004/38 which is favourable to the requests of the UK with little fear of breaching primary law.

On the other hand, the precise legal status of the rights of EU third-country national family members of EU citizens with no prior lawful residence was blurred. This allowed the UK Settlement to propose a political solution to address the claims of the UK – i.e. of a legislative nature – but recent case law suggests that this approach could be in breach of EU primary law. Indeed, the rights of third-country national family members of an EU citizen are currently seemingly protected by the EU treaty rights as we shall see (section III).

After spelling out the constitutional setting in relation to both types of rights, we will seek to draw lessons for the constitutional design of non-economic rights of EU citizens when treaty and legislation co-exist (section IV). It will be argued that whenever possible, emphasis shall be placed on legislative guidance so as to allow for political dialogue.

II. DECONSTITUTIONALISING THE PERIMETERS OF EU CITIZENSHIP LAW: FROM *MARTÍNEZ SALA V. FREISTAAT BAYERN* TO *BREY* AS REFLECTED IN THE UK SETTLEMENT

In a now well-known series of recent cases on the rights of mobile EU citizens that do not perform an economic activity, the CJEU “deconstitutionalised” its understanding of key aspects of the prohibition of nationality discrimination (enshrined in Art. 18, para. 1, TFEU). In other words, the CJEU moved the discussion to the secondary law level, having kept it at the primary law level for many years.³²

³² Elements of the following sections build on E. MUIR, *EU Equality Law*, cit., ch. III.

II.1. ENSHRINING EU CITIZENS' RIGHTS IN EU PRIMARY LAW: "CONSTITUTIONAL ENGINEERING"

The story starts in the late 1990s when the Court's ruling in *Martínez Sala v. Freistaat Bayern*³³ captured the imagination of lawyers by asserting that a mobile EU citizen³⁴ "lawfully resident in the territory of the host Member State, can rely on [Art. 18 TFEU] in all situations which fall within the scope *ratione materiae* of [Union] law".³⁵ Furthermore, a situation would fall within the scope *ratione materiae* of Union law if the

"Member State delays or refuses to grant to that claimant a benefit [covered by Regulations 1408/71³⁶ and 1612/68³⁷] that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State".³⁸

The Court thereby decoupled the personal scope of the EU prohibition of nationality discrimination from specific requirements established by EU legislative instruments regulating its material scope.³⁹ It was now enough to be an EU citizen lawfully residing in another Member State *under the law of that Member State*⁴⁰ to benefit from the prohibition of nationality discrimination (Art. 18, para. 1, TFEU), in order to obtain a benefit covered by specific EU legislation. This was remarkable progress for non-economically active and mobile EU citizens. Before that, their equal treatment rights did not have constitutional status in EU law and only legislative instruments setting specific *ratione personae* requirements applied to them before they could be granted a limited set of rights.⁴¹ This framed the debate on EU mobile and non-economically active citizens' equal treatment rights in constitutional terms, despite the provision in the treaty articles on EU citizenship (Art. 20, para. 2, and Art. 21, para. 1, TFEU) and the general

³³ *María Martínez Sala v. Freistaat Bayern*, cit.

³⁴ *Ibid.*, para. 61.

³⁵ *Ibid.*, para. 63.

³⁶ Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

³⁷ Regulation (EEC) 1612/68 of 15 October 1968 of the Council on freedom of movement for workers within the Community.

³⁸ *Martínez Sala v. Freistaat Bayern*, cit., para. 63.

³⁹ *Ibid.*, paras 45 and 56-62. See further S. O'LEARY, *Putting Flesh on the Bones of European Union Citizenship*, in *European Law Review*, 1999, pp. 77-78.

⁴⁰ *Martínez Sala v. Freistaat Bayern*, cit., para. 47.

⁴¹ See Directive 90/366/EEC of the Council of 28 June 1990 on the right of residence for students; Directive 90/365/EEC of the Council of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity and Directive 90/364/EEC of the Council of 28 June 1990 on the right of residence.

prohibition of nationality discrimination (Art. 18, para. 1, TFEU) referring to the limits of the treaty and to its scope of application as possibly defined in legislation.

II.2. THE ADOPTION OF NEW LEGISLATION: FRESH POLITICAL GUIDANCE

In interpreting the principle of equal treatment for mobile EU citizens in such an innovative way, the Court of Justice limited the possibility for the EU legislature to influence the personal scope of the said principle. In 2004, the European Parliament and the Council adopted Directive 2004/38.⁴² According to this Directive and building on earlier legislative guidance, a pre-condition for a non-economically active person to have lawful residence for more than three months in another Member State *under EU law* is to have “sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State”.⁴³

Lawful residents would then enjoy equal treatment on the ground of nationality; this was repeated in Art. 24, para. 1, of the Directive subject to certain conditions, including an exception to the effect that: “the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b) [establishing specific conditions for work seekers] to persons other than workers, self-employed persons, persons who retain such status and members of their families”.⁴⁴ In other words, the Member States’ concern to protect their social assistance systems against overburdening influenced both the conditions to obtain lawful residence in another Member State under EU law and equal treatment rights.

Although the Directive was only to apply in the Member States from 2006, the provisions adopted could have prompted the Court to give greater emphasis to the Union legislature’s attempt to circumscribe the conditions under which free movement rights could be exercised. Nevertheless, the Court of Justice continued to reason directly on the basis of treaty provisions on issues concerned with equal treatment rights of mobile and non-economically active EU citizens.⁴⁵ In doing so it largely disregarded the concern expressed by political institutions to make non-economically active migrants’ residence

⁴² Directive 2004/38, cit.

⁴³ Art. 7, para. 1, let. b), of Directive 2004/38, cit.

⁴⁴ Art. 24, para. 2, of Directive 2004/38, cit.

⁴⁵ E.g. Court of Justice: judgment of 7 September 2004, case C-456/02, *Trojani*, para. 39; judgment of 15 March 2005, case C-209/03, *Bidar*, para. 46. The position of the CJEU can usefully be contrasted to that of the Advocate General in that case: Opinion of AG Geelhoed delivered on 19 February 2004, case C-456/02, *Trojani*. See further A.P. VAN DER MEI, *Union Citizenship and the “De-Nationalisation” of the Territorial Welfare State, Comments on Trojani (Case-456/02 of 7 September 2004) and Bidar (Case C-209/03 of 15 March 2005)*, in *European Journal of Migration and Law*, 2005, p. 209.

– and therefore equal treatment rights under EU law – conditional upon having a “sufficient” level of resources.⁴⁶

II.3. LEGISLATION ACTING AS A GATEWAY TO EU CITIZENSHIP RIGHTS

A move away from the constitutional approach described in the past section and towards deconstitutionalisation, or greater emphasis being placed on secondary legislation, was initiated by the *Brey* case of 2013.⁴⁷ This redirection was confirmed in three subsequent cases.⁴⁸ The characteristics of this new case law can be summarised as follows. To start with, the CJEU now declines to reason on the basis of treaty provisions on citizenship and nationality discrimination; it focuses instead almost exclusively on guidance provided in secondary legislation. Although this is visible in all four cases,⁴⁹ it is particularly clear in *Dano* where the Court had been specifically asked to reason on the basis of EU constitutional law but refused to do so. The Court of Justice indeed raised the fact that the Charter could only be applied within the scope of Union law. As the situation was not covered by EU secondary legislation, this condition was not fulfilled in the case at hand.⁵⁰ In other words, the Court refused to look at whether the treaty provisions on EU citizenship and nationality discrimination could bring the matter within the scope of EU law despite the limitations enshrined in secondary legislation. The Court further explained elsewhere in the ruling that protection of non-economically active mobile citizens against nationality discrimination when this occurred outside the scope of Directive 2004/38 would run counter to one of the Directive’s objectives: to prevent such citizens from becoming an unreasonable burden on the social assistance system of the host Member State.⁵¹ In other words, the CJEU did a methodological U-turn on its earlier case law, whereby such equal treatment rights were granted to all with direct reference to the treaty provisions on nationality discrimination and EU citizenship.

Secondly, from the EU secondary law sources, the CJEU places particular emphasis on Directive 2004/38 which lays down – *inter alia* – the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by EU citizens.⁵² Not only does this emphasis result from the move away from

⁴⁶ Note that, and I am grateful to Gillian More for stressing this, there were also elements in the Directive intended to balance this approach such as Art. 14, para. 3, of Directive 2004/38, cit., according to which: “An expulsion measure shall not be the automatic consequence of a Union citizen’s or his or her family member’s recourse to the social assistance system of the host Member State”.

⁴⁷ Court of Justice, judgment of 19 September 2013, case C-140/12, *Brey*.

⁴⁸ Court of Justice: judgment of 11 November 2014, case C-333/13, *Dano*; judgment of 15 September 2015, case C-671/14, *Alimanovic*; judgment of 25 February 2016, case C-299/14, *García-Nieto and Others*.

⁴⁹ See for instance: *Brey*, cit., paras 46-47 and 53-56; *Alimanovic*, cit., para. 50; *García-Nieto and Others*, cit., para. 39.

⁵⁰ *Dano*, cit., para. 90.

⁵¹ *Ibid.*, para. 74, see also paras 60-62.

⁵² Art. 1, let. a), of Directive 2004/38, cit.

treaty provisions, but it can also be read as a clarification of certain aspects of the relationship between this Directive and Regulation 883/2004 on the coordination of social security systems.⁵³ Directive 2004/38 is given precedence when it comes to defining EU citizens' rights of residence in another Member State.⁵⁴ As a consequence, the Directive acts as a gateway to EU equal treatment law on the grounds of nationality for non-economic actors⁵⁵ which, in the view of the Court, is indeed in line with one of the central objectives of the said Directive.⁵⁶

Thirdly, in seeking guidance from Directive 2004/38, the Court of Justice sticks as closely as possible to the spirit, wording and gradual system established by it when possible.⁵⁷ When no such specific scheme exists, the Court provides guidance to the competent national authorities on how to ensure compliance with the general requirements of the Directive after closely examining its overall internal dynamics.⁵⁸ For instance, the Directive establishes that residence for more than three months⁵⁹ and less than five years for non-economically active persons who do not have a more specific and beneficial status⁶⁰ is dependent *inter alia* upon having "sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State".⁶¹ In *Brey*, the Court of Justice indicated that this must be understood as requiring "an overall assessment of the specific burden which [a national of another Member State requesting a particular social assistance benefit]⁶² would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned".⁶³ This amounts to requiring a case-by-case evaluation from the perspective of: a) the national social assistance system; as well as, b) the specific situation of the indi-

⁵³ Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

⁵⁴ *Brey*, cit., paras 50 and 53-54.

⁵⁵ *Dano*, cit., para. 83; see also: Court of Justice, judgment of 14 June 2016, case C-308/14, *European Commission v. United Kingdom of Great Britain and Northern Ireland*, para. 68. For critical comments on that approach see H. VERSCHUEREN, *Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by Dano*, in *Common Market Law Review*, 2015, p. 377 *et seq.*

⁵⁶ Art. 1, let. a), of Directive 2004/38, cit.

⁵⁷ See Opinion of AG Wathelet delivered on 11 January 2018, case C-673/16, *Coman and Others*, fn. 62.

⁵⁸ E.g. *Dano*, cit., paras 69-73 and 77.

⁵⁹ Note that in *Brey* the applicant for social benefits desired to reside for more than three months, see *Brey*, cit., para. 53.

⁶⁰ See the other recitals of Art. 7 of Directive 2004/38, cit., concerning among others student and family members of a mobile EU citizen. The specific situation of those having involuntarily lost employment or workseekers is discussed further below.

⁶¹ Art. 7, para. 1, let. b), of Directive 2004/38, cit.

⁶² As defined under Directive 2004/38: *Brey*, cit., paras 60-63.

⁶³ E.g. *Brey*, cit., para. 64, see also the detailed analysis of the interplay between different provisions of the Directive at paras 65-72 and 77.

vidual, and keeping in mind, c) the specific nature of the benefits requested by the applicant. This case law seems to hold true, although the Court applied this test fairly strictly in the *Dano* case.⁶⁴

In contrast, when more detailed guidance is provided in the form of a “gradual system” the Court of Justice actually relies on the legislature’s choices.⁶⁵ In *Alimanovic*, the Court referred to and stuck to the gradual system established by the Directive: namely the retention of the status of “worker” and the relevant conditions to retain the right to reside and be given access to social assistance. That included the duration of the exercise of any economic activity.⁶⁶ The Court of Justice stressed that the advantage of such a scheme is to be unambiguous. As it is enshrined in legislation, it guarantees a significant level of legal certainty and transparency; and as it is gradual, it also complies with the principle of proportionality.⁶⁷ The Court of Justice rejected further attempts to call into question the balance performed by the EU legislature between individuals’ right to free movement, and the burden that mobile EU citizens who have lost their employment status may constitute on the national system of social assistance.⁶⁸

The same approach was adopted in *García-Nieto* in relation to jobseekers; the Court re-asserted that the Directive provides a set of detailed and gradual rights.⁶⁹ The Court of Justice may thus be ready to accept a rather inflexible system of allocation of rights if it is progressive and set in a way that ensures legal certainty and transparency.⁷⁰ In that sense, the Court defers to political guidance and departs from its constitutional case law which provided more individualised solutions, but which were also less predictable.⁷¹

II.4. *INTERIM* CONCLUSION: DECONSTITUTIONALISATION

Some have lamented that this novel approach constitutes a step backwards when compared to the early cases in which the Court of Justice developed a protective approach

⁶⁴ *Dano*, cit., paras 81 and 83. Here the Court entitled a Member State to refuse to grant social benefits when the applicant exercise their right to freedom of movement solely in order to obtain social assistance; *Ibid.*, paras 76 and 78.

⁶⁵ *Alimanovic*, cit., paras 59-60.

⁶⁶ *Ibid.*, para. 60.

⁶⁷ *Ibid.*, para. 61.

⁶⁸ *Ibid.*, paras 60 and 62.

⁶⁹ *García-Nieto and Others*, cit., paras 47-48.

⁷⁰ See Opinion of AG Wathelet, *Coman and Others*, cit., para. 62.

⁷¹ Providing interesting analyses proposing to reconcile the old and new lines of cases: G. DAVIES, *Migrants and Social Assistance: Trying to Be Reasonable About Self-sufficiency*, in *College of Europe Research Papers in Law*, 2016 and G. DAVIES, *Has the CJEU Changed or Have the Cases? The Deservingness of Litigants as an Element in CJEU of Justice Adjudication*, in *Journal of European Public Policy*, 2018, forthcoming.

to equal treatment for EU citizens directly grounded in primary law.⁷² Critics point out that the post-*Brey* case law may have been triggered by fears of social tourism and Eurosceptic debates in several Member States.⁷³ The point made here is more modest. This line of cases sheds light on the ability of the Court to reframe the interplay between primary and secondary law as well as between the judicial and political guidance. The post-*Brey* case law on access to social benefits provides a remarkable example of deconstitutionalisation following a period of intense constitutionalisation.

It may be added that the desire expressed in the UK Settlement from 2016 to “settle, in conformity with the treaties, certain issues raised by the United Kingdom in its letter of 10 November 2015”,⁷⁴ sat comfortably with the post-*Brey* case law and in particular with the rulings in *Dano* (11 November 2014) and *Alimanovic* (15 September 2015). These cases indeed made it possible to accommodate the UK demands within the existing state of EU law and without there even being need for legislative reform. The UK Settlement recalled the wording of Art. 21 TFEU referring to the limitations and conditions laid down, *inter alia*, in legislation. As allowed by the deconstitutionalisation process resulting from the aforementioned rulings, the right of non-economically active persons grounded in EU secondary law is dependent, among other things, on having sufficient resources for themselves and their family member. Member States can therefore refuse to grant social benefits to persons who exercise their right of movement solely in order to obtain social assistance if they do not have a right to residence under EU law.⁷⁵

III. CONSTITUTIONALISING THE PERIMETERS OF EU CITIZENSHIP LAW: FROM *METOCK TO LOUNES*, VIA THE UK SETTLEMENT

The relationship between treaty provisions, Directive 2004/38, related case law and the dialogue initiated by the UK Settlement took a different shape in relation to the rights of third-country national family members of mobile EU citizens.

III.1. EU LEGISLATION AND THE RIGHTS ATTACHED TO EU CITIZENSHIP: FROM *SINGH TO AKRICH*

This second part of our story starts with the *Surinder Singh* ruling by the Court of Justice in 1992. The Court asserted that a national of a Member State might be deterred from

⁷² E.g. N. NIC SHUIBHNE, *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 889.

⁷³ E.g. S. PEERS, *Benefit Tourism by EU Citizens: The CJEU Just Says No*, in *EU Law Analysis*, 11 November 2014, eulawanalysis.blogspot.com.

⁷⁴ As quoted in the Introduction.

⁷⁵ Exploring how this could impact a future agreement with the UK: C. BARNARD, S.F. BUTLIN, *Fair Movement of People: Equal Treatment? (Part Two)*, in *EU Law Analysis*, 20 June 2018, eulawanalysis.blogspot.com.

leaving his country of origin if, on returning, the conditions of his entry and residence in his home State would constitute obstacles to his right of movement and establishment as provided in Arts 48 and 52 of the European Economic Community Treaty (EECT) at the time.⁷⁶ This would be particularly so if children and spouses – nationals of a third country – were not permitted to enter and reside in the State of origin under conditions at least equivalent to those granted in the host country under secondary legislation available at the time.⁷⁷

In *Surinder Singh* as well as in a number of subsequent cases,⁷⁸ EU free movement rules were relied upon to enhance the (albeit derived) rights of third-country national family members. The main feature of these cases was the Court's heavy reliance on the EU legislature's attachment to protecting the family life of mobile EU citizens.⁷⁹ One question however was left unanswered: what if the third-country national family member has not yet been admitted, or is within the territory of the EU without leave to remain before seeking to obtain a right to enter and stay as a family member of a mobile EU citizen?⁸⁰

The answer came, in a less protective way than third-country national family members of a mobile EU citizen might have hoped for, in the *Akrich* ruling from 2003. Here, prior lawful residence by the third-country national family member of an EU citizen in the EU state of origin was deemed to constitute a prerequisite for reliance on Art. 10 of Regulation 1612/68 on freedom of movement for workers, for the purpose of being able to claim residence rights against the state of origin.⁸¹ The regulation therefore was used to limit the rights of EU citizens to move with their third-country national family members. In the absence of prior lawful residence in the host State, the third-country national had no right under Regulation 1612/68 in the host State and could therefore claim no right "by analogy" under EU law in the State of origin.⁸² This approach was supported with reference to "the structure of Community provisions seeking to secure the freedom of movement for workers within the Community".⁸³

⁷⁶ Court of Justice, judgment of 7 July 1992, case C-370/90, *Surinder Singh*, paras 19 and 23. Note that the same right can now be derived from Art. 21, para. 1, TFEU; Court of Justice, judgment of 12 March 2014, case C-456/12, *O. and B.*, paras 48-49.

⁷⁷ *Surinder Singh*, cit., paras 20-21.

⁷⁸ For a more exhaustive overview see N. CAMBIEN, *Citizenship of the Union as a Cornerstone of European Integration: A Study of Its Impact on Policies and Competences of the Member States*, Leuven: KU Leuven (Doctoral thesis), 2011, p. 207 *et seq.*, available at limo.libis.be.

⁷⁹ E.g. Court of Justice: judgment of 25 July 2002, case C-459/99, *MRAX*, para. 53; judgment of 14 April 2005, case C-157/03, *Commission v. Spain*, para. 26.

⁸⁰ Opinion of AG Geelhoed delivered on 27 February 2003, case C-109/01, *Akrich*, para. 7.

⁸¹ Court of Justice, judgment of 23 September 2003, case C-109/01, *Akrich*, para. 50.

⁸² *Ibid.*, para. 54.

⁸³ *Ibid.*, para. 51.

III.2. AMBIGUITIES ON THE SOURCES OF RIGHTS: THE ADOPTION OF A NEW LEGISLATIVE FRAMEWORK & REVIREMENT IN *METOCK*

As is well known, the *Akrich* ruling was openly overruled in *Metock*.⁸⁴ In the latter ruling, the Court of Justice made clear that the right of an EU citizen to move within the EU with a third-country national family member cannot depend on the prior lawful residence of such a family member in the EU.⁸⁵ The Court explained its decision to reconsider the *Akrich* ruling⁸⁶ with reference to political guidance taken from the text of the (then) new Directive 2004/38:⁸⁷ the Directive does not distinguish between the status of various family members and entry to the territory of the host state must be possible even in the absence of a residence card. Furthermore, the Directive is understood as a tool that strengthens the right of free movement and residence of Union Citizens.⁸⁸ This heavy emphasis on political guidance could have indicated that the rights of EU citizens to move to and reside freely in another Member State with their third-country national spouse – with no need for prior lawful residence – are enshrined in the Directive.⁸⁹

Yet, the ruling in *Metock* is ambiguous on that point. On the one hand, the Court of Justice explains that the legislature has competence to regulate the conditions for entry and residence of family members of EU citizens.⁹⁰ On the other hand, in para. 62 (to which we will come back below), the Court stresses that “if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed *by the Treaty* would be seriously obstructed” (emphasis added).⁹¹ As a consequence, although the Court largely reasons on the basis of Directive 2004/38 throughout the ruling, the reference to treaty protection of the right to free movement suggests a constitutional anchorage of the possibility for EU citizens to move within the EU with third-country national family members irrespective of their prior lawful residence. The content of Directive 2004/38 on that point could thereby be subsumed in EU primary law. Importantly, and unlike in certain earlier cases,⁹² there is *no* statement from the Court in that ruling according to which such constitutional protection should be justified with reference to the fundamental right to family life. In fact, the case law of the European Court of Human Rights focusing on the fundamental right

⁸⁴ *Metock*, cit., para. 58.

⁸⁵ *Ibid.*, para. 58.

⁸⁶ See for instance, *ibid.*, paras 55-57 on earlier case law of the CJEU as well as para. 69 on the comparison with family reunification for third country nationals.

⁸⁷ *Ibid.*, paras 50-54.

⁸⁸ *Ibid.*, para. 59.

⁸⁹ See also Opinion of AG Maduro delivered on 11 June 2008, case C-127/08, *Metock*, para. 13.

⁹⁰ *Metock*, cit., para. 61.

⁹¹ *Ibid.*, para. 62.

⁹² I am most grateful to Jonathan Tomkin for pointing that out; e.g. *Baumbast and R*, cit., para 72 and see further: E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive: A Commentary*, Oxford: Hart, 2014, p. 133.

to family life was in that sense less generous than that of the Court of Justice focusing on freedom of movement. The European Court of Human Rights indeed limited interferences into domestic migration policy on behalf of family life to exceptional family circumstances; it built on the assumption that family life may be possible in other States than the one refusing entry or residence.⁹³

The important treaty provision referred to in *Metock* is in Art. 21 TFEU as well as more specific treaty provisions for mobile economic actors.⁹⁴ Before delving further into the role of Art. 21 TFEU in the subsequent UK Settlement, it shall be made clear that the Court of Justice has consistently held that EU citizens may not rely on Directive 2004/38 against their state of nationality – as will be the case in several cases discussed below – as the Directive applies to “Union citizens who move and reside in a Member State other than that of which they are nationals”.⁹⁵ However, Art. 21 TFEU protects the rights of mobile EU citizens to return to their country of origin.⁹⁶ The Court of Justice traditionally applies the content of EU legislation on free movement “by analogy” to rule on the rights of returning EU citizens under Art. 21 TFEU.⁹⁷ Nevertheless, as a consequence of the lack of clarity of the reversal of case law in *Metock*, it is not clear whether the entitlement of EU citizens to move freely with their third-country national family member with no prior lawful residence is derived from the content of Directive 2004/38 applied directly (in case of movement to a host Member State), or by analogy (in case of movement back to the Member State of nationality), or from Art. 21 TFEU *per se*.

III.3. SHIFTING TO ART. 21, PARA. 1, TFEU: FROM THE UK SETTLEMENT TO *LOUNES*

The UK Settlement, as quoted in the Introduction, ignored (it may be presumed intentionally) the possible constitutional anchorage of the rights of third-country national family members. It built on the assumption that the solution in *Metock* was a matter of EU secondary law *only*. The UK Settlement proposed to address the challenge to EU law on that point through legislative intervention. The UK Settlement indeed included a declaration by which the European Commission intended to adopt a proposal to “complement” Directive 2004/38.⁹⁸ The proposal to have been supported by the Member States

⁹³ European Court of Human Rights, judgment of 2 August 2001, no. 54273/00, *Boultif v. Switzerland*, paras 52-55. See also Opinion of AG Geelhoed, *Akrich*, cit., para. 147. See further: N. CAMBIEN, *Citizenship of the Union*, cit., p. 222.

⁹⁴ *Metock*, cit., para. 61.

⁹⁵ Art. 3, para. 1, of Directive 2004/38, cit.

⁹⁶ This approach could already be observed in cases such as *Surinder Singh*, cit., paras 19-21.

⁹⁷ See also early cases such as Court of Justice, judgment of 11 December 2007, case C-291/05, *Eind*, paras 39-45.

⁹⁸ This was perhaps deemed as less difficult than re-opening a full negotiation of Directive 2004/38 in the near future: see for instance the more distant proposal made “on the occasion of a future revision of Directive 2004/38” in relation to the notions of public policy and public security, Annex 7 of Decision of the Heads of State or Government of 18-19 February 2016, cit.

within the Council would have been intended to undo the *Metock* ruling. Indeed, a new instrument would be proposed in order to “exclude, from the scope of free movement rights, third country nationals who had no prior lawful residence in a Member State before marrying a Union citizen, or who marry a Union citizen only after the Union citizen has established residence in the host Member State”.⁹⁹ The UK Settlement thereby built on the assumption that reversing *Metock* could be achieved through legislative intervention. It was hoped that the European Parliament, as a co-legislator, would support this initiative.

Yet, in the *Lounes* case,¹⁰⁰ the Court of Justice adopted a different reading of its ruling in *Metock*. Ms Ormazabal, a dual national from Spain and the UK, sought to derive a right of residence in the UK for her husband from her EU citizenship status. The latter, Mr Lounes, was not lawfully residing in that country at the time of their marriage.¹⁰¹ Ms Ormazabal, in the view of the Court, could not rely on Directive 2004/38. Although she had moved from Spain to the UK in her capacity as a Spanish national, she had subsequently acquired British citizenship before marrying Mr Lounes. The UK had thereby become her country of nationality¹⁰² and she had an unconditional right of residence in the UK under international law.¹⁰³

Although she could not rely on EU secondary law against her country of nationality, the Court found that Ms Ormazabal could rely on Art. 21, para. 1, TFEU. While in the past, similar findings were based on the risk of hindering the freedom of movement of EU citizens,¹⁰⁴ the Court of Justice here reasoned that “[a] national of one Member State who has moved to and resides in another Member State cannot be denied that right merely because he subsequently acquires the nationality of the second Member State in addition to his nationality of origin, otherwise the effectiveness of Article 21(1) TFEU would be undermined”.¹⁰⁵ The Court then went on to substantiate this finding.¹⁰⁶

Leaving aside aspects of the rulings related to the specific case of mobile EU citizens acquiring the nationality of the host State and possibly related to the Draft Withdrawal Agreement¹⁰⁷ (as discussed elsewhere by Davies),¹⁰⁸ what is of particular interest in this

⁹⁹ *Ibid.*

¹⁰⁰ Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes*.

¹⁰¹ *Ibid.*, para. 16.

¹⁰² *Ibid.*, para. 15.

¹⁰³ *Ibid.*, paras 37 and 41.

¹⁰⁴ As acknowledged by the Court of Justice in *Lounes*, cit., para. 48. See also *supra*, *Surinder Singh*, cit.

¹⁰⁵ *Lounes*, cit., para. 53.

¹⁰⁶ *Ibid.*, paras 54-59.

¹⁰⁷ Art. 9, of European Commission, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, TF50 (2018) 35 – Commission to EU27.

¹⁰⁸ For an analysis of other aspects of the ruling in the context of Brexit see G. DAVIES, *Lounes, Naturalisation and Brexit*, in *European Law Blog*, 5 March 2018, europeanlawblog.eu. That discussion relates

Article is the anchorage of Ms Ormazabal's rights in Art. 21, para. 1, TFEU. These rights of EU citizens include "the right to lead a normal family life, together with their family members".¹⁰⁹ To support that finding, the Court of Justice reasoned by analogy to para. 62 of the ruling in *Metock*.¹¹⁰ The Court insisted that for the rights conferred by Art. 21, para. 1, TFEU to be effective, citizens in a situation such as Ms Ormazabal must continue to enjoy the right to "build a family life with their third-country-national spouse, by means of the grant of a derived right of residence to that spouse" under that provision.¹¹¹ Although there is no explicit reference to the lack of prior lawful residence, the ruling in *Lounes* can be read as bringing an end to the ambiguity created by para. 62 in *Metock*.

III.4. *INTERIM* CONCLUSION: CONSTITUTIONAL PROTECTION?

The rights of EU citizens to be with their family members from a third country in the host State, irrespective of the absence of prior lawful residence – as the facts of both *Metock* and *Lounes* indicate – would thereby be anchored in Art. 21, para. 1, TFEU. This approach implies that disagreement on the scope of free movement rights for EU citizens with third-country nationals with no prior lawful residence in a Member State cannot be addressed without treaty reform, contrary to the underlying logic of the proposal in the UK Settlement.

However, the ruling in *Lounes* replaces one ambiguity with another. Although that ruling is mostly structured around Art. 21, para. 1, TFEU, the Court concludes its reasoning in para. 61 by stating that the conditions for granting a derived right of residence to the third-country national spouse should not be stricter than those provided in Directive 2004/38, and that the Directive should be applied "by analogy".¹¹² This suggests that although the rights of EU citizens such as Ms Ormazabal are anchored in Art. 21, para. 1, TFEU, the Court of Justice puts flesh on the bones of EU primary law with the political guidance enshrined in EU legislation. This raises the following questions: would a modification of EU legislation (or other legal instrument of the EU ranking beyond primary law) favourable to domestic migration policies lead to a change of case law in a case such as *Metock* or *Lounes*? Or would the legislation be found to breach the constitutional right of EU citizens to move with their family members, even in the absence of prior lawful residence in a Member State?

to mobile EU nationals having acquired the nationality of the host State, that aspect of the ruling is therefore beyond the scope of the current *Article*.

¹⁰⁹ *Lounes*, cit., para. 52.

¹¹⁰ *Ibid.*, para. 52.

¹¹¹ *Ibid.*, para. 60.

¹¹² *Ibid.*, para. 61.

IV. SOUL SEARCHING: ACKNOWLEDGING THE POLITICAL DIMENSION OF EU CITIZENSHIP LAW AND LOCATING THE DEBATE AT LEGISLATIVE LEVEL

The analysis of the first set of rights – access to social benefits for non-economically active persons – showed how the Court of Justice reframed its initial approach grounded in EU constitutional provisions in order to discuss such rights in the context of Directive 2004/38. To the contrary, the analysis of the second set of rights – of third-country national family members of an EU citizen with no prior lawful residence – has shown that this set of rights is seemingly being elevated to EU primary law. The practical outcome of these divergent processes is usefully illustrated with reference to the UK Settlement: while controversies to do with the first set of rights could be addressed with reference to the legislation, as things currently stand, controversies related to the second set of rights could presumably *not* be addressed through legislative change. How can we reconcile or coherently articulate these two approaches?

IV.1. ART. 21, PARA. 1, TFEU AND DIRECTIVE 2004/38: THE DIRECTIVE AS A GATEWAY TO EU PRIMARY RIGHTS?

As noted in section II, the recent case law of the Court of Justice on access to social benefits for non-economically active persons espouses the structure of Directive 2004/38 and acknowledges that the Directive acts as a gateway to equal treatment rights for EU citizens in the host State. In contrast, section III pointed at the possibility that the rights derived by third-country nationals with no prior residence from EU citizens are being anchored directly in Art. 21, para. 1, TFEU – although the wording of para. 61 of the ruling in *Lounes* leaves open the possibility of articulating the relationship between Directive 2004/38 and the primary right differently. It is submitted that, as far as the rights of EU citizens to move with third-country national family members with no prior lawful residence are concerned, Directive 2004/38 should remain the main point of reference to define the scope of the rights of EU citizens – be it “by analogy”.¹¹³

This would allow discontent to be addressed through political dialogue as was proposed by the UK Settlement. This would also allow the approach of the Court of Justice in relation to third-country national family members to be brought closer to that adopted in the cases on social benefits examined above, while keeping in line with the European Court of Human Rights’ approach to the fundamental right to family life.¹¹⁴ This would finally allow for a better alignment of the related case law with the general approach of the Court of Justice as it has been shaping up over the past few years in other areas of EU citizenship law related to Art. 21 TFEU.

¹¹³ See for instance Court of Justice, judgment of 12 July 2018, case C-89/17, *Banger*, para. 29 *et seq.*

¹¹⁴ See for instance *Akrich*, cit., paras 58-60.

The Court of Justice is indeed increasingly consistently¹¹⁵ using Directive 2004/38, and its Art. 7 in particular, as a gateway to access EU citizenship rights when the two layers of norms can inform each other. (Understandably, this has not been done in the context of rights anchored directly in treaty provisions and where the provisions of EU legislation were fully irrelevant).¹¹⁶ Useful recent examples are the three Grand Chamber rulings in *O. and B.*, *Marín* and *Chavez-Vilchez*.¹¹⁷ In *O. and B.*, the Court of Justice investigated the ability of EU citizens to derive rights for third-country national family members in their country of origin from the exercise of the freedom of movement. Although such rights would be anchored in Art. 21, para. 1, TFEU – as the Directive cannot be relied upon against the State of origin – the Court firmly asserted that the provisions of Directive 2004/38 would act as a gateway to Art. 21, para. 1, TFEU.¹¹⁸ Directive 2004/38 was being applied by analogy¹¹⁹ but with a detailed analysis of its provisions. Indeed, for rights to be derived from the treaty, it is necessary that “residence of the Union Citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State”.¹²⁰ For that purpose, “[r]esidence in the host Member State pursuant to and in conformity with the conditions set out in Art. 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen’s genuine residence in the host Member State, and goes hand in hand with creating and strengthening family life in that Member State”.¹²¹ In contrast, residence under Art. 6, para. 1, would not be enough.¹²² The Court of Justice insists that the conditions in Art. 7, paras 1 and 2, of Directive 2004/38 must be met for

¹¹⁵ E.g. Court of Justice, judgment of 19 October 2004, case C-200/02, *Zhu and Chen*, paras 27-28 and 46; *Eind*, cit., paras 39-40; Court of Justice, judgment of 10 October 2013, case C-86/12, *Alokpa*, paras 29-30.

¹¹⁶ See for instance Art. 20 TFEU and the case law developed on the basis of the ruling in *Ruiz Zambrano*, cit. In such cases though, there is very limited space for dialogue – to which this contribution is devoted – between European key players on the content of the rights. There are also naturally cases in which EU citizenship law is simply not applicable; e.g. Court of Justice, judgment of 8 November 2012, case C-40/11, *Iida*, para. 73 *et seq.* It is acknowledged that there also exist situations where Art. 21, para. 1, TFEU cannot be used in conjunction with EU legislation. For a recent example see Court of Justice, judgment of 10 April 2018, case C-191/16, *Pisciotti*.

¹¹⁷ See also for instance the ruling by the Court of Justice, judgment of 30 June 2016, case C-115/15, *NA*, para. 78.

¹¹⁸ See also E. SPAVENTA, *Family Rights for Circular Migrants and Frontier Workers: O and B, and S and G*, in *Common Market Law Review*, 2015, pp. 753-777, 767 and 769.

¹¹⁹ *O. and B.*, cit., para. 50.

¹²⁰ *Ibid.*, para. 51.

¹²¹ *Ibid.*, para. 53.

¹²² *Ibid.*, paras 52 and 59. The CJEU also secures the role of Art. 7 of Directive 2004/38, cit., as an entry point by rejecting arguments based on the recognition of a residence card given by the host State to the third country national in the absence of a right derived from the EU citizen (*ibid.*, para. 60). Furthermore, the third-country national must have been a family member in the host State before being able to indirectly derive rights from the EU citizenship through Art. 21, para. 1, TFEU and using Directive 2004/38 by analogy (*ibid.*, para. 63).

the effectiveness of the right of the EU citizen, under Art. 21, para. 1, TFEU, to return with a family member who is a third-country national to be protected.¹²³ This applies *a fortiori* for residence pursuant to Art. 16, paras 1 and 2, of Directive 2004/38.¹²⁴

This approach of using Directive 2004/38 as a gateway to Art. 21, para. 1, TFEU is further exemplified by the Court's efforts to rephrase preliminary questions raised by domestic courts so as to articulate its reasoning with reference to both Art. 21, para. 1, TFEU and Directive 2004/38. The case in *Marín* concerned the residence rights in Spain of a third-country national who was primary carer of two children, one with Spanish nationality, the other with Polish nationality. Although the domestic court asked the CJEU for guidance on Art. 20 TFEU,¹²⁵ the CJEU rephrased the question so as to be able to start the analysis with an examination of Art. 21 TFEU and Directive 2004/38.¹²⁶ The Polish nationality of the daughter living in Spain brought her within the personal scope of Directive 2004/38.¹²⁷ The Court derived from this observation that the daughter was therefore entitled to "rely on Article 21(1) TFEU and the measures adopted to give it effect"¹²⁸ and, therefore, that her right to reside in Spain was in principle conferred by Art. 21, para. 1, TFEU and Directive 2004/38.¹²⁹ Having acknowledged that the two provisions had to be read in conjunction, the Court of Justice went on to check if the conditions contained in the Directive were met with a particular focus on whether the daughter fulfilled the conditions under Art. 7, para. 1, let. b), of the Directive.¹³⁰ That provision was therefore used as a gateway to EU citizenship rights.¹³¹ The Court further relied on Directive 2004/38 to examine the derived rights of the third-country national family member.¹³²

The *Chavez-Vilchez* judgment also provides an illustration of the Grand Chamber of the Court of Justice's efforts to articulate the relationship between Art. 21, para. 1, TFEU and Directive 2004/38 in a similar way. The case arose from eight disputes surrounding the residence rights of third-country nationals who were primary carers of children in the latter's country of nationality. Once again, although the domestic court asked for guidance on Art. 20 TFEU, the CJEU brought Art. 21 TFEU and Directive 2004/38 as a preliminary point for

¹²³ *O. and B.*, cit., para. 54.

¹²⁴ *Ibid.*, para. 55.

¹²⁵ Court of Justice, judgment of 13 September 2016, case C-165/14, *Marín*, para. 23.

¹²⁶ *Ibid.*, paras 34-35.

¹²⁷ *Ibid.*, para. 41.

¹²⁸ *Ibid.*, para. 43.

¹²⁹ *Ibid.*, para. 44.

¹³⁰ *Ibid.*, para. 46.

¹³¹ This is particularly clear at: *Marín*, cit., para. 52.

¹³² *Ibid.*, paras 54, 57, 62 and 67. It may be noted that the reasoning on limitations to EU citizenships rights granted by Art. 20 TFEU in that case also seems to be strongly inspired from the content of Directive 2004/38 although the Directive is not explicitly mentioned. See also Court of Justice, judgment of 13 September 2016, case C-304/14, *CS*, para. 36 *et seq.* The Author is grateful to Stephen Coutts for pointing that out.

analysis for the one child who had exercised his free movement right.¹³³ The child had then returned to the country of nationality and Directive 2004/38 could not therefore apply as such; instead Art. 21, para. 1, TFEU would apply and the content of the Directive would be applied by analogy.¹³⁴ The Court then emphasised that the national court would therefore have to check if the conditions listed under Arts 5 to 7 of Directive 2004/38 were fulfilled before the child could claim derived rights from Art. 21, para. 1, TFEU and Directive 2004/38 for her third-country national carer. In other words, once again, the provisions of Directive 2004/38 were used as a gateway to EU citizenship rights.¹³⁵

These cases illustrate not only that Art. 21 TFEU shall be given priority over Art. 20 TFEU, but also that Directive 2004/38 acts as an entry point to primary EU citizenship rights, even when the Directive is only applied by analogy, as in *O. and B.* and *Chavez-Vilchez* regarding returning EU citizens. This is precisely what the design of the treaty provisions call for by referring to the limitations and conditions defined in instruments adopted thereupon. This approach does not neglect the requirement for legislation to comply with primary law and fundamental rights such as the fundamental right to family life, this remains a pre-condition for the validity of EU secondary law. Nor does this approach prevent direct reliance on Art. 21, para. 1, TFEU.¹³⁶ It is more modestly argued that when legislation *co-exists* with primary rights, reliance on guidance enshrined in legislative instruments makes it possible to more easily address accusations of over-constitutionalisation of EU law and empowers actors to address challenges through political dialogue.

It is therefore suggested that, following the trend initiated by the post-*Brey* case law in relation to social benefits, the relationship between Art. 21 TFEU and Directive 2004/38 in the context of claims in favour of third-country national residents with no prior lawful residence could be clarified by placing stronger emphasis on legislative guidance. The constitutional status of EU citizenship would thereby be present and recognised with reference to Art. 21, para. 1, TFEU, but the precise scope of the rights at hand would rely on stronger political guidance that could be modified in case of disagreement subject to compliance with higher norms such as the fundamental right to family life as understood by the European Court of Human Rights.

It is in light of this last caveat on fundamental rights' compliance that the recent ruling in *Coman* may be understood and reconciled with the approach proposed in this *Article*.¹³⁷ The Grand Chamber of the Court of Justice was asked several questions on Directive 2004/38, as well as the Charter.¹³⁸ The national court asked for guidance on the possibility of a mobile EU citizen returning to his home country with a third-country

¹³³ Court of Justice, judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez*, paras 49-50.

¹³⁴ *Ibid.*, paras 54-55.

¹³⁵ This is particularly clear at: *Marín*, cit., para. 56.

¹³⁶ *Baumbast and R*, cit., para. 86.

¹³⁷ Court of Justice, judgment of 5 June 2018, case C-673/16, *Coman and Others*.

¹³⁸ *Ibid.*, para. 17.

national whose status as a family member was unclear. Indeed, the same-sex couple had lawfully married in Belgium but same-sex marriage is not recognised by the Member State of origin of the EU citizen where the couple now wants to return. Once again, the Court reframed the dispute and focused on Art. 21 TFEU as well as Directive 2004/38 applied by analogy to the situation of a returning EU citizen.¹³⁹ The Court of Justice initially examines the term of “spouse” enshrined in Directive 2004/38 to conclude that national law cannot exclude same-sex couples lawfully married in another Member State “for the sole purpose of granting a derived right of residence to a third-country national”.¹⁴⁰ While this first part of the ruling answers the call for emphasis on legislative instruments expressed above,¹⁴¹ the Court then moves on to examining the domestic measure restricting the EU citizen’s mobility in light of Art. 21 TFEU.¹⁴² This shift towards a constitutional level of protection of the right is surprising in light of the cases discussed above which were more exclusively focused on Directive 2004/38. Yet, reference to the constitutional rights of EU citizens can be understood with reference to the fundamental right to family and private life of same-sex couples that may under specific circumstances be protected in the same way as that of heterosexual couples in similar situations as recognised by the European Court of Human Rights.¹⁴³

IV.2. CONCLUDING REMARKS ON THE RELATIONSHIP BETWEEN PRIMARY AND SECONDARY RIGHTS

Looking beyond the cases discussed so far, several broader lessons can be drawn from the post-*Brey* and post-*Metock* case law as regards the role of key EU actors in shaping the contours of EU law. To come back to the initial concerns against the over-constitutionalisation of EU law, the post-*Brey* cases illustrate that the Court of Justice may be ready to engage in deconstitutionalisation processes, to thereby make more space for political dialogue. What influences the readiness of the EU judiciary to adopt such an approach? Several important factors in the hands of the drafters of the Treaty and EU political institutions can be identified.

Firstly, in the cases discussed above, the wording of the relevant treaty provisions clearly identified the need for further political guidance. As the Court of Justice itself ob-

¹³⁹ *Ibid.*, paras 18-27.

¹⁴⁰ *Ibid.*, para. 36.

¹⁴¹ This is irrespective of the details of the CJEU’s analysis of the actual wording of the Directive. See further Opinion of AG Wathelet, *Coman and Others*, cit., paras 43-76.

¹⁴² *Coman and Others*, cit., para. 40 *et seq.* Note the interesting reference to national identity, which is beyond the scope of this *Article*, at paras 42-46.

¹⁴³ *Coman and Others*, cit., para. 48 (referring to the Charter) and para. 50 (referring to the case law of the European Court of Human Rights). See in particular European Court of Human Rights, judgment of 14 December 2017, nos 26431/12, 26742/12, 44057/12 and 60088/12, *Orlandi and Others v. Italy*. The Court of Justice does not however elaborate further on its approach to the fundamental rights at hand.

served in *Dano*: a) Art. 18, para. 1, TFEU prohibits any discrimination on grounds of nationality "[w]ithin the scope of application of the treaties, and without prejudice to any special provisions contained therein"; b) the second subparagraph of Art. 20, para. 2, TFEU expressly states that the rights conferred on EU citizens by that article are to be exercised "in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder", and; c) under Art. 21, para. 1, TFEU the right of EU citizens to move and reside freely within the territory of the Member States is subject to compliance with the "limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".¹⁴⁴ All key treaty provisions thus call for further political guidance.

Secondly, and importantly, the secondary legislation relied upon in the deconstitutionalisation process described above has a strong organic link with the relevant treaty provisions (Arts 18, 20 and 21 TFEU). Arts 18 and 21 TFEU count among the legal bases for Directive 2004/38.¹⁴⁵ Furthermore, Art. 24 of Directive 2004/38 constitutes a specific expression of the principle of non-discrimination laid down generally in Art. 18 TFEU¹⁴⁶ for the benefit of EU citizens (as defined in Art. 20 TFEU), who exercise their right to move by virtue of Art. 21 TFEU. This organic link may make it easier for the judiciary to shift from one level of analysis to the other; that is from primary to secondary law. Now, this observation can work the other way around as illustrated by the ambiguities created by the rulings in *Metock* and *Lounes* examined above. It is submitted that, when treaty provisions and legislative guidance co-exist, emphasis shall be placed on the latter.

Thirdly, the Court of Justice places specific emphasis on the quality of the legislative materials it is relying upon and deferring to. In cases such as *Alimanovic* and *García-Nieto*, the Court indeed endeavours to highlight the progressive (and thus presumably proportionate) nature of the system of allocation of rights under Directive 2004/38; it also stresses the unambiguous wording that ensures transparency and legal certainty.¹⁴⁷ A similar emphasis on the gradual approach enshrined in Directive 2004/38 is clear from the *O. and B.* case. The Court of Justice emphasised the link between settling in another Member State in accordance with Art. 7 of Directive 2004/38 – and *a fortiori* under Art. 16 (permanent residence after five years) of that instrument – and creating and strengthening family life in that same Member State.¹⁴⁸ On the contrary, the absence of an intention to settle when movement is based on Art. 6 of Directive 2004/38 (residence of less than three months) excludes the possibility of residence that would be "sufficiently genuine so as to

¹⁴⁴ *Dano*, cit., para. 60.

¹⁴⁵ Recital 1 of Directive 2004/38, cit. (note that the numbering of treaty articles mentioned herein is pre-Lisbon).

¹⁴⁶ *Dano*, cit., para. 61.

¹⁴⁷ See *supra*, fn. 65 *et seq.*

¹⁴⁸ *O. and B.*, cit., paras 51-56 and 59.

enable that citizen to create or strengthen family life in that Member State".¹⁴⁹ Importantly, in establishing the gradual system in Directive 2004/38, and on which the *Lounes* case also insists,¹⁵⁰ the EU legislature made the policy implications of its choices sufficiently clear for the Court to be willing to defer to it. Critics of the system established by the Directive may then argue for changes in the legislation itself.

This analysis of the respective role of the drafters of the treaty, the EU's judicial, and political institutions in shaping EU citizenship law therefore sheds light on three elements that determine the pre-conditions for a healthy balance between the constitutional value of the relevant right, and the political dimension of decision-making on fundamental rights: the constitutional norm itself ought to explicitly call for political guidance. Building on such a constitutional mandate, political institutions ought to achieve a fine balance between acknowledging the existence of the constitutional right and giving it shape through legislation. It is submitted that this may be best done by asserting the policy implications of decision-making in the field and the policy arguments justifying choices made in EU legislation. Furthermore, the internal coherence, clarity and nuanced nature of the rights thereby regulated will make it easier for political guidance to be deferred to. As for the judiciary, when the constitutional framework is clear and the relevant political guidance fulfils the procedural requirements set therein, it may be encouraged to defer to that legislative framework.

¹⁴⁹ *Ibid.*, paras 51 and 59.

¹⁵⁰ *Lounes*, cit., paras 56-57.