

EU Citizenship at the Periphery: Reassessing the Constitutional Value of EU
Citizenship through the Lens of Derivative Rights of Residence and Brexit

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A thesis submitted for the degree of Doctor of Philosophy

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(December 2025)

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Acknowledgments

This thesis would not have been written without the invaluable contributions of more people than I can name in this space, but I will do my best.

I would like to thank, firstly, my supervisors: Theodore Konstadinides, Anastasia Karatzia and Niall O'Connor. I have learned and grown so very much from your expertise, your knowledge, your critiques and your patience.

My friends, who have talked me down off innumerable ledges, delivered a million pep talks, picked up the phone during a truly embarrassing amount of breakdowns, bribed me with wine and snacks, and never once let me let impostor syndrome win this fight: Claire; Georgia; Jamie; Vincent; Stephanie; Jeremy; Greg; Imogen; Isabelle; Olivia; Emma; Jo; Mara; Daniel; Yvonne; Emily; Anna; Stephen; Mina; Anna; Alice; Henry; Oli. You are all, without a doubt, the absolute best friends a girl could have.

Lola and Macduff: you were useless research assistants, but you kept me sane.

And lastly, but most certainly not least: my parents. Not a single word of this would have been written without your unfailing support, belief, encouragement, and love. The greatest gift I have ever been given in this life is that of being your daughter.

Abstract

This thesis aims to answer the question of how the process of constitutionalisation of EU citizenship creates a framework for the protection and enforceability of individual rights. How permanently have EU citizenship rights been acquired and how reliable are those rights for those individuals (third-country national family members of EU citizens, former EU citizens residing in the European Union, and EU citizens residing in a former Member State) operating on the periphery of EU citizenship protections?

The periphery of EU citizenship rights protections serves as the case study for this thesis because the periphery is exactly where the 'rubber meets the road' of citizenship provisions. It is where Member State competence reasserts itself and can once again take precedence over the constitutional framework of the EU. EU citizenship at the periphery serves as a useful case study for the constitutionalisation of EU citizenship because those 'periphery' individuals show

how ‘expensive’ it is for the CJEU and the EU to prioritise the rights of those individuals in the face of competing Member State pressures.

The level of protection offered to those peripheral individuals, therefore, will illustrate the permanence and reliability of the constitutionalisation of EU citizenship protections.

Introduction

1.1: Introductory remarks: EU citizenship and its constitutionalisation

The history and development of EU citizenship and the rights attendant to it can be usefully analysed by examining its constitutionalisation. The most basic definition of constitutionalisation is ‘the attempt to subject all governmental action within a designated field to the structures, processes, principles, and values of a “constitution”’.¹ In the context of the European Union, the ‘constitutionalisation’ process is less than straightforward because of the absence of an overarching or single foundational document that can serve as a constitution.² In this thesis, ‘constitutionalisation’ refers to the process of linking and embedding the status of EU citizen to a fundamental status anchored *within the Treaties* and protected by the Court of Justice of the European Union (the CJEU).³ Constitutionalisation, as argued in this thesis, is the act of permanently embedding the status of EU citizen – including its person-based rights, such as the right to freedom of movement and the protections of proportionality, non-

¹ Martin Loughlin, ‘What is Constitutionalisation?’ in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 47.

² *ibid* 65. See also Morten Rasmussen and Dorte Sindbjerg Martinsen, ‘EU constitutionalisation revisited: Redressing a central assumption in European studies’ (2019) 25 *ELJ* 251.

³ Katarina Hyltén-Cavallius, ‘The Unfolding Destiny of Union Citizenship: From a Fundamental Status to a Status of Genuine Substance’ (2022) 24 *EJML* 430, 436; Stephanie Reynolds, ‘Brexit and the (Not Quite) Constitutionalised Status of EU Citizenship’ (*Constitutional Law Group*, 24 April 2019) < <https://ukconstitutionallaw.org/2019/04/24/stephanie-reynolds-brexit-and-the-not-quite-constitutionalised-status-of-eu-citizenship/> > accessed 12 December 2024; Jo Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalisation’ in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021); Dimitry Kochenov, ‘EU Citizenship: Some Systemic Constitutional Implications’ (2018) 3 *European Papers* 1061; Hanneke van Eijken, *EU Citizenship and the Constitutionalisation of the European Union* (Europa Law Publishing 2015).

discrimination and equal treatment against any infringements – into a legal framework that offers permanent and ongoing protections, protections that cannot be arbitrarily limited or rolled back in periods of political backlash within the Member States.⁴ The value in this reassessment of the constitutional nature of EU citizenship, examined through the lens of derivative rights of residence for third-country national (TCN) family members, is that it analyses how permanently and how explicitly those EU citizenship protections have been constitutionalised, independent from and in addition to the rights already guaranteed to the economic rights linked to freedom of movement for workers. By analysing how much, and how many, EU citizenship protections extend to individuals on the periphery of EU citizenship and how limited Member States are in pushing back against those protections, this thesis offers a ‘snapshot’ view of where EU citizenship rights have been permanently constitutionalised; where the exact scope of EU citizenship rights are still fluctuating under the purview of the CJEU; and where the gaps in the constitutional framework exist for TCN family members, as well as vulnerable EU citizens, to fall through. A secondary case study, that of Brexit and the resultant renegotiation over EU citizenship rights, will also serve to highlight those gaps.

1.1.1: EU citizenship as a concrete status independent of freedom of movement for workers (and other economic rights)

The first concrete step of EU citizenship constitutionalisation as a *citizenship*, independent of worker status, was achieved with the introduction of ‘EU citizen’ as a status held independently by every individual holding the nationality of a Member State in the Treaty of Maastricht, as distinct – yet based upon – the freedom of movement of workers as it existed at the time.⁵

⁴ Catherine Barnard and Emilija Leinarte, ‘The Creation of European Citizenship: Constitutional Miracle or Myopia?’ (2022) 24 CYELS 24; van Eijken (n 3); Eleanor Spaventa, ‘Seeing the wood for the trees? On the scope of Union citizenship and its constitutional effect’ (2008) 45 CML Rev 13; Michael Dougan, ‘The constitutional dimension to the case law on Union citizenship’ (2006) 31 EL Rev 613; Reynolds (n 3).

⁵ Treaty on European Union (TEU, Maastricht Treaty) 1992 OJ C191, Article 8; Brian Wilkinson, ‘Towards European Citizenship? Nationality, Discrimination and Free Movement of Workers in the European Union’

Freedom of movement, as it applies to the internal market, is a clearly defined set of parameters and ‘eligibility’ access, that exist within primary and secondary EU law. This access is predicated upon the individual as an *economic participant*, or a *market actor* – either a worker, a self-employed individual, a provider of services, or a student (within a certain set of conditions). Access to EU rights, especially that of freedom of movement, is predicated upon and guaranteed by that status as a market actor – or by previous status as a market actor, in the case of social security and pension coordination for those individuals who have moved, or former workers and retired individuals.⁶ Those rights are accepted as applying to economic participation, and are ‘awarded’ on the basis of being able to easily evidence the current or former status of worker, or otherwise being a market actor.⁷

EU citizenship takes that free movement along economic participation as the ‘cornerstone’ of the rights attached to it and builds upon free movement.⁸ These rights were expanded along political lines – consular representation, voting and standing in European elections –, expanding the rights of residence for non-market actors (such as EU citizen children); as well as broadening the scope of who can offer derivative rights protections for TCN family members. The constitutional ‘weight’ of EU citizenship has been built over time by anchoring it to freedom of movement, and eventually freedom of residence, to an individual status independent of a purely economic status *even as it comprises rights predicated upon economic status within it*. That is why it protects children resident in Member States of

(1995) 1 Eur Pub L 417; Ludivine Damay and Heidi Mercenier, ‘Free movement and EU citizenship: a virtuous circle?’ (2016) 23 JEPP 1139.

⁶ Wilkinson (n 5); David O’Keefe and Margot Horspool, ‘European Citizenship and the Free Movement of Persons’ (1996) 31 Irish Jurist 145; Ferdinand Wollenschlaeger, ‘A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration’ (2011) 17 ELJ 1; Dorte Sindbjerg Martinsen ‘Who Has the Right to Intra European Social Security? From Market Citizens to European Citizens and Beyond’ (EUI Working Paper LAW No. 2003/13); Catherine Barnard, ‘The day the clock stopped: EU citizenship and the single market’ in Panos Koutrakos and Juka Snell (eds) *Research Handbook on the Law of the EU’s Internal Market* (Edward Elgar Publishing 2017).

⁷ Alice Welsh, *The Market Citizenship Illusion: Free Movement Rights for Atypical Workers* (Bloomsbury Publishing 2025).

⁸ O’Keefe and Horspool (n 6); Damay and Mercenier (n 5).

nationality rather than solely adults who move; and that is why the ‘periphery’ cases are identified as important in the citizenship definition and constitutionalisation, as they differentiate which rights are available to all citizens rather than the ones delineated in primary and secondary law for market actors.⁹

The two cannot be completely or neatly differentiated, because one – EU citizenship – is built upon the rights that were already being afforded to the other – market actors. The deepening of the integration of the single market, has contributed to the continuing embedding of EU citizenship and the resultant constitutional push-and-pull experienced within the EU and within the Member States.¹⁰ Economic rights for workers are linked very much to that status as a ‘worker’, and the constitutional pressures exhibited by Member States against EU rights have been concentrated in both perception and limiting measures against actors who were not perceived to be ‘positively’ contributing to an economic marketplace.¹¹ Conversely, the ‘rights for citizens’, such as the rights of residence for EU citizen children and their TCN parents, and social assistance provided against destitution for non-workers, have proven to be the most ‘in question’ as the most expensive for Member States to protect and enforce. This is why those non-working, ‘periphery’ examples of EU citizenship, *of individuals who carry their EU rights in their role of EU citizens and not market actors*, have been identified as the primary case study for this dissertation. Those cases are the ones that more clearly identify the constitutionalisation of EU citizenship as those are the cases that strengthen the citizenship rights as citizenship rights, rather than strictly ‘worker’ rights, even though the worker rights

⁹ Wollenschlaeger (n 6).

¹⁰ Ibid; Barnard (n 6).

¹¹ Welsh (n 7).

are the more ‘obvious’. As evidenced in the jurisprudence that will be discussed in this thesis, the two oftentimes serve to bolster each other.¹²

1.1.2: the two phases of EU citizenship constitutionalisation

The increasingly constitutionalised nature of EU citizenship, and its linking to a fundamental status held by individuals independent to status as a market actor, means that the CJEU has allowed its interpretation of those fundamental rights linked to EU citizenship to supercede the competing political priorities of the Member States in controlling immigration and access to social security, housing, and residence rights.¹³ The constitutionalisation of EU citizenship is what has created the formal link between the pre-existing right of freedom of movement for workers and the symbolic nature of EU citizenship as a fundamental status. The constitutionalisation process of EU citizenship is also what has allowed for the expansion of EU citizenship rights beyond the right to move solely for the purposes of seeking or taking up employment.¹⁴ There are two key phases of ‘constitutionalisation’, explored in Chapters 1-3: the ‘rights-expanding’ jurisprudence, where EU citizenship rights were anchored in and interpreted through Treaty rights, and the ‘outer limits’ of EU citizenship protections were being set through expansive jurisprudence on TCN derivative rights. This was followed by the ‘rights-defining’ phase of constitutionalisation, where EU citizenship rights were anchored in and interpreted through secondary law instruments, and the jurisprudence set a line of allowable restrictions on TCN derivative rights.

Derivative rights of residence for TCN family members of EU citizens will serve as one of the thesis’s case studies. This thesis contends that the constitutional strength of EU

¹² Katarina Hyltén-Cavallius, *EU Citizenship at the Edges of Freedom of Movement* (Oxford Hart Publishing 2020); Damay and Mercenier (n 5).

¹³ Barnard and Leinarte (n 4); Dougan (n 4); Robin White, ‘Free movement, equal treatment and citizenship of the Union’ (2005) 54 ICLQ 54.

¹⁴ Anja Wiesbrock, ‘The self-perpetuation of EU constitutionalism in the area of free movement of persons: Virtuous or vicious cycle?’ (2013) 2 GlobCon 125.

citizenship can best be assessed through an examination of the level of protection for derived rights of residence for TCN family members of EU citizens, and other individuals operating at the ‘periphery’ of EU citizenship’s constitutionalisation, such as former EU citizens and EU citizens living in a former Member State. The relative strength of protections offered to those individuals on the periphery of the constitutional framework of EU citizenship attests to the strength and solidity of the constitutional centre. As TCN family members of EU citizens, they are excluded from the protections of both own-state nationals and EU citizens and rely on their familial relationship to a mobile EU citizen for protections within the host Member State.¹⁵ Derivative rights of residence are a useful point of analysis for the constitutionalisation of EU citizenship rights because they serve as a practical example of the outer limits of EU citizenship protections: they sit at the edges where EU protected rights meet national sovereignty, and where EU constitutional principles (equality and non-discrimination, proportionality, fundamental rights) meet and need to be balanced with the political and pragmatic considerations of the Member States. The existence of derivative rights of residence for TCNs attached to the family of an EU citizen contribute to the ‘genuine enjoyment of the substance’ of the EU citizen’s rights, and the extent of the protection of those derivative rights by the CJEU can be interpreted as a useful indicator of the strength of EU citizenship itself.¹⁶ They are the example of the balancing act, between the competences and priorities of the Member States on the one hand and the constitutional legal framework of the EU on the other hand, that is required to create EU citizenship as a constitutional status and endow it with subsequently enforceable rights.

¹⁵ White (n 13); Elspeth Guild, ‘EU Citizens, Foreign Family Members and European Union Law’ (2019) 27 EJML 358; Hyltén-Cavallius (n 3).

¹⁶ Hyltén-Cavallius (n 3); Stanislas Adam and Peter van Elsuwege, ‘Citizenship and the federal balance between the European Union and its Member States: Comment on Dereci’ (2012) 37 EL Rev 176; Francesca Strumia, ‘Supranational Citizenship’s Enablers: Free Movement from the Part of the Home Member State’ (2020) 45 EL Rev 507, 517, 520-1.

There is no linear progression to the constitutionalisation of EU citizenship, because the constitutional priorities, and the scope of EU law, have also changed and fluctuated over time. The shifting and sometimes contradictory political priorities in the Member States, such as limiting immigration and protecting access to social security, have also impacted on the constitutional priorities of the EU and the extent to which the CJEU was expansively interpreting the scope of EU citizenship rights. The responsibility and burdens of the enforcement of EU citizenship rights lie with individual Member States – hence the ‘friction’ between the constitutional order of the EU and the Member States transposing EU law into their own domestic frameworks. Because of the active role of the CJEU in the constitutionalisation process of EU citizenship, the ongoing citizenship jurisprudence also reflects those shifts of priorities and limitations.

This thesis contends that there are two clear phases of EU citizenship constitutionalisation. The first is the ‘rights-expansion’ stage, in which the rights of EU citizenship are extended through the greater protection of rights for their TCN family members by prioritising the interpretation of rights as grounded in primary law instruments of the EU. This encompasses the period in which EU citizenship was created, including and broadening the previously existing freedom of movement and establishment protections for workers and their family members.¹⁷

In the ‘rights-expanding’ phase of constitutionalisation, the rights of EU citizens and their TCN family members were advanced even over the competing claims of the Member States, culminating in the *Zambrano* decision of 2011 which allowed for the unqualified residence of TCN parents of EU citizens as their ‘primary caregivers’ and as necessary for the

¹⁷ Nicole Lazzerini, ‘The Scope and Effects of the Charter of Fundamental Rights in the Case Law of the European Court of Justice’ in Giuseppe Palmisano (ed), *Making the Charter of Fundamental Rights a Living Instrument* (Brill Publishing, 2015).

‘genuine enjoyment of the substance of citizenship rights’ of the EU citizen.¹⁸ This is the stage of constitutionalisation of EU citizenship that has been called ‘expansive’ by some scholars, partly due to the CJEU’s teleological interpretation of the EU citizenship legal framework which has been described as ‘rights-enhancing’.¹⁹ This is also the period where the derivative rights of residence of TCN family members of EU citizens were also at their most ‘permissive’; i.e., allowing for the greatest amount of EU citizenship protections, and the protections for TCN family members, to take precedence over the conflicting demands of Member States to limit immigration and claims made against their social security frameworks.²⁰ This stage is also where the test of ‘genuine enjoyment of the substance’ of EU citizenship rights was introduced in the jurisprudence, as an additional benchmark of rights protections individuals could use to promote their own rights against a Member State policy that would potentially limit the scope of citizenship rights.²¹

The second stage is the ‘rights-defining’, or delimitation, stage of constitutionalisation, in which EU citizenship rights were interpreted as residing in ‘restrictive’ instruments of secondary law, and rights for EU citizens and their TCN family members were limited and strictly defined.²² It is in this stage when EU citizenship rights were being interpreted primarily

¹⁸ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)* [2011] ECLI:EU:C:2011:124; Hanneke van Eijken, ‘Connecting the Dots Backwards, what did Ruiz Zambrano Mean for EU Citizenship and Fundamental Rights in EU Law?’ (2021) 23 EJML 48.

¹⁹ Gerard-René de Groot and Ngo Chun Luk, ‘Twenty Years of CJEU Jurisprudence on Citizenship’ (2014) 15 GLJ 821; Kay Hailbronner and Daniel Thym, ‘Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, not yet reported’ (2011) 48 CML Rev 1253; Hester Kroeze and Peter Van Elsuwege, ‘Revisiting *Ruiz Zambrano*: A Never-Ending Story?’ (2021) 23 EJML 1, 12; Theodore Konstadinides, ‘European Citizenship in a Constitutional Context: where the ‘social’ coexists with the ‘market’’ [2022] SIEPS <sieps.se/en/publications/2022/European-citizenship-in-a-constitutional-context-where-the-social-coexists-with-the-market> accessed November 21 2022; Dimitry Kochenov, ‘Two Sovereign States vs a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters’ in Jo Shaw (ed), *Has the European Court Challenged Member-State Sovereignty in Nationality Law?*, EUI RSCAS Working Paper No.2011/62.

²⁰ Barnard and Leinarte (n 4); van Eijken (n 18).

²¹ *Zambrano* (n 18); Welsh (n 7).

²² Charlotte O’Brien, ‘The ECJ sacrifices EU Citizenship in vain: *Commission v UK*’ (2017) 54 CML Rev 209; Niamh Nic Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47 CML Rev 1597; Cian Mulligan, ‘The Fragility of Freedom of Movement’ (2017) 52 Review of European Economic Policy 254; Willem Maas, ‘Unrespected, Unequal, Hollow? Contingent citizenship and reversible rights in the European Union’ (2009) 15

through strict interpretation of the scope of secondary law instruments. This established the legal framework of ‘rights-definition’ in which the rights of EU citizens and their TCN family members were more narrowly construed, and the requirements of the Member States to limit access to immigration and social security nets were prioritised over the access rights of EU citizens. The outer limits of EU citizenship protections had already – mostly – been established and upheld, so the CJEU reverted to a more ‘interpretive’ role, and the jurisprudence shifted its focus from the outer edges of citizenship to a more definitional phase: determining who exactly fit under the umbrella of EU citizenship, and how far specifically would those protections extend. This pattern of jurisprudence, therefore, is called the ‘delimitation’ phase of constitutionalisation. This thesis will not take the stance that the jurisprudence of this period was restrictive, but rather, that the ‘outer limits’ had already been set by the peripheral cases of the previous stage. The jurisprudence of this period is more concerned with the *definition* of EU citizenship, in delineating clearly who is entitled to what, rather than establishing the outer limits of EU citizenship provisions and the authority of the CJEU. The focus of the jurisprudence here shifts away from ‘the genuine enjoyment of the substance’ of EU citizenship rights and the ‘fundamental’ nature of EU citizenship, and gives more weight to the limiting aspects of secondary law instruments.²³ This line of jurisprudence is therefore reflective of a shift in the constitutional priority of the CJEU, away from the establishment of EU citizenship

Colum J Eur L 265; Stefano Giubboni ‘European Citizenship and Social Rights in Times of Crisis’ (2014) 15 GLJ 953.

²³ Council Directive 2004/38/EC 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC OJ L158/30; Phil Syrpis, ‘The relationship between primary and secondary law in the EU’ (2015) 52 CML Rev 461; Ferdinand Wollenschläger, ‘The judiciary, the legislature and the evolution of Union citizenship’ in Phil Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012); Niamh Nic Shuibhne, ‘The Third Age of EU Citizenship’ in *ibid*.

principles and towards the political pressure exerted by the Member States and the concerns about immigration and welfare structures being placed under too much strain.²⁴

There is overlap between the two phases, as jurisprudence developed along both ‘rights-enhancing’ and ‘rights-defining’ lines in the same chronological time period, and every judgment issued by the CJEU contains elements of both ‘rights-expansion’ and ‘rights-definition’: for example, the rights of particularly vulnerable EU citizens, such as children, and their TCN family members were being increasingly protected at the same time as the rights to social security access for adult EU citizens and their TCN family members were being restricted along the parameters of economic and in-work pre-conditions.²⁵ This overlap, however, is indicative of the constantly fluctuating nature of EU citizenship constitutionalisation, and how the framework that governs and defines the access to rights that are encompassed by that status of EU citizen is shifting between constitutional loci as a result of competing constitutional pressures both within the EU and within Member States. This non-linear fluctuation contributes to the constitutional fragility of EU citizenship: the rights are clearly defined in theory (i.e., in the Charter of Fundamental Rights and the Treaties), but the exact ‘brushwork’ of how those rights are enforced, and the minimum standards of rights restrictions allowable within the Member States, is left primarily to the interpretation of the CJEU, which is dependent upon more than just the purely legal framework of EU law.²⁶

²⁴ Susanne K. Schmidt, ‘No match made in heaven: Parliamentary sovereignty, EU over-constitutionalisation and Brexit’ (2020) 27 JEPP 779; Michael Blauberger, Anita Heindlmaier, Dion Kramer, Dorte Sindbjerg Martinsen, Jessica Sampson Thierry, Angelika Schenk and Benjamin Werner, ‘ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence’ (2018) 25 JERP 1422; Shaw (n 3); Barnard and Leinarte (n 4).

²⁵ Welsh (n 21); Charlotte O’Brien ‘I trade therefore I am: legal personhood in the European Union’ (2013) 50 CML Rev 1643.

²⁶ Schmidt (n 24); Spaventa (n 4); Barnard and Leinarte (n 4); Katarina Hyltén-Cavallius, ‘Union Citizenship: Towards a Deepened Legal Meaning’ in Per Ekman, Björn Lundqvist, Anna Michalski and Lars Oxelheim (eds), *The Depth and Size of the European Union in a Time of War* (Palgrave Macmillan 2025); van Eijken (n 3); Blauberger et al (n 24); Urška Šadl and Suvi Sankari, ‘Why Did the Citizenship Jurisprudence Change?’ in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity* (Hart Publishing 2017); Angie Gago and Francesco Maiani, ‘Pushing the boundaries’: a dialogical account of the evolution of European case-law on access to welfare’ (2022) 44 JEI 261; Michael Blauberger and Dorte

Because of the lack of permanence in the acquisition of EU citizenship rights, this thesis posits that EU citizenship remains a citizenship status of some constitutional flexibility, where the most protection is offered to individuals who most straightforwardly meet the economic pre-conditions that form the basis of the status itself.²⁷

Brexit offers an additional layer to the case study of derivative rights of residence, as the introduction of the category of ‘former EU citizen’ and ‘former EU Member State’ allows for an examination of the strength of *residual* protections of EU citizenship status, even when the Member State enforcing EU citizenship rights has removed itself from the EU and thereby ‘deconstitutionalised’ – defined in this thesis as the removal of the constitutional framework that embeds the citizenship right from the legal parameters that enforce and protect those rights – from a category of EU citizen entirely.²⁸ The Withdrawal Agreement and the EUSS continue along the ‘rights-delimiting’ phase of the constitutionalisation of EU citizenship because of the Withdrawal Agreement’s replication of the residence and evidence requirements of the CRD, a rights-delimiting secondary law instrument, rather than the ‘free movement’ principles enshrined in the Treaty, the primary law framework, and the ‘rights-expanding’ jurisprudence of the CJEU.²⁹ There is a requirement embedded both within the Withdrawal Agreement and the EUSS to protect the residual rights of EU citizens – i.e., the rights that had already been acquired by residence in the United Kingdom under EU law prior to Brexit day; and protecting them on an equal or similar level to the rights they would have enjoyed and been able to

Sindjberg Martinsen, ‘The Court of Justice in times of politicisation: ‘law as a mask and shield’ revisited’ (2020) 27 JEPP 382.

²⁷ Nic Shuibhne (n 22); Charlotte O’Brien, ‘The Great EU Citizenship Illusion Exposed: equal treatment rights evaporate for the vulnerable’ (2021) 46 EL Rev 801; Welsh (n 21).

²⁸ Niamh Nic Shuibhne, ‘Did Brexit Change EU Law?’ (2021) 74 CLP 195; Patricia Mindus ‘A constitutional eyesore after Brexit: EU citizenship and British nationality’ in Devyani Prabhat (ed), *Citizenship in Times of Turmoil?* (Edward Elgar Publishing 2019).

²⁹ Reynolds (n 3); Elspeth Guild, *Brexit and its consequences for UK and EU citizenship, or monstrous citizenship* (Brill Publishing 2017); Alice Welsh and Charlotte O’Brien, ‘Side-stepping international law on the sly: The secret severing of the EU Settlement Scheme from the Withdrawal Agreement’ (forthcoming publication; JIANL 2026).

individually enforce under the constitutional framework offered by the EU institutions and with some recourse to the CJEU.³⁰

The level of protections for EU citizens in a former Member State that EU institutions are willing to negotiate for and commit to is indicative of the constitutional strength of EU citizenship, as a visible and measurable yardstick of the ‘value’ that EU citizenship protections possesses. Because of the relative recency of both the Brexit vote and the development of the new legal framework surrounding the residence rights of EU citizens in the UK post-withdrawal, this thesis will be able to offer an original analysis of the gaps in that constitutionalisation framework that could expose vulnerable EU citizens – and their even more vulnerable TCN family members – to a lesser standard of rights protections, as well as the dangers that come from an irregular immigration status.³¹

1.2: Structure of the thesis

This thesis will fall into two parts, following the phases of constitutionalisation definitions developed in the above section. Each part will be supported by the same case study of derivative rights of residence for TCN family members of EU citizens. The first part (Chapters 1-2) will analyse the ‘rights-enhancing’ jurisprudence of constitutionalisation of EU citizenship from the perspective of the CJEU jurisprudence and the instruments of relevant EU law: the Treaties, the Charter, the relevant directives and the general principles of EU law. The second part (Chapters 3-5) will analyse the ‘rights-defining’ jurisprudence of EU citizenship and TCN derivative rights through the analysis of the ‘clarifying’ jurisprudence of the Member State, and in the context of a departing Member State.

³⁰ Reynolds (n 3); Eleanor Spaventa, ‘The rights of citizens under the Withdrawal Agreement: a critical analysis’ (2020) 45 EL Rev 193; Adam Lazowski, ‘Court of Justice of the European Union and the United Kingdom after Brexit: Game Over?’ (2022) 47 EL Rev 666; Welsh and O’Brien (n 29).

³¹ Reynolds (n 3); Welsh and O’Brien (n 29).

Chapter 1 of this thesis establishes the ‘cornerstone’ of EU citizenship, freedom of movement for workers, and how the constitutional framework of the economic marketplace and the internal market were adapted into a citizenship-protecting framework. Chapter 2 continues to expand on the constitutionalisation of EU citizenship, and how those protections were being encoded along the constitutional principles of equal treatment and non-discrimination, proportionality, and fundamental rights. Chapter 3 identifies the ‘periphery’ cases of derivative rights of residence for TCN parents of EU citizen children to clarify the scope and nature of EU citizenship rights as held by individuals. The second section of this thesis (Chapters 4-5) will examine the protection of derivative rights in the UK specifically, as the country transitions away from the primacy of EU law into a new legal landscape following withdrawal from the EU. It will also serve to situate derivative rights within the legal and political setting in the UK, including the first cases coming out of the transition of EU law into domestic law post-Brexit. It will serve as an analysis and a critique of the impact of Brexit on the protection of derivative rights, by examining relevant cases such as those of *Patel & Shah* and *Akinsanya* – both post-Brexit and post-transition judgments handed down after the Exit Day that deal with protections under the European Union Settlement Scheme (the EUSS, the system that governs and adjudicates the access of EU citizens living in the United Kingdom prior to withdrawal) rather than EU freedom of movement rights – and comparing these decisions to other immigration regulations made during the transposition of European migration rights.³² This will serve as an illustrative example on the practical implications of the decoupling of citizenship rights protections from the constitutional centre underpinning the legal framework of those rights.³³

³² *Akinsanya v Secretary of State for the Home Department* [2022] EWCA Civ 37; *Patel v. Secretary of State for the Home Department* [2019] UKSC 59.

³³ Maria Dicosola, ‘The right to citizenship in Europe: Brexit as a stress test’ (2020) 1 *Democrazia e Sicurezza* 15; Stijn Smismans, ‘Protecting EU Citizens in the UK from a Brexit ‘Windrush on Steroids’: A Legislative Proposal for a Declaratory Registration System’ (2019) DCU Brexit Institute – Working Paper N. 8-2019;

The jurisprudence on EU citizenship will take a central role in the analysis of the constitutionalisation of EU citizenship rights because of the importance that the jurisprudence, and the CJEU more generally, has held in the constitutionalisation of EU citizenship itself.³⁴ This lens of analysis aligns neatly with the narrative of EU citizenship as a constitutional imposition that also follows the ‘top-down’ structure.³⁵ Derivative rights of residence, in this context, can be seen as an ‘additional’ benefit of the rights of citizenship itself, as an extension of the right of the citizen rather than from the perspective of the TCN holding the derived right.³⁶ The case study of derivative rights examines how derivative rights protections and the protections of EU citizenship fit together in order to strengthen both the protections of and the constitutional legacy of EU citizenship. That constitutional legacy remains a fragile one, with significant gaps that could be utilised by domestic policymakers in order to limit not necessarily EU citizenship rights but the further access to benefits that EU citizenship might entail.³⁷ This was particularly evident in the case of the United Kingdom, when limiting access to social security benefits for EU citizens that could not easily evidence either their employment or financial independence, and will be examined in more depth in Chapter 4.³⁸

The shift in focus in the jurisprudence away from ‘establishing’ and ‘expanding’ rights for EU citizens and their TCN family members towards a more restrictive approach on access to social security for both EU citizens and their TCN family members is indicative of the delimitation phase that forms the subject of the second part of the thesis. The access to rights

Stephanie Reynolds, ‘May We Stay? Assessing the Security of Residence for EU Citizens Living in the UK’ in Michael Dougan (ed) *The UK after Brexit: Legal and Policy Challenges* (Intersentia 2018).

³⁴ Patricia Mindus, ‘Dimensions of Citizenship’ (2014) 15 GLJ 735; Wollenschläger (n 23); Carolyn Moser and Berthold Rittberger, ‘The CJEU and EU (de)-constitutionalization: Unpacking jurisprudential responses’ (2022) 20 ICON 1038.

³⁵ Shaw (n 3); Schmidt (n 24); Dougan (n 4); Barnard and Leinarte (n 4); Spaventa (n 4); Adam Perry and Adam Tucker, ‘Top-Down Constitutional Conventions’ (2018) 81 MLR 765.

³⁶ Iyiola Solanke, ‘Who Speaks for the Zambrano Families? Multi-level Abandonment in the UK and the EU’ in Dustin M, Ferreira N and Millins S (eds), *Gender and Queer Perspectives on Brexit* (Palgrave Macmillan 2019).

³⁷ Reynolds (n 3); Guild (n 29).

³⁸ Reynolds (n 3); Charlotte O’Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Oxford Hart Publishing 2017); Welsh (n 27).

expanded when the CJEU based the source of rights in primary law instruments, such as the Treaty and the Charter, and the access to rights was narrowed when the source of rights was placed in secondary law instruments. This thesis will focus its lens, therefore, on the question of ‘citizenship at the periphery’: the TCN family members of EU citizens, in both the EU and the UK, and the ‘former EU citizens’ as well as current EU citizens living in the United Kingdom post-Brexit. By focusing on those individuals who do not fall obviously or easily into the traditionally protected characteristics of EU citizenship, this thesis will be able to offer a picture of the constitutional strength – and residual weaknesses – of EU citizenship by identifying how far, exactly, the umbrella of protections can extend. The jurisprudence will therefore be examined along two themes, that of ‘rights-expanding’ and ‘rights-defining’ (or clarifying).

Brexit is the first example of its kind of a ‘breaking point’ or ‘stress test’ for EU citizenship, as an example of how the standard of protections and enforceability of individual rights decreases when the rights are completely divorced from their constitutional framework.³⁹ It can therefore operate as a useful means of examining how, as well as providing the trigger for, a new push for increased constitutionalisation of EU citizenship by the EU institutions, including the CJEU, in a way that is more politically palatable to sceptical Member States.⁴⁰ The exit of one of the more recalcitrant Member States about the ongoing integration and constitutionalisation of greater and more flexible EU citizenship rights might lead to an

³⁹ Dicosola (n **Error! Bookmark not defined.**); Mindus (n 34); Eleonor Spaventa, ‘Mice or Horses? British Citizens in the EU 27 after Brexit as “Former EU Citizens”’ (2019) 44 EL Rev 589; Niamh Nic Shuibhne, ‘Protecting the legal heritage of former Union citizens: EP v Préfet du Gers’ (2023) CML Rev 60, 475; Dora Kostakopoulou, *EU Citizenship Law and Policy: Beyond Brexit* (Edward Elgar Publishing 2020).

⁴⁰ Willem Maas, ‘European Citizenship in the Ongoing Brexit Process’ (2021) 58 International Studies 168; Kostakopoulou (n 39).

increased grounding of the fundamental rights aspect of EU citizenship into greater solidified constitutional footing, as is discussed in Chapter 5 and the concluding chapter of this thesis.⁴¹

1.3: Methodology

The primary methodology used in this thesis is that of doctrinal legal analysis: an examination and synthesis of the relevant case law and legislation on EU citizenship rights in an effort to understand how the jurisprudence on EU citizenship rights reflects the constitutionalisation of EU citizenship, and the strength of protections offered to individuals existing on the periphery of the citizenship project.⁴² The main body of evidence analysed and used to support this thesis's argument is the jurisprudence of the CJEU on EU citizenship rights and the derivative rights of residence of TCN family members of EU citizens as well as the legislation and statutes of both the EU and the United Kingdom on the interpretation of EU citizenship rights in a host Member State.⁴³

This thesis will utilise the sources of EU law that pertain to EU citizenship rights, the jurisprudence on EU citizenship by the CJEU, as well as the litigation and legislation changes occurring in the United Kingdom due to the Brexit process, in order to analyse the strength of constitutional protections of EU citizenship. This would fall into what has been called the 'interpretive' school of doctrinal analysis, as this thesis is attempting to use the case law and the hierarchies within the sources of law to identify a pattern in the history of judicial interpretation of the strength of EU citizenship in order to answer the overarching question of

⁴¹ Hanneke van Eijken and Pauline Phoa, 'The scope of Article 20 TFEU clarified in Chavez-Vilchez: Are the fundamental rights of EU citizens coming of age?' (2018) 43 EL Rev 949; Adrienne Yong, 'Driving a wedge between friends?: The Court of Justice of the EU and its citizens in the case of welfare benefits' (2016) 6 EHRLR 664; Kostakopoulou (n 50).

⁴² Paul Daly and Joe Tomlinson, 'Introduction: The Importance of Methodology in Public Law Research' in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar Publishing 2023); Jan Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Hans Micklitz and Edward Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (CUP 2017).

⁴³ See the appendix for a full table of cases referenced.

how the constitutionalisation process of that citizenship contributed to the protections offered within it.⁴⁴

The ‘interpretivism’ model of doctrinal methodology will be applied to this thesis’s analysis: ‘interpretivism involves identifying doctrinal patterns’ (such as the patterns of constitutionalisation phases in the CJEU jurisprudence on EU citizenship provisions) ‘and explain those patterns’.⁴⁵ Part of this process will involve identifying ‘important’ CJEU cases in the constitutionalisation process of EU citizenship, focusing particularly on the cases that deal with the expansion of rights for TCN family members and that either expand or limit the scope of EU citizenship rights and the enforceability of those rights.⁴⁶ The case law analysis will include discussion of the cases traditionally considered ‘important’ in the development of EU citizenship rights (see Chapters 1-3).⁴⁷ This will include a particular focus on *Zambrano* as the seminal case of derivative rights of residence for TCN family members (see Chapter 1).⁴⁸ The analysis will also broaden to include discussion of cases that include EU citizenship rights other than the important ‘social’ ones, but are still foundational to the constitutionalisation patterns of EU citizenship.⁴⁹

⁴⁴ Jason Varuhas, ‘Mapping doctrinal methods’ in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar Publishing 2023).

⁴⁵ *ibid* 18.

⁴⁶ William Baude, Adam S. Chilton and Anup Malani ‘Making Doctrinal Work More Rigorous: Lessons from Systemic Reviews’ (2017) 84 U Chi L Rev 37.

⁴⁷ Dimitry Kochenov, ‘The essence of EU citizenship emerging from the last ten years of academic debate: beyond the cherry blossoms and the moon?’ (2013) 62 ICLQ 97; please also refer to the appendix for the table of cases cited.

⁴⁸ Niamh Nic Shuibhne, ‘Seven Questions for Seven Paragraphs’ (2011) 36 EL Rev 161; Kroeze and van Elsuwege (n 19); Anja Wiesbrock, ‘Union Citizenship and the Redefinition of the “Internal Situations” Rule: The Implications of *Zambrano*’ (2011) 12 GLJ 2077; Giuseppe Martinico and Anna Margherita Russo, ‘Is the European Union a Militant Democracy? The Perspective of the Court of Justice in *Zambrano* and *Kadi*’ (2015) 21 Eur Pub L 659; Anja Lansbergen and Nina Miller, ‘European Citizenship Rights in Internal Situations: An Ambiguous Revolution?’ (2011) 7 EuConst 287.

⁴⁹ Mattias Derlén and Johan Lindholm, ‘Goodbye van Gen den Loos, Hello Bosman? Using Network Analysis to Measure the Importance of Individual CJEU Judgments’ (2013) 20 ELJ 667; Phillipp Schroeder, ‘Seizing opportunities: the determinants of the CJEU’s deference to national courts’ (2023) 31 JEPP 2986.

There is a certain element of circular reasoning involved in doctrinal analysis that focuses primarily on the analysis of CJEU jurisprudence: the case law is both part of the constitutionalisation process of EU citizenship since the CJEU was and remains an active agent of constitutional change within the EU, as well as an indicator of the extent of the constitutionalisation and the priorities of the constitutional actors themselves.⁵⁰ The case law on EU citizenship is a key part of both the legal underpinning and the constitutional concept of EU citizenship. Furthermore, the case law of the CJEU on derivative rights of residence is part of the enforceable set EU rights for those EU citizens and their TCN family members in the host Member States.⁵¹ The case law at the CJEU level is part of what makes EU citizenship law, law as well as a key component of its constitutionalisation process.⁵² The role of the preliminary reference procedure has evolved to function effectively as a judicial review mechanism in order to ensure the compliance of domestic courts and legislative bodies with the principles and norms of EU law, contributing to the constitutionalisation of the rights that the CJEU interpreted as binding.⁵³ The CJEU does not function in the same way as the supreme courts of common law nations – it is not bound by precedent in the way the UK Supreme Court would be, for example – but judgments issued by the CJEU became a part of the *acquis communautaire* of EU law, and therefore form an important bedrock of the constitutional process as well as the legal underpinning of future rights enforcement claims.⁵⁴ This

⁵⁰ Anne Wesemann, *Citizenship in the European Union* (Edward Elgar Publishing 2020); Dora Kostakopoulou ‘Co-creating European Union Citizenship: Institutional Process and Crescive Norms’ (2012) 15 CYELS 255.

⁵¹ Urška Šadl and Silje Hermansen, ‘The European Court of Justice, an Able and Unwilling Lawmaker: Evidence from 920 Free Movement and Persons Judgments’ in Mark Dawson, Elise Muir and Bruno de Witte (eds), *Judicial Politics in the EU* (Edward Elgar Publishing 2023).

⁵² Schmidt (n 24).

⁵³ Jan Zgliniski, ‘The new judicial federalism: the evolving relationship between EU and Member State courts’ (2023) *European Law Open* 2, 345; Daniel Sarmiento, ‘The silent lamb and the deaf wolves: constitutional pluralism, preliminary references and the role of silent judgments in EU law’ in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Bloomsbury Publishing 2012); Schmidt (n 24).

⁵⁴ Zgliniski (n 53); Wesemann (n 50); van Eijken (n 3); Šadl and Hermansen (n 51); Schmidt (n 24); Derlén and Lindholm (n 49); Paul Lasok, ‘Precedent in EU Law: A Practitioner’s View’ (2024) *International Journal of Language & Law* 13, 8; Marc Jacob, *Precedents and Case-based Reasoning in the European Court of Justice* (CUP 2014).

jurisprudence has been called, as a helpful ‘alternative’ term to precedent, as ‘settled jurisprudence’: this allows for interpretations to be made on a case-by-case matter, while still making reference to previous decisions, and using those previous decisions as a guiding principle rather than a binding one.⁵⁵

This ‘settled jurisprudence’ goes hand in hand with an increasing centralisation of the CJEU as the ‘final authority’ on matters of EU law, and increasing enforcement by the CJEU of the duty of national courts to refer cases where points of EU law were in question but not *acte clair* to the CJEU in order to ensure compliance with EU law.⁵⁶ This can be seen particularly in cases of citizenship rights for EU citizens and their TCN family members: the Court, in issuing judgments that interpreted Treaty rights of individual EU citizens as ‘supreme’ even in cases that ran counter to Member State priorities, created and reinforced a substantial constitutional norm of EU citizenship that Member States were then in obligation to adopt and enforce.⁵⁷ In the United Kingdom, specifically in the post-withdrawal setting, the case law surrounding the Withdrawal Agreement and the establishment of ongoing EU citizenship law and rights is intrinsic to the protections as they change and adapt.⁵⁸

The centrality of the jurisprudence to the constitutionalisation of EU citizenship, in the way it creates both the outer limits of EU citizenship protections and offers individuals potential means of redress, is why doctrinal analysis will form the bedrock of this thesis. The case law on EU citizenship both sets a precedent and enhances the constitutionalisation of EU

⁵⁵ Jacob (n 54); Gian Maria Farnelli, Federico Ferri, Mauro Gatti and Susanna Villani, ‘Introduction: Judicial Precedent in International and European Law’ (2022) 2 *The Italian Review of International and Comparative Law* 263.

⁵⁶ Zginski (n 53); Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECLI:EU:C:2003:513; Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v Estado português* [2015] ECLI:EU:C:2015:565.

⁵⁷ Wesemann (n 50); van Eijken (n 3); Barnard and Leinarte (n 4); Schmidt (n 24); Zginski (n 53); Šadl and Hermansen (n 51).

⁵⁸ Welsh and O’Brien (n 29).

citizenship because the interpretation of the CJEU reinforces the level of protections for individual rights as well as setting the outer boundaries of rights protections.⁵⁹

1.4: Literature review and originality

EU citizenship is not a subject that has lacked for academic commentary or focus. Since its introduction in 1992, there has been extensive research and commentary on the different ways it is interpreted and enacted in the EU and in the Member States, because EU citizenship is tied intimately with the further political integration and increased constitutionalisation of the Union itself.⁶⁰ By examining the impact of Brexit on the protection of EU citizenship rights for both EU citizens and their TCN family members, this thesis will also offer an original perspective on how the decoupling of citizenship status from its constitutional foundations impacts the level of access to rights for those citizens and their family members, and how the standard of protections of those rights shifts (Chapters 4-5 will posit that the rights decline without recourse to the EU constitutional centre).⁶¹

Brexit has helpfully identified the gaps in EU citizenship constitutionalisation and rights protections, and where renewed CJEU attention to the constitutional nature and frameworks of EU citizenship might lead to a further strengthening of the legal underpinning

⁵⁹ Wiesbrock (n 14).

⁶⁰ Markus Gehring, *Europe's Second Constitution: Crisis, Courts and Community* (CUP 2020) 295-310; Eleanor Spaventa, 'Brexit and the Free Movement of Persons: What is EU Citizenship Really About?' in Niamh Nic Shuibhne (ed), *Revisiting the Fundamentals of the Free Movement of Persons in EU Law* (OUP 2023).

⁶¹ Reynolds (n **Error! Bookmark not defined.**); Spaventa (n 39); Smismans (n **Error! Bookmark not defined.**); Nic Shuibhne (n 39); Maas (n 40); Catherine Barnard, Fiona Costello and Sarah Fraser Butlin, *Low Paid EU Migrant Workers: The House, The Street, The Town* (BUP 2024); Catherine Barnard, Fiona Costello and Sarah Fraser Butlin, 'The changing status of European Union nationals in the United Kingdom following Brexit: The lived experience of the European Union Settlement Scheme' (2021) 31 S & LS 365; Jed Meers, Joe Tomlinson, Alice Welsh and Charlotte O'Brien "Rights on Paper? The Discriminatory Effects of Digital Immigration Status on Private Landlord Decisions" (*UKCLA*, 14 March 2023) available at <<https://ukconstitutionalaw.org/2023/03/14/jed-meers-joe-tomlinson-alice-welsh-and-charlotte-obrien-rights-on-paper-the-discriminatory-effects-of-digital-immigration-status-on-private-landlord-decisions/>>, accessed on 18 June 2025; Roch Dunin-Wasowicz "EU Citizens in the UK are in a particularly weak position and need an independent authority to monitor their rights" (*LSE Law Blogs*, 26 March 2018) available at <<https://blogs.lse.ac.uk/brexit/2018/03/26/eu-citizens-in-the-uk-need-a-independent-authority-to-monitor-their-rights/>>, accessed on 18 June 2025.

of EU citizenship and its rights enforcement mechanisms in primary law frameworks.⁶² Brexit has identified the importance of the need for an EU citizenship that is permanently anchored within the primary law frameworks of the EU, wherein limiting powers of secondary law instruments are not granted primacy over the primary law frameworks of the Treaties, that can offer more long-term protection to both EU citizens.⁶³

Throughout the thirty years of literature on the subject, discussions on European citizenship has mirrored the complex and complicated constitutionalisation process of EU citizenship itself.⁶⁴ EU citizenship has been referred to as a ‘messy’ concept, with many competing angles of analysis and frameworks, where the symbolic meaning of the term itself does not have a clear-cut constitutional definition.⁶⁵ What this thesis articulates is the hypothesis that EU citizenship has always been building towards a constitutional status from its origin as a market status: the origins of EU citizenship lie in the free movement of workers across the internal borders of the EU, and the additional ‘benefits’ of citizenship were layered on top of that original, solely, economic status.⁶⁶

EU citizenship has the potential to develop into a citizenship with a strong social component, by expanding the economic and financial solidarity that is spelled out in the Treaties to *all* EU citizens, including those who fall outside the parameters of the work and

⁶² Georgia Austin-Greenall and Sylvia Lipinska, ‘Brexit and Loss of EU Citizenship: Cases, Options, Perceptions’ (ECAS, 2017); Reynolds (n 3); A.P. van der Mei, ‘Member State Nationality, EU Citizenship and Associate European Citizenship’ in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020).

⁶³ Dicosola (n **Error! Bookmark not defined.**); Nic Shuibhne (n 28); Mindus (n 34); Spaventa (n 39); Kostakopoulou (n 39); Maas (n 40); Syrpis (n 23); Welsh and O’Brien (n 29).

⁶⁴ Shaw (n 3); Case C-26/62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1; Consolidated Treaty on the Functioning of the European Union [2012] OJ C326/56 Article 20(1); The Consolidated Treaty on European Union OJ C115/13 (TEU) Article 9; Case C-181/23 *European Commission v Republic of Malta* [2025] ECLI:EU:C:2025:283 Opinion of AG Collins paras 42-45.

⁶⁵ Stefan Enchelmaier, ‘Four Freedoms, Ever More Principles?’ (2016) 36 OJLS 192, 204; Jo Shaw, ‘The many pasts and futures of citizenship in the European Union’ (1997) 22 EL Rev 554; Jo Shaw, ‘The Interpretation of European Union Citizenship’ (1998) 61 MLR 293, 304.

⁶⁶ Wesemann (n 50); Hyllén-Cavallius (n 3); Nic Shuibhne (n 22); Dora Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ (2005) 68 MLR 233; O’Brien (n 22); Welsh (n 21).

economic preconditions. That stage has not been reached yet (see the delimitation phase discussed in Chapters 2-4, when the scope of EU citizenship entitlements has been retrenched into a stricter interpretation).⁶⁷ The process of Brexit has, additionally, frozen that stage for ‘former’ EU citizens and EU citizens living in the United Kingdom.⁶⁸

Oftentimes the recipients of TCN derivative rights claims, especially in the example of the United Kingdom, are vulnerable individuals who stand the most to benefit from the protections of an EU citizenship status permanently anchored in the primary law frameworks and therefore protected from the restrictive elements introduced in secondary law instruments in the ‘limiting’ phase of the 2010s.⁶⁹ The existing literature centres the legal framework as the subject of debate and research about the binary distinction between market and social citizenship.⁷⁰ The centrality of the conversation remains the questions surrounding the potential of continuing constitutional integration of the EU, or the questions that arise from an addition to the case law around EU citizenship – however what this thesis proposes to do, in contrast to the bulk of the literature as it exists, is to use the derivative rights of TCN family members as well as the Brexit process to highlight the changes and fluctuations in the constitutionalisation of EU citizenship law, and identify the potential routes in future jurisprudence that may be used by the CJEU to strengthen individual rights protections.

This thesis does not argue that EU citizenship can be entirely decoupled from its origin as a market citizenship (meaning that the rights of EU citizenship, such as freedom of

⁶⁷ O’Brien (n 38).

⁶⁸ Welsh (n 21); Hyltén-Cavallius (n 3); Reynolds (n 3).

⁶⁹ Solanke (n 36); Matthew Evans, ‘Abusing or Misusing the Right of Free Movement? The UK’s Policy towards EU Nationals Sleeping Rough’ in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Publishing 2020); O’Brien (n 67); Ferdinand Wollenschläger, ‘An EU Fundamental Right to Social Assistance in the Host Member State? The CJEU’s Ambivalent Approach to the Free Movement of Economically Inactive Union Citizens Post Dano’ (2022) 24 EJML 151.

⁷⁰ O’Brien (n 22); Konstadinides (n 19); Kochenov (n 19); Mark Dawson and Daniel Augustin, “After Brexit: Time for a Decoupling of European and National Citizenship?” (*Verfassungblog*, 14 July 2016) < <https://verfassungsblog.de/brexit-decoupling-european-national-citizenship/>> accessed 22 October 2021.

movement and residence, are dependent upon an individual's economic status, their participation in the single market economy of the EU, or their ability to be self-sufficient), or even that its origin as a market citizenship is entirely a negative one.⁷¹ EU citizenship will in all likelihood never be completely decoupled from its origin in the integration of an economic market, but to argue that there is no substance to EU citizenship beyond the status of market citizen is, practically speaking, a limited view and does not fully engage with the jurisprudence of the 2000s that established rights for EU citizens unrelated to, and not explicitly linked, to economic status.⁷² This view also does not account for the currents shifting towards clearer legal grounding of EU citizenship rights, as well as a potential 're-expansion' of access to social security rights, for both EU citizens and their TCN family members, of the jurisprudence in the 2020s.⁷³ Market citizenship was the *basis* of EU citizenship, but it has since come to exist along with some markers of a social citizenship (social security access, education, housing, family and fundamental rights) and that has potential for greater political integration and a more fundamental rights-based approach.⁷⁴

This thesis will not argue that EU citizenship is *only* a symbolic status meant to bolster rights linked solely to economic status. Free movement rights, and the rights of EU citizens

⁷¹ Martijn van den Brink, 'The Problem with Market Citizenship and the Beauty of Free Movement' in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov and Justin Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (CUP 2019); Michael Dougan, 'Free Movement: The Workseeker as Citizen' (2001) 4 CYELS 93; O'Brien (n 25); Jo Shaw, 'Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law' (2015) 17 CYELS 247; Nic Shuibhne (n 22); Nic Shuibhne (n 23).

⁷² Please see the following for the argumentation on EU citizenship as a sole market status: Dimitry Kochenov 'The Oxymoron of 'Market Citizenship' and the Future of the Union' in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov and Justin Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (CUP 2019); Nic Shuibhne (n 22); Charlotte O'Brien, 'Civis capitalist sum: Class as the new guiding principle of EU free movement rights' (2016) 53 CML Rev 937; Cristina Juverdeanu 'The EU Market Citizenship paradigm: embraced or abandoned?' (2022) 44 J Europ Integration 1011.

⁷³ Kostakopoulou (n 66). See also the concluding chapter of this thesis.

⁷⁴ Maxime Tecqmenne, 'Migrant jobseekers, right of residence and access to welfare benefits: one step forward, two steps backward?' (2021) 46 EL Rev 765; Sandra Seubert, 'Shifting Boundaries of Membership: The politicisation of free movement as a challenge for EU citizenship' (2019) 26 ELJ 48; Katerina Kalaitzaki, 'The Application of EU Fundamental Rights During the Financial Crisis: EU Citizenship to the Rescue?' (2021) 27 EPL 331.

and their dependent family members, are not in a constant state of advancement, but rather fluctuating depending on the advancement of ‘constitutional’ principles in any given time – hence the expansive judgments of the 1990s and the 2000s, when the CJEU was issuing judgments on citizenship that amounted to (or were considered as) policy-making and committed to the constitutional nature of citizenship and its rights linked to personhood.⁷⁵ The shifts in the jurisprudence in the 2010s, with an emphasis placed on the restrictive nature of secondary law, is a regression in the constitutionalisation process because the Treaties were *not* expanded to include more personal rights but were rather considered secondary in priority in the jurisprudence than the secondary law instruments codifying and defining the extension of the scope of rights.⁷⁶ The constitutionalisation process might be entering a phase of renewal now in the 2020s, when the commitment to the ‘social’ rights of citizenship are being more broadly argued at national level as well as supranational citizenship level.⁷⁷

The thesis acknowledges the critiques from some scholars regarding the CJEU’s conservative (as opposed to rights-expanding) rulings of the 2010s that have limited the welfare rights available to EU migrants in their member states of residence (see Chapter 2 of this thesis for more discussion on this line of case law).⁷⁸ That line of scholarship argues that EU citizenship functions primarily as an economic marker for the protection of workers, activated only under specific conditions. Despite acknowledging these criticisms, this thesis remains unconvinced by this overarching argument.⁷⁹ While in the post-2010 years, the CJEU set more prescriptive and narrower allowances for access to citizenship rights than had been seen prior to *Zambrano*, this thesis (as exemplified in the structure section above) does not consider that

⁷⁵ Wesemann (n 50); Sarmiento (n 53); Schmidt (n 24); Zglinksi (n 53); Šardl and Heinemann (n 51).

⁷⁶ Syrpis (n 23); Susanne K. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of the Case Law* (OUP 2018); Lazzerini (n 17).

⁷⁷ Maas (n 40); Kostakopoulou (n 39).

⁷⁸ See: Charlotte O’Brien (n 25) on the restrictions of welfare benefits available for non-working, non-independently wealthy moving EU citizens and vulnerable family members; also O’Brien (n 22).

⁷⁹ O’Brien (n 25); O’Brien (n 22).

this ‘retrenchment’ is permanent, or even necessarily indicative of an ‘abandonment’ of the possibility of EU citizenship evolving to contain increased social protections.

Rather, the jurisprudence that has come in for the most of those critiques was arising from a time period that this thesis will argue was the most politically and constitutionally fraught for the CJEU, when competing claims of Member State sovereignty and desires to limit intra-EU immigration and claims on social security by non-nationals were more vocal and politically volatile than they had been previously.⁸⁰ There is some truth in the argument that the turn towards restrictive judgments for social security access is an overcorrection in response to a problem that was disproportionately perceived within the Member States (see Chapter 4), however this thesis will argue that the overcorrection was temporary and that there is still scope for the jurisprudence of the 2020s to lead to a return of more rights-expanding CJEU judgments.⁸¹

The literature is also divided on the constitutional implications of the citizenship jurisprudence having been, mostly, left to the CJEU to determine, and which has contributed to the negative connotation of ‘constitutionalisation’ as evidence of the Court overstepping its judicial bounds – behaving as a policy-maker, or an activist, judiciary – and overarching EU competence into matters of sole domestic concern.⁸² Partly this is because of the lack of legislation establishing clear standard of free movement and citizenship rights for the economically inactive, a lack of clear structure which has also excluded TCN family members from a clearly-delineated legal framework that supports their own rights.⁸³

⁸⁰ Bernard and Leinarte (n 4); Shaw (n 3); Schmidt (n 76).

⁸¹ Evans (n 69); Wollenschläger (n 69); Konstadinides (n 19); Koen Lenaerts and José A. Guitérrez-Fons, ‘Epilogue on EU Citizenship: Hopes and Fears’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism* (CUP 2017); Lazzerini (n 17).

⁸² Seubert (n 74); Wesemann (n 50); Spaventa (n 4); Zglinksi (n 53); Moser and Bertholdt (n 34); Rasmussen (n and Martinsen (n 2).

⁸³ Daniel Thym, ‘The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens’ (2015) 52 CML Rev 17.

This is particularly problematic in the case of Brexit, as the legal framework of EU law that provided their protections has been replaced by a new body of domestic legislation (namely, assimilated EU law, as well as the framework of rights created under the Withdrawal Agreement) that provide far fewer protections for the rights than they were entitled to under the instruments of EU law (see Chapter 5).⁸⁴ Some scholars have criticised the Court for ‘overstepping’ its bounds in issuing decisions on citizenship questions that should have fallen solely under the purview of the Member States, especially in cases of static EU citizens.⁸⁵ This was greeted by other scholars, however, as the ‘coming of age’ of EU citizenship rights: perhaps the EU citizen would be perceived as an EU citizen first and those rights could be brought to bear against the Member State should it be proven that the Member State was violating any EU-specific right.⁸⁶ This, however, proved not to be the case; the CJEU clarified its case law almost immediately and brought itself back in line with an interpretive role awaiting specific triggers of EU law.⁸⁷

This thesis will also take the stance of arguing that the fundamental rights of EU citizenship are beginning to achieve more priority in the considerations of the CJEU, as well as being more explicitly linked to the developments and changes of the constitutional system across the EU.⁸⁸ With the Treaty of Lisbon and the elevation of the Charter of Fundamental Rights to the same binding status as the Treaty (it is now considered primary law on the same footing as the Treaties), Articles 7 and 8 of the Charter – those addressing specifically the right

⁸⁴ Bethan Lant, “Uncertainty persists for Zambrano carers following Court of Appeal ruling” (*Freemovement*, 26 January 2022) < <https://freemovement.org.uk/uncertainty-persists-for-zambrano-carers-following-court-of-appeal-ruling/> > accessed 13 March 2022; Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] C384/1101; Welsh and O’Brien (n 29).

⁸⁵ Nic Shuibhne (n 48) is the notable example.

⁸⁶ Dimitry Kochenov (n 72).

⁸⁷ Thym (n 83).

⁸⁸ Theodore Konstadinides and Niamh Nic Shuibhne, ‘A Constitutional Reading of EU Citizenship’ in L Besselink, N Lupo and M Wendel (eds), *Research Handbook on EU Constitutional Law* (Edward Elgar Publishing 2024).

to family and private life – became linked to the citizenship rights of the EU citizen.⁸⁹ While this thesis does agree that there has been a decline in the relative weight given to the fundamental rights of EU citizens in the jurisprudence of the 2010s compared to the limiting provisions of secondary law (e.g., the CRD), that decline has not been universal. For example, the rights of children are dealt with by the Court on similar levels of permissiveness as was seen in the ‘rights-expansion’ phase of constitutionalisation.⁹⁰

1.5: Concluding remarks

EU citizenship originated as an economic freedom designed to facilitate the integration of a customs union, the status is now very explicitly a status that is possessed and enjoyed by both mobile and non-mobile, and can be used by a citizen against their host and original Member State in order to protect their access to the fundamental rights that are tied into the citizenship status itself.⁹¹ This reached its high-water mark in the *Zambrano* judgment when the Court ruled that for any citizen to be deprived of their ‘genuine enjoyment of the substance’ of their citizenship rights would be enough to bring in the necessary link to Union law. The CJEU, however, took a step back in its 2010s case law from expanding citizenship rights to strictly defining the beneficiaries of those protections. By 2014, with the cases of *Dano* and *Dereci*, the Court scaled backwards into a seemingly more restrictive interpretation of EU citizenship rights during the rest of the 2010s.⁹²

⁸⁹ Treaty of Lisbon, Article 6 paragraph 1 and Article 6 paragraph 3; Elise Muir, ‘The fundamental rights implications of EU legislation: some constitutional challenges’ (2014) 51 CML Rev 219, 227; Martin van den Brink, ‘EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?’ (2012) 39 LIEI 273, 287.

⁹⁰ Adrienne Yong, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Hart Publishing 2019) 112; Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* [2017] ECLI:EU:C:2017:354.

⁹¹ Daniel Sarmiento and Eleanor Sharpston, ‘European Citizenship and Its New Union: Time to Move On?’ in Dimitry Kochenov (ed), *Citizenship within the EU Federal Context* (CUP 2017).

⁹² Blauberger et al (n 24); Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECLI:EU:C:2011:734; van den Brink (n 89) 282; Sarmiento and Sharpston (n 91).

That is why EU citizenship remains relevant as a topic of study – it is never a static status, and the shifting sands of how far the protections of EU citizenship extends can leave individuals in doubt about the nature of their protections and how far those protections can be enforced against a Member State. In the fluctuating interpretations of it by the CJEU and the Member States, there are individuals whose rights, and whose ability to enforce those rights, varies and fluctuates. Because of the nature of the constitutionalisation of EU citizenship – that of institutional actors seeking to define the outer edges – the individuals in question are often vulnerable ones, presenting cases at the ‘margins’ of the categories of protected individuals in EU law.⁹³ That is why EU citizenship still matters: it offers an important safety net of constitutionally embedded protections to vulnerable individuals, especially in the cases of TCN family members of EU citizens whose immigration status is not straightforward, even if that safety net possesses its own gaps. A stronger understanding of the constitutionalisation process, and the gaps of individually-enforceable rights protection within those processes, can help provide a better understanding of the avenues for rights protection for EU citizens and their TCN family members, especially in the United Kingdom where Brexit has offered many possibilities for individual rights protection standards to fall below the previous EU minimum standard.⁹⁴

In the case of the UK, free movement law can no longer be used to bolster EU citizenship rights; the only protections EU citizens – or, indeed, British citizens living in the EU – and their TCN family members will be offered are protections based upon the residual strength of the constitutional protections of EU citizenship. If those protections fail, or if gaps arise in the protection offered to different individuals, there is limited recourse allowable to the

⁹³ Welsh (n 21); O’Brien (n 25).

⁹⁴ Dicosola (n **Error! Bookmark not defined.**).

constitutional centre that underpins those citizenship rights.⁹⁵ Because the question of derivative rights often touch on vulnerable groups of people, this thesis also aims to highlight and humanise arguments of the scholars that push for a more ‘liberal’ jurisprudence of EU citizenship. This thesis will serve as a case study in transitioning immigration and citizenship law into a post-EU landscape, which in an era of continued European fragmentation will continue to be useful.

⁹⁵ For example, it is certainly time-delineated: the provisions for recourse to the CJEU expire after 8 years from the transition period. For more on the constitutional relationship between the CJEU and ongoing British jurisprudence, see Lazowski (n 30). See also Welsh and O’Brien (n 29).

Chapter 1: The constitutional framework of EU citizenship

1.1: Introduction

The questions about EU citizenship tend to mirror the questions about the European Union project as a whole.¹ This can be in part explained by the uniqueness of the European Union and EU citizenship on the world stage: there is nothing that can serve as a perfectly analogous situation for purposes of comparison or learning.² The closest example that exists in politics or international law is that of United States citizenship and its federalist model, but even that is not a comfortable comparison: though there are elements of the EU that resemble a federalist system, a resident of California who wishes to move to New York will not face the same bureaucratic or logistical obstacles as a citizen of Spain wishing to relocate to Germany.³ The differences in terminology are themselves indicative of a significant difference in the legal grounding, and the constitutional oversight of the federal United States government to ensure the rights of its mobile citizens across internal borders is by far more comfortably anchored in traditionally recognised and enforced constitutional principles than that of the EU.

The status of EU citizen as a constitutional citizenship is predicated upon elements of a market citizenship.⁴ From its early days, there was an understanding by the actors that were shaping the ‘forward march’ of EU citizenship that it was a constitutional status, implicitly and explicitly linked to the legal framework of the EU, and not merely the ‘buy-in’ of an individual participating in an integrated marketplace.⁵ As Kostakopoulou writes, echoing the AG opinion

¹ Dora Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ (2005) 68 MLR 233; Lisa Conant, ‘Failing backward? EU citizenship, the Court of Justice, and Brexit’ (2021) 28 JEPP 1592.

² Rainer Bauböck, ‘Why European Citizenship? Normative Approaches to Supranational Union’ (2007) 8 Theoretical Inquiries in Law 453.

³ *ibid.*

⁴ Hanneke van Eijken, *EU Citizenship and the Constitutionalisation of the European Union* (Europa Law Publishing 2015) 16-17; Kostakopoulou (n 1) 241.

⁵ Eleanor Spaventa, ‘Seeing the wood for the trees? On the scope of Union citizenship and its constitutional effect’ (2008) 45 CML Rev 13; van Eijken (n 4); Case C-378/97 *Arrondissementsrechtbank te Rotterdam*,

in *Wijsenbeek* that EU citizenship is both an end-goal of the Union and not merely a parameter of the common market:⁶

It is thus unfortunate that much of the relevant literature in the 1990s did not recognise that the value of European citizenship existed not so much in what it *was*, but in what it ought to be. As an institutional designer and agent of change, the European Court of Justice has succeeded in institutionalising European citizenship, that is, in giving meaning, specificity and value to it, thereby establishing new institutional norms.⁷

The constitutionalising of EU citizenship, by the CJEU and the EU bodies, has been both incremental, non-linear, and oftentimes contradictory, complex, and confusing.⁸ The CJEU did not embark upon a linear, strategic action based upon its interest in inscribing EU citizenship into reality. Its practice of issuing jurisprudence that functions along an individual, marginal-by-marginal case basis has led to what can be described as ‘incremental’ gains in the protection of citizenship rights within the Member States that are sometimes too easily set back by a change in institutional or political priority within the Member States or at the EU, such as the restriction of social security rights access for EU citizens in the United Kingdom (see Chapter 4).⁹

This thesis, as described in the introduction, will be divided into two parts: the rights-expanding constitutionalisation phase, when the gains in citizenship protections were being issued; and the ‘rights-delimitation’ phase, when rights were being defined and delineated along secondary law instruments.¹⁰ This chapter will trace the first phase of the constitutionalisation of EU citizenship, analysing its establishment as an independent,

Netherlands v Florus Ariël Wijsenbeek [1999] ECLI:EU:C:1999:439 paras 35-36; *ibid* Opinion of AG Cosmas para 86; Kostakopoulou (n 1) 263.

⁶ *Wijsenbeek* (n 5) Opinion of AG Cosmas para 88.

⁷ Kostakopoulou (n 1) 263, emphasis mine.

⁸ Conant (n 1).

⁹ Kostakopoulou (n 1); Koen Lenaerts, ‘EU Citizenship and the European Court of Justice’s ‘stone-by-stone’ approach’ (2015) 1 *International Comparative Jurisprudence* 1; Charlotte O’Brien, ‘Civis capitalist sum: Class as the new guiding principle of EU free movement rights’ (2016) 53 *CML Rev* 937.

¹⁰ Eftychia Constantinou, ‘Judicial Europeanisation Through Deconstitutionalisation: The Case of the Analogous Application of the Citizenship Directive’ (2024) 9 *European Papers* 529.

constitutional status, the role of the CJEU in shaping it and endowing it with rights, the sources of law governing it within the constitutional and legal framework of the EU, and the linking of the constitutional status of citizen to the previously economic status of worker.

1.2: The linking of freedom of movement for workers to the status of EU citizen

The origins of EU citizenship can be found in the origins of the EU as a whole: a political and economic union with the primary objective of ensuring that an internecine war would not once more devastate the continent.¹¹ The EU was originally a customs union, and later an economic community, and its stated objective at its inception was the interlinking of economic interests to preclude the possibility of a third continental war.¹² EU citizenship is, by its nature, a compromise between economic rights guaranteed by treaty and legal protections that, while existing in basic forms in the constitutional documents of the Treaties, have been confirmed and expanded upon by the CJEU.¹³ It is a compromise status that enshrines a political protection for the freedom of movement that EU citizens enjoy, a linking of the social rights and the market participation, a compromise that exists even without the explicit judicial protections of the CJEU arising out of post-1992 case law.¹⁴ Any case law seeking to expand the rights of EU citizenship away from purely economically active workers seeking

¹¹ Álvaro Castro Oliveira, 'Workers and other persons: step-by-step from movement to citizenship – case law 1995-2001' (2002) 39 CML Rev 77 provides an excellent overview of the case law and forms the primary citation for the chronology set out in this section.

¹² The European Coal and Steel Community (ECSC) and the European Economic Community (the EEC). The EEC became the European Community (the EC) in 1993 and formed the first pillar of the European Union until 2009, when the Treaty of Lisbon came into effect.

¹³ Oliver Garner, 'The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status' (2018) 20 CYELS 116.

¹⁴ Theodore Konstadinides, 'European Citizenship in a Constitutional Context: where the 'social' coexists with the 'market'' [2022] SIEPS <sieps.se/en/publications/2022/European-citizenship-in-a-constitutional-context-where-the-social-coexists-with-the-market> accessed November 21 2022; Augustín José Menéndez, 'Which Citizenship? Whose Europe? – The Many Paradoxes of European Citizenship' (2014) 15 GLJ 908, 908; Castro Oliveira (n 11).

employment and marketplace participation across the internal borders of the EU had to contend with and occasionally go against those market origins.¹⁵

The rights associated with EU citizenship were confirmed and expanded to include a political and democratic dimension with the introduction of the Treaty of the Functioning of the European Union.¹⁶ EU citizenship was introduced as an attempt to move from a mainly economic union to a political one, as a linking of economic rights to a political project, as well as to increase the protections for the rights which entailed from EU legislation beyond solely those Member State nationals who were economically active and moving across the borders of the Member State of their nationality.¹⁷ This linkage is worth exploring in detail in this section because of the importance of the way the rights that had previously been linked to freedom of movement and other market provisions, such as non-discrimination, were attached to *the rights of citizenship of the Union itself* (the case law of which will be examined in more depth in Chapter 2 of this thesis).¹⁸ It was this time period of case law that established EU citizenship as a discrete legal category that carried with it rights that could be enforced against Member States by not only the EU citizen, but their TCN family members as well.

Citizenship law and rights within the EU emerged as a natural byproduct of increased integration in immigration legislation and control as Europe shifted, continentally, from an exporter of immigrants to an importer (to put it in the crudest of possible economic terms), as well as an increase in the territorial reach of the EU as Member States continued to accede into

¹⁵ Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CML Rev 1597; O'Brien (n 9) and Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Oxford Hart Publishing 2017). It remains to be seen how the shifting political priorities in the aftermath of the Covid pandemic, the Eurozone crisis, and the refugee crisis of the late 2010s will impact the rulings of the Court long-term. The thesis will return to this argument in Chapters 4-5, when discussing the changing nature of EU citizenship as a result of Brexit impacts on derivative rights of residence readings.

¹⁶ Consolidated Treaty on the Functioning of the European Union [2012] OJ C326/56.

¹⁷ Willem Maas, *Creating European Citizens* (Rowman & Littlefield 2007); Willem Maas, 'The Origins, Evolution and Political Objectives of EU Citizenship' (2014) 15 GLJ 797; Kostakopoulou (n 1); Dora Kostakopoulou, 'Co-creating European Union Citizenship: Institutional Process and Crescive Norms' (2012) 15 CYELS 255.

¹⁸ Gareth Davies, 'The High-Water Point of Free Movement of Persons: Ending Benefit Tourism and Rescuing Welfare' (2004) 26 JSWFL 211.

the twenty-first century and the ratification of the Schengen Agreement in 1985 and 1990.¹⁹ Countries with vastly different citizenship and immigration policies forced the European order into finding ways of reconciling those differences into a coherent supranational body of laws. Intra-European immigration was officially codified as a right of European workers in the Treaty of Rome 1957, which allowed for the free movement of workers within the European community. This included the right to accept an offer of employment in any of the member-states of the European Economic Community. From that moment on, immigration policies at the European level were instituted with the aim of eliminating bureaucratic barriers to the movement of workers, even as this aim was not always met with enthusiasm by the governments of the Member States even as far back as the 1956 discussions on whether or not there should be introductions of quotas on free movement of persons; extending the beneficiaries of the freedom of free movement to categories other than workers, such as students; allowing for the aggregation of social security and pension benefits; and, eventually, the concept of European citizenship itself and linking the rights of free movement to a citizenship right in and of *itself*, with the door thereby opened for fundamental rights-based approach decisions in the CJEU in later years.²⁰

The rights of EU citizenship are rights often already protected by the principle of free movement – namely, the right of non-discrimination, social security coordination and aggregation, and the right of family reunification — and so the throughline of what is an EU

¹⁹ Pieter Boeles, *European Migration Law* (Intersentia 2014).

²⁰ *ibid*; Leslie Page Moch, *Moving Europeans: migration in Western Europe since 1650* (Indiana University Press 2015); Hanneke van Eijken, ‘Tjebbes in Wonderland: on European citizenship, nationality and fundamental rights’ (2019) 15 EuConst 714; Sara Iglesias Sánchez, ‘The Constitutional Status of Foreigners and European Union Citizens: Loopholes and Interactions in the Scope of Application of Fundamental Rights’ in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Oxford Hart Publishing 2017); Catherine Barnard and Sarah Fraser Butlin, ‘Ceding Control and Taking it Back: The Origins of Free Movement in EU Law’ (2022) 51 ILJ 643; see also Konstadinides (n 14).

citizenship right rather than strictly a freedom of movement right is oftentimes unclear.²¹ It was therefore unclear from the very beginning whether someone who, for example, was born in Germany but never exercised their free movement rights outside of Germany would be able to rely on their EU citizenship rights to reunify their Tunisian family, as those rights were originally understood to be bound up in the principle of workers moving across borders.²² This ambiguity, and the increased layering of EU citizenship and freedom of movement rights, formed the basis of the constitutional pressure between the competing claims of ‘a Europe of citizens’ versus ‘a Europe of workers’, and partly explains the chronologically inconsistent nature of the constitutionalisation of EU citizenship as a whole.²³ A citizen possessing the right to move with their family is indicative of a stronger constitutionalised EU citizenship, one that affords rights beyond strictly that of free movement of workers. The emphasis is beginning to shift from pure market considerations to an increased focus on the social, and rights, aspects of a EU citizenship.²⁴

In the 1980s and 1990s, as the discussion on citizenship and increased European integration became more of a priority, freedom of movement rights for workers began to be expanded into freedom of movement rights *more generally*, including for individuals who did not fall under the strict definition of worker at the time.²⁵ The right to freedom of movement has moved towards right to freedom of movement of persons, partly because of the case law that extended ‘worker’ protections to people who were not strictly workers, such as students,

²¹ Dimitry Kochenov, ‘The Right to Have What Rights? EU Citizenship in Need of Clarification’ (2013) 19 ELJ 502; this paradox was also being discussed as far back as 1998, namely in Jo Shaw, ‘The Interpretation of European Union Citizenship’ (1998) 61 MLR 293, 304.

²² Engin F. Insin and Michael Saward, ‘Questions of European Citizenship’ in Engin F. Insin and Michael Seward (eds), *Enacting European Citizenship* (CUP 2013).

²³ Floris de Witte, ‘The Liminal European: Subject to the EU Legal Order’ (2021) 40 YEL 56.

²⁴ Jane Jenson, ‘The European Union’s Citizenship Regime: Creating Norms and Building Practices’ (2007) 5 Comparative European Politics 53; Kostakopoulou (n 1).

²⁵ Maas (n 17); Martin Van den Brink, ‘The Problem with Market Citizenship and the Beauty of Free Movement’ in F. Amtenbrink and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (CUP 2019).

job-seekers, and those family members of former workers. The right to freedom of movement became a fundamental right of EU citizenship, one that must be protected and that would preclude Member States from making legislation that would infringe upon it.²⁶ The right to move, as well as the right to *potentially* move, became attached to EU citizenship and therefore a part of EU law. That allowed for the derivative right of residence for the family members of workers to develop from an economic incentive to cross a border, to a *benefit* that could be enjoyed by any EU citizen who had crossed a border to, even theoretically, participate in the labour market, whether presently or in future. Eventually, this protection expanded to include EU citizens who had the right to cross a border, even if a border had not yet been crossed.

The rights of individuals to move across borders expanded in the 1980s-1990s; however, those rights remained inextricably linked to economic principles. Workers, jobseekers, and students were included in Treaty protections, but those who were not economically active, or only potentially economically active, were not protected by the primary legislation of EU treaties under the accepted practices of the common market.²⁷ The Maastricht Treaty of 1992, and later the TFEU, changed this by expanding the protection of primary legislation to *all* citizens of the European Union, regardless of economic participation and whether or not they moved across borders, and the CJEU began interpreting the Treaty in ways that would limit the ability of Member States to enforce domestic immigration policies that could be construed as a potential obstacle to freedom of movement (unless a derogation from the requirement to facilitate freedom of movement meets the proportionality and ‘due interest’ thresholds for exemptions), such as denying a returning worker the right to return to their

²⁶ *ibid* 50; Treaty on European Union (TEU, Maastricht Treaty) 1992 OJ C191, Article 3(2); Jenson (n 24).

²⁷ Sylvia de Mars, Colin Murray, Aoife O’Donoghue, and Ben Warwick, ‘Continuing EU Citizenship ‘Rights, Opportunities and Benefits’ in Northern Ireland after Brexit’ for the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission, published March 2020.

Member State of nationality with a family member or a spouse.²⁸ Elevating the right of freedom of work to a right to *move*, to seek employment rather than move to fulfil already secured employment, to a fundamental right of EU citizenship and protected by Treaty meant that the right to move ‘wishfully’ was legally and formally decoupled from employment status, and brought that right into the ambit of potential CJEU jurisdiction.²⁹ The Treaty of Maastricht was meant to decouple citizenship from freedom of movement for workers, but freedom of movement was still linked to employment status and the exceptions to the protections remained exactly that, exceptions.³⁰ Workers that had moved across borders had the most rights, and those were granted automatically by virtue of the internal EU border having been crossed to take up employment; non-workers had fewer rights, had to prove their right to access those rights, and some were not granted automatically.³¹

The definition of worker has also been expanded to apply to jobseekers and those who have lost their employment.³² The period in which job-seekers can remain in the Member State without being in active employment vary from state to state, but cannot be less than three months.³³ However, that time limit, within which a migrant worker can be asked to leave if there is no genuine chance of that worker obtaining employment, must be put aside.³⁴ It is certainly unlawful for a Member State to immediately require a migrant worker to leave the

²⁸ *ibid*; Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECLI:EU:C:1992:296; Dimitry Kochenov, ‘Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights’ (2009) 15 *Colum J Eur L* 169. See also Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECLI:EU:C:1974:82 on the need to remove national trade barriers and legislative harmonisation to accomplish the single market as a roughly analogous situation.

²⁹ Van den Brink (n 25); Stefano Montaldo, ‘Freedom of movement, social integration and naturalization: Testing reverse discrimination in the recent case law of the Court of Justice’ (2018) 3 *European Papers* 1481; TFEU (n 16) Articles 20-21; Castro Oliveira (n 11).

³⁰ Davies (n 18); Elizabeth Meehan, *Citizenship and the European Community* (Sage Publishing 1993).

³¹ De Witte (n 23).

³² Case C-138/02 *Brian Francis Collins v. Secretary of State for Work and Pensions* [2004] ECLI:EU:C:2004:172 para 29.

³³ Catherine Barnard, *The Substantive Law of the EU* (6th edn, OUP 2019).

³⁴ Case C-292/89 *The Queen and the Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECLI:EU:C:1991:80 para 22.

state if they lose their employment.³⁵ Family members and workers are both equivalently protected from expulsion if the worker can provide evidence that they are continuing to seek employment and that they have a genuine chance of being employed.³⁶ This protection was then extended to Union citizens seeking employment in another Member State than that of their residence and education, and that the protections from non-discrimination on the grounds of nationality must also be extended by the Member State if there is a tradition of the state facilitating the transition from student to worker for the nationals of that state.³⁷

These protections, expanded to non-discrimination and expanded beyond the strictest definition of ‘worker’, were part of the linkage of freedom of movement protections to those who were moving not only to take up employment, but to seek it and expand their possibilities of it.³⁸ The fact that these provisions were also extended to self-sufficient participants was also a signal that freedom of movement was no longer explicitly linked to employment status or economic participation.³⁹

These protections were also expanded to include family members who had not moved with the worker, and resided in a different Member State to the residence of the worker, but could still rely on social benefits extended to that worker in the case of family subsistence payments.⁴⁰ This situation would apply even if the spousal relationship between the worker and the family member claiming the payment had been dissolved, especially if there were a child in the case triggering another applicability of ‘family member’.⁴¹ This expansion of the

³⁵ Case C-344/95 *Commission of the European Communities v Kingdom of Belgium* [1997] ECLI:EU:C:1997:81 para 18.

³⁶ The Immigration (European Economic Area) Regulations 2016, SI 1052/2016 s2(14).

³⁷ Case C-258/04 *Office national de l’emploi v Ioannis Ioannidis* [2005] ECLI:EU:C:2005:559 paras 25-28.

³⁸ Barnard (n 33).

³⁹ *ibid.*

⁴⁰ Joined Cases C-245/94 and C-312/94 *Ingrid Hoever and Iris Zachow v Land Nordrhein-Westfalen* [1996] ECLI:EU:C:1996:379 para 38.

⁴¹ Case C-363/08 *Romana Slanina v Unabhangiger Finanzsenat, Außenstelle Wien* [2009] ECLI:EU:C:2009:732 para 30; the specific role of children in CJEU citizenship jurisprudence will be examined in more depth in Chapter 3.

rights of EU citizenship extended beyond the worker, the job-seeker, or the student to their family members was a signal that the CJEU was shifting the focus of freedom of movement protection provisions even further away from strictly economic provisions. The rights of moving EU citizens to integrate into the host Member State society were being prioritised – and that included protection of family members.

While the expansion of protections for ‘worker’ to a broader definition of protected person as an EU citizen as well as jobseekers, those constitutional expansions could still be considered to fit under the definition of a ‘market’ citizen. After all, workers and those seeking work are still participating in an economic marketplace, and the protections awarded to their family members were intended to increase the likelihood of the worker fully integrating into the Member State and continuing to reside there to continue to seek employment.⁴² The case law concerning students, therefore, was of vital importance in setting the precedent that expanded the protections of freedom of movement to anybody possessing EU citizenship rather than specifically worker status – students, after all, are not part of an economic marketplace.⁴³ The movement towards the protection of these individuals was a signal shift of the gradual weakening of the explicit link between active economic participation and the protections of free movement required to trigger CJEU protections as well as the viewpoint on migrants shifting away from them being perceived as strictly economic factors and as individuals with a set of rights that could be enforced against Member States, even against potentially the Member State of their nationality and residence.⁴⁴ This tendency, towards the prioritisation of rights of movement for the TCN family members of EU citizens, was a beginning of a shift

⁴² Elspeth Guild, ‘EU Citizens, Foreign Family Members and European Union Law’ (2019) 21 EJML 358; Niamh Nic Shuibhne, ‘Reconnecting free movement of workers and equal treatment in an unequal Europe’ (2019) 43 EL Rev 477; O’Brien (n 9); O’Brien (n 15).

⁴³ Katerina Kalaitzaki, ‘EU Citizenship as a Means of Broadening the Application of EU Fundamental Rights: Developments and Limits’ in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020).

⁴⁴ Barnard (n 33); Konstadinides (n 14).

from the right to *reside* rather than purely the right to *move*.⁴⁵ This right of residence, rather than strictly movement, was another building block in the constitutionalisation process of EU citizenship, as it afforded more rights linked very specifically to the status of EU citizens and their family members themselves, even in scenarios where that right was decoupled from the freedom of movement right itself. The status of EU citizen was beginning to expand the umbrella of who could be protected by it.

Because the citizenship itself originated in a marketplace, it was never able to fully develop beyond that of a citizenship linked to economic status and value.⁴⁶ Perhaps that is why, in its post-*Zambrano* years, the Court felt able to follow Member State preference in limiting the rights of EU citizenship along the lines of marketplace contributions and potential burdens on the financial systems of domestic welfare states.⁴⁷ While all users of social security benefits have been victims of political demonisation in an era of austerity, EU citizen and their TCN family members who rely on social security benefits have been both easy scapegoats and easy sacrifices to the political discourse and the austerity measures themselves.⁴⁸ It has taken several decades of litigating at the level of the CJEU to attempt to enshrine EU citizenship as anything beyond a purely economic marker: the ‘social’ aspect of citizenship has become more embedded in EU citizenship, with access to the social security and educational systems of the host Member State guaranteed in EU law for EU citizens, whereas the ‘political’ aspect of citizenship, including the right to vote in national elections of the host Member State, is not

⁴⁵ Siofra O’Leary, *The evolving concept of Community citizenship: from free movement of persons to Union citizenship* (Kluwer Law International 1996), 109.

⁴⁶ *ibid.*

⁴⁷ O’Brien (n 15).

⁴⁸ Catherine Jacqueson, ‘EU social citizenship: between individual rights and national concerns’ in Frans Pennings and Martin Seeleib-Kaiser, *EU Citizenship and Social Rights* (Edward Elgar Publishing, 2018); Cecilia Bruzelius, Constantin Reinprecht and Martin Seeleib-Kaiser ‘Stratified Social Rights Limiting EU Citizenship’ (2017) 55 JCMS 1239; Charlotte O’Brien, ‘The ECJ sacrifices EU Citizenship in vain: *Commission v UK*’ (2017) 54 CML Rev 209.

guaranteed.⁴⁹ Questions around freedom of movement and citizenship rights have become more sophisticated and more interlinked, touching upon the conditions that Member States need to create to enhance the enjoyment of citizenship status, including making provisions to accommodate a citizen's carer, family members, or other dependants, whether those dependants are European citizens themselves or third-country nationals.

As in the citizenship jurisprudence, the derivative rights jurisprudence moved from purely economic incentive for derivative rights protection to prioritising the integration of workers and families into the societal fabric of the host Member State: a shift away from the right merely to move, but the right to reside; and the conception that the rights moved across the border and then stayed there, even if the original status that caused the right to migrate had ceased or shifted.⁵⁰ This was exemplified in the judgments that prioritised the access of family members to the benefits of the host Member State on an equal footing to the nationals of the Member State themselves, and most importantly in the continuation of that right *beyond* the employment status of the relevant EU worker.⁵¹ This emphasis on the right of residence, rather than solely the right to move, will prove of importance in Chapter 4, when the questions of how the United Kingdom chose to implement EU rights for TCN carers was interpreted by the domestic courts in light of EU law.

That quirk was ultimately built upon when the cases of citizenship and derivative rights of residence moved towards less of an 'economy first' grounding (most explicitly in *Grzelczyk*

⁴⁹ Marc Hooghe and Jennifer Oser, 'Social and Political Citizenship in European Public Opinion: An Empirical Analysis of T.H. Marshall's Concept of Social Rights' (2018) 53 *Government and Opposition* 595; Jo Shaw, *EU Citizenship and Political Rights in an Evolving European Union* (Routledge 2013); Dora Kostakopoulou, 'European Union citizenship rights and duties: Civil, political and social' in Engin Isin and Peter Nyers, *Routledge Handbook of Global Citizenship Studies* (Routledge 2014).

⁵⁰ Council Directive 2004/38/EC 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC OJ L158/30, Article 3.

⁵¹ Barnard (n 33) 381.

and later *Zambrano*).⁵² The bridge between economically active citizenship and non-economically active members of the EU had been sketched and the precedent created, where it would be possible to treat EU citizens *as* citizens with rights independent of freedom of movement ones.⁵³ While in *Baumbast* the Court did not definitively reject market participation as the primary consideration in whether or not an EU citizen could be treated to all the protections inherent in European citizenship, it reinforced the precedent for individuals to be treated as *independent* bearers of citizenship rights without having reference to an economic participation and extends that protection to the members of their family as facilitators of their integration.⁵⁴ This complex treatment of independent rights-bearers deriving their rights from a worker who loses his freedom of movement rights, complemented the attempts of the Court to only give judgments in questions of contested cross-border movements prior to *Zambrano* and *Zhu and Chen*, is what has given rise to the later discussions of European citizenship between static and mobile European citizens.⁵⁵

The freedom of movement codified in citizenship rights therefore had its origin in the freedom of movement of workers to take up employment in any of the Member States of the European Union. The protections of citizenship (right to consular protection of all Member States of the EU when in a country without consular presence of the Member State of nationality, for example) to that economic right were added in 1992, when the protections of workers began to be interpreted by the Court as protections of *citizenship* rather than

⁵² Lorin-Johannes Wagner, ‘Member State nationality under EU Law – To be or not to be a Union citizen?’ (2021) 28 MJ 304.

⁵³ Oxana Golyner, ‘Partial Migration in the EU after the *Baumbast* Case: Bringing Social and Legal Perspectives Together’ (2004) 15 KLJ 167, 180.

⁵⁴ Angie Gago and Francesco Maiani ‘Pushing the boundaries: a dialogical account of the European case-law on access to welfare’ (2022) J Eur Integr 44, 261; Francis G. Jacobs ‘Citizenship of the European Union – A Legal Analysis’ (2007) ELJ 13, 59; Case C-413/99 *Baumbast and R. v. Secretary of State for the Home Department* [2002] ECLI:EU:C:2002:493 para 50.

⁵⁵ Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECLI:EU:C:2004:639; Golyner (n 53) 384.

protections of strictly or simply *workers*.⁵⁶ Some of those rights of citizenship were still, however, linked to the right of freedom of movement. Workers could move across an internal border to reside in another Member State with their family and had very little other requirements to meet in order to qualify as beneficiaries of Union law and entitled to host Member State benefits. Students, job-seekers, the formerly employed still had rights in their Member State of residence as did their family members, but those rights were more conditional and the Member State national authorities had more leeway in determining their access to those benefits.⁵⁷ Prior to *Singh*, EU jurisdiction very clearly only came into play when determining which benefits in *host* Member States moving EU citizens and their family members could have access to. This directly contributed to the stratification within CJEU case law of ‘static’ citizens versus ‘moving’ citizens, and protections were still granted to workers *de facto* as they were the ones most commonly moving across borders. It was the expansion of protections previously awarded only to workers to other categories of persons that contributed therefore to the expansion of citizenship rights as well, eventually leading to the potential inclusion of static citizens in the ambit of CJEU protection. Freedom of movement, therefore, is considered a fundamental right granted to the *status of EU citizen* – a status granted to *personhood* rather than strictly an economic one.

The expansion of rights, away from the purely economic ones linked to freedom of movement for workers and including more robust protections for TCN family members of EU citizens as well as non-working, non-moving EU citizens, is part of this thesis’s argument for the need for an EU citizenship that – while containing elements of the market status that

⁵⁶ Maas (n 17).

⁵⁷ Nic Shuibhne (n 42); Daniel Thym, ‘Introduction: The Judicial Deconstruction of Union Citizenship’ in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Oxford Hart Publishing 2017).

originated it – is also a rigorously constitutionalised and independent status. The next section will further the normative case for EU citizenship.

1.3: The normative case for EU citizenship

Every critique offered of EU citizenship includes an implicit assumption within that critique itself of what EU citizenship ought to, or can, offer.⁵⁸ Either the citizenship offers too targeted and limited a scope of protections that do not extend sufficiently beyond increased protections for non-national workers.⁵⁹ Others offer the critique that the status of the citizen itself is operating in a field of too much legal uncertainty.⁶⁰ Some critiques also suggest the act of constitutionalising EU citizenship in order to offer rights protections to the individuals who carry it is indicative of a CJEU that is overstepping its constitutional limits, or stretching EU law beyond what it has been agreed to by the Member States or is permitted within its own constitutional documents.⁶¹ For those who believe EU citizenship should offer more advanced rights protections, especially in the cases of social security and welfare access, the direction of travel in citizenship jurisprudence since the early 2010s will be considered a disappointment.⁶² For those who consider the role of the CJEU to be a strictly interpretive one, and that the Court has become too actively political in its definition of EU citizenship as a fundamental status with rights that Member States are obligated to respect, the retrenchment of the 2010s is an

⁵⁸ Dimitry Kochenov, 'The essence of EU citizenship emerging from the last ten years of academic debate: beyond the cherry blossoms and the moon?' (2013) 62 ICLQ 97; Dora Kostakopoulou, 'European Citizenship: Writing the Future' (2007) 13 ELJ 623; Bauböck (n 2); Pälvi Johanna Neuvonen, 'A Revised Democratic Critique of EU (Citizenship) Law: From Relative Homogeneity to Political Judgment' (2020) 21 GLJ 867.

⁵⁹ T.H. Marshall, *Citizenship and Social Class: And Other Essays* (University Print 1950); O'Brien (n 15).

⁶⁰ Kochenov (n 21).

⁶¹ *ibid*; Conant (n 1); Susanne K. Schmidt 'No match made in heaven: Parliamentary sovereignty, EU over-constitutionalisation and Brexit' (2020) 27 JEPP 779; Neuvonen (n 58); Catherine Barnard and Emilija Leinarte 'The Creation of European Citizenship: Constitutional Miracle or Myopia?' (2022) 24 CYELS 24.

⁶² Jo Shaw, 'EU Citizenship: Still a Fundamental Status?' in Rainer Bauböck (ed), *Debating EU Citizenship* (IMISCOE Research Series 2019).

appropriate one.⁶³ Therein lies the perennial debate at the heart of EU citizenship: what should it be, and how far should the scope of protections extend?

EU citizenship is, importantly, not a merely symbolic status nor merely freedom of movement for workers by another name. There are of course elements of freedom of movement for workers that apply to EU citizenship – freedom of movement is, after all, the core of all EU citizenship rights, and the right upon which the layers of EU citizenship rights have been based and built.⁶⁴ There are elements of EU citizenship that protect non-workers, such as jobseekers and students, and most importantly, elements of EU citizenship protects not only the EU citizen, but the TCN family members of that EU citizen. The protections of non-discrimination, equal treatment, proportionality and fundamental rights as constitutionalised within EU citizenship (see Chapter 2) apply to EU citizens who have moved and are lawfully resident in Member States other than their nationality, as well as their TCN family members. There is no political appetite within the Member States, currently, to expand the rights of EU citizens further than the freedom of movement rights linked to citizenship as constitutionalised within the Treaty, which limits the scope of action for the CJEU and the EU bodies. However, the expansion that has been seen since the 1990s has been introduced and constitutionalised by the Court into a status with attendant rights that *cannot* be overturned or denied by the Member States beyond the definitional phase that followed the rights-expansion of the 2010s.⁶⁵

EU citizenship, therefore, throughout this thesis, will be argued as a status that, while historically originating within a marketplace as an economic status, is a status that contains elements of citizenship as defined by Marshall, and while not actively functioning as a social

⁶³ Floris de Witte, ‘The constitutional quality of the free movement provisions: looking for context in the case law on Article 56 TFEU’ (2017) 42 EL Rev 313.

⁶⁴ Nic Shuibhne (n 15); Konstadinides (n 14).

⁶⁵ Barnard and Leinarte (n 61); Henri de Waele, ‘EU Citizenship: Revisiting its Meaning, Place and Potential’ (2010) 12 EJML 319.

citizenship, does have the potential for becoming a social citizenship in time.⁶⁶ It is a constitutionally-recognised citizenship that offers protections for individuals regardless of their participation or contribution to an economic project, even if the personal acquisition and defence of those rights is easier to evidence and bring into scope of EU law if that contribution is made.⁶⁷ It does currently offer a model for rights protections for individuals, especially vulnerable individuals, who find themselves potentially locked out of the social security or residence rights to utilise when needed.

However, those protections are not universal, and the access to them by individuals is also not universal. An EU citizen must meet certain preconditions to avail themselves of their specifically citizenship rights under the Treaties, the Charter, or the Citizenship Directive, and the rights for their family members are dependent upon the citizen meeting those preconditions. But the patterns in the citizenship jurisprudence and the constitutionalisation of EU citizenship is towards that social citizenship, even as the CJEU balances the competing pressures of Member States wishing to restrict the access of EU migrants and TCNs to their social systems. This ‘aspirational’ nature of EU citizenship has been reinforced in the recent case of *Commission v Malta*.⁶⁸ EU citizenship entails political, social, and democratic rights, not just for the EU citizen, but for their TCN family member, in the host Member State. Those rights are ‘imposed’ upon the Member State and the Member State undertakes to enforce them as an expression of good faith and solidarity towards not only the EU, but the EU citizen who is

⁶⁶ A non-legal, but still rather apt metaphor, here would be phase play in rugby. Constitutionalisation of European citizenship as it builds towards a fully-encompassing social status that applies universally to all Union citizens without any preconditions having to be met is, currently, building the phases; sometimes a phase is moved backwards due to competing political, social, and constitutional pressures and the Court, or other EU bodies, respond to that backwards pressure by reevaluating the play. It does not mean that the phases are building towards nothing, or that the phases will be abandoned; it is merely impossible to adequately analyse the success of the phase building until the play concludes, one way or the other. The constitutionalisation of EU citizenship is phase play that has not yet reached its completion. See the conclusion in de Waele (n 65).

⁶⁷ Van Eijken (n 4) 15.

⁶⁸ Case C-181/23 *European Commission v Malta* [2025] ECLI:EU:C:2025:283.

making use of their EU citizenship rights, and their TCN family members.⁶⁹ The importance of EU citizenship as an expression of the EU project must therefore be preserved by ensuring that the beneficiaries of that project are those who have ‘bought into’ the aspirational nature of EU citizenship, and not just monetarily done so.⁷⁰

The constitutionalisation of EU citizenship is a piecemeal process and is continually evolving. It does, currently, offer a level of protection, even if that protection comes with preconditions, but it is developing towards a citizenship that offers wider protections beyond those preconditions. It is an aspirational status, but one that does have solid legal grounding that offers practical protections to those who benefit from it. The social protections embedded within EU citizenship – including the right to work – are in and of themselves aspirational: EU citizenship is linked to a right of mobility, and a right to use that mobility to seek a better life elsewhere.⁷¹ EU citizenship is the constitutionalisation, and embodiment of rights within that status, of a right to migration endowed with the rights that come with belonging. By endowing EU citizenship with a constitutional layer of protections, the CJEU and the EU institutions endow the aspirational and social symbolism of the rights of migrants to the constitutional obligations to protect the rights of *citizens*.⁷² These protections will include the protection of the constitutional principles of the EU of nondiscrimination, equal treatment, proportionality, and fundamental rights protections in their access to social security and education within the

⁶⁹ Ruairi O’Neill, ‘A Stitch in Time? Mutual Trust as the EU’s Fix-All in Case C-183/23 *Commission v Malta*’ (2025) 10 *European Papers* 463.

⁷⁰ *Commission v Malta* (n 68) paras 97, 89, 93, 99; O’Neill (n 69); also Case C-132/22 *European Commission v Hungary* ECLI:EU:C:2024:493 para 127.

⁷¹ Niall O’Connor and Darren Harvey, ‘Freedom of Movement and the Normative Value of the Right to Work in the United Kingdom Post-Brexit’ (2024) 25 *CYELS* 174; Floris de Witte, ‘The End of EU Citizenship and the Means of Non-Discrimination’ (2011) 18 *MJ* 86.

⁷² Kostakopoulou (n 1); Bauböck (n 2); Elspeth Guild, ‘Who wants to be an EU citizen?’ in Sandra Mantu, Elspeth Guild, and Paul Minderhoud (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Publishing 2020).

host Member States on the same playing field as those who have not moved.⁷³ The constitutionalisation of EU citizenship allows for the protections of belonging and identity to apply to those who have migrated; and eventually, perhaps, for that ‘double-barrel’ of citizenship protections and migration protections to apply to all individuals who possess the status of EU citizen, including static ones.⁷⁴

EU citizenship also endows some TCNs with derived sets of rights, rights which derive from the original EU citizenship status. It is why derivative rights of residence serve as an analytical lens of this thesis: they serve as an effective case study through which to examine the development of EU citizenship as a supranational citizenship that imposes duties on a Member State rather than purely on an individual. The ‘rights’ aspect of EU citizenship is currently much more evolved than the ‘duties’ aspect of EU citizenship. The strength of protections awarded to TCNs whose only link to the rights and protections of the EU are their familial links to individual EU citizens, and the priority placed upon protecting those rights because of the vulnerability of those individuals and the importance of the roles they play in the lives of the EU citizens they are related to, illustrate the commitment of the European bodies to the constitutionalisation of EU citizenship itself. Those rights and protections are anchored not only in the governing treaties of the Union, but can also be taken as a further illustration of the statement of intent made by the CJEU in *Grzelczyk*: ‘Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality’.⁷⁵ The more people linked to a citizenship status – i.e., the TCN parents of a citizen child; the non-

⁷³ Marie-Pierre Granger, ‘The civil right to free movement: the beating heart of European Union citizenship?’ in Sybe de Vries, Henri de Waele and Marie-Pierre Granger (eds), *Civil Rights and EU Citizenship* (Edward Elgar Publishing 2018).

⁷⁴ De Witte (n 71).

⁷⁵ Case C-184/99 *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECLI:EU:C:2001:458 para 31.

national spouse of a citizen; the dependent TCN family members of a citizen – that that status can protect, and the greater the scope of the protection extends, the stronger that status is: hence the importance of studying the derived rights of TCN family members of EU citizens, to assess the strength of that EU citizenship status itself.⁷⁶

The rights for TCN family members that derive from Union citizenship can be called doubly derivative.⁷⁷ This ‘double derivation’ – the rights of TCN family members derive from EU citizens, whose own rights originally derive from freedom of mobility rights – would go some way to explaining complexity of legislating and litigating those derivative rights: those rights reflect a layering of *multiple* rights attached to different people with competing citizenship and protection claims.⁷⁸ The difficulty lies, therefore, when the CJEU has attempted to find a unified approach in answering those questions; especially in a CJEU that has eschewed the strategy of unified principles and rather issues judgments on case-by-case basis, particularly in the line of citizenship and derivative rights case law.⁷⁹

1.4: The role of the CJEU as an agent of EU citizenship constitutionalisation

The discussion about the role of the CJEU in determining EU citizenship rights and parameters has been part of the development of EU citizenship since it was first introduced as a concept. The drive for EU citizenship has been led in part by the CJEU, with the CJEU judgments drawing their legal backing and reasoning from the Treaties.⁸⁰ However, it is true that the

⁷⁶ Irene Bloemraad and Alicia Sheares, ‘Understanding Membership in a World of Global Migration: (How) Does Citizenship Matter?’ (2017) 51 IMR 823, 844-845.

⁷⁷ Lucía Alonso Sanz, ‘When there is no family: Unaccompanied minors in the EU’ in Maribel Pascual and Aida Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge 2017) 172-174.

⁷⁸ Fulvia Ristuccia, ‘The right to social assistance of children in education and their primary carers: Jobcenter Krefeld’ (2021) 58 CML Rev 877, 880.

⁷⁹ Alonso Sanz (n 77) 173; Jesse Moritz and Daniel William Carter, ‘Life after the ‘Dano-Trilogy’: Legal Certainty, Choices and Limitations in EU Citizenship Case Law’ in Nathan Cambien, Dmitri Kochenov and Elise Muir (eds), *EU Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020).

⁸⁰ José Menéndez (n 14); Lenaerts (n 9); Jo Shaw, ‘EU citizenship: still a fundamental status?’ [2018] EUI Working Paper RSCAS 2018/14.

continuing drive for EU citizenship in the time period delineated in this thesis as the ‘rights-expansion’ phase of constitutionalisations has for the most part been led by the CJEU, sometimes against the wishes of the Member States.⁸¹ The jurisprudence on EU citizenship forms a key cornerstone of its constitutionalisation, because of the weight that jurisprudence also carries: case law of the CJEU is a binding source of law on the Member States when they are applying EU law, especially in cases concerning EU citizenship.⁸² CJEU case law is considered ‘supplementary law’ of the EU, rather than primary or secondary legislation, but still forms a part of the constitutional framework of EU citizenship rights.⁸³ It is therefore impossible to discuss the constitutionalisation of EU citizenship without addressing the case law in detail, because of how much impact the case law has had on the policies of the Member States in terms of both amending their nationality acquisition policies and the implementation of their immigration policies.⁸⁴

It is in the area of citizenship jurisprudence that the CJEU has been accused the most often of overstepping its constitutional bounds, or seeking to impose a policy agenda of increased European integration over the objections of the Member States.⁸⁵ However, citizenship constitutionalisation was always going to be a matter for the CJEU, as soon as it was introduced in a document granted constitutional weight that was the TFEU: the CJEU is

⁸¹ *Grzelczyk* (n 75); Paul Craig and Gráinne de Burca, *EU Law: Text, Cases and Materials* (UK version, 7th edn, OUP 2020) 97.

⁸² Case C-26/62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1; Case C-6/64 *Flaminio Costa v E.N.E.L* [1964] ECLI:EU:C:1964:66; Anne Wesemann, *Citizenship in the European Union* (Edward Elgar Publishing 2020); Laurent Pech and Dimitry Kochenov, ‘Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case’ [September 2021], SIEPS, available at <<https://sieps.se/en/publications/2021/respect-for-the-rule-of-law-in-the-case-law-of-the-european-court-of-justice/>>, accessed 13 August 2025; Mattias Derlén and Johan Lindholm, ‘Characteristics of Precedence: The Case Law of the European Court of Justice in Three Dimensions’ (2015) 16 GLJ 1073; Urška Šadl and Silje Hermansen, ‘The European Court of Justice, an Able and Unwilling Lawmaker: Evidence from 920 Free Movement and Persons Judgments’ in Mark Dawson, Elise Muir and Bruno de Witte (eds), *Judicial Politics in the EU* (Edward Elgar Publishing 2023).

⁸³ Please see section 1.5 of this thesis for the sources of EU citizenship rights and section 1.5.3 specifically for the role of CJEU jurisprudence.

⁸⁴ Michael Blauberger and Susanne K. Schmidt, ‘The European Court of Justice and its political impact’ (2017) 40 *West European Politics* 907. See Chapters 4-5 of this thesis for the specific example of the United Kingdom.

⁸⁵ Blauberger and Schmidt (n 84).

enabled by the Treaties, which were ratified and accepted by the Member States as binding documents limiting their sovereignty in certain areas that implemented the scope of EU law, and therefore the CJEU is acting within its remit as a constitutional adjudicator.⁸⁶ The jurisprudence of the CJEU on citizenship therefore serves two key functional roles: it reinforces the constitutional nature of the status of EU citizenship and elevates it to a level of constitutional ‘supremacy’ over ordinary Union (or national) law, and expands (or retrenches, as the case may be – see Chapter 3) the scope of those rights.⁸⁷

The CJEU has played a crucial role as one of the ‘constitutional actors’ in the shaping of EU citizenship: the CJEU has interpreted and developed the rights associated with EU citizenship through its jurisprudence, effectively shaping the scope and application of these rights across the Member States.⁸⁸ The jurisprudence on EU citizenship is considered part of its constitutionalisation because the CJEU has actively developed and interpreted the concept of EU citizenship through its case law, effectively creating a set of rights and protections for EU citizens that resemble the weight of citizenship rights granted within a national constitution.⁸⁹

The jurisprudence of the CJEU, both in the context of the wider EU legal framework as well as the framework of EU citizenship, has served to ground the legal order of the EU in a constitutional framework rather than solely an international legal one.⁹⁰ The role of the CJEU in shaping the extent of individual protections within the status of EU citizenship, by the acknowledgment of the constitutional weight of the Treaty that gave rise to those citizenship rights itself, was part and parcel of the constitutionalisation process and therefore cannot be

⁸⁶ Wesemann (n 82) 141; Alexander Hoogenboom, ‘In Search of a Rationale for the EU Citizenship Jurisprudence’ (2015) 35 OJLS 301.

⁸⁷ Van Eijken (n 4) 210.

⁸⁸ Carolyn Moser and Berthold Rittberger, ‘The CJEU and EU (de)-constitutionalization: Unpacking jurisprudential responses’ (2022) 20 ICON 1038; Wesemann (n 82).

⁸⁹ Barnard and Leinarte (n 61); Moser and Rittberger (n 88); Konstadinides (n 14); van Eijken (n 4).

⁹⁰ Wesemann (n 82).

overlooked.⁹¹ In issuing judgments that accepted the Treaty as a constitutional document that guarantees the rights of individuals, rather than merely as an agreement binding upon a loose coalition of Member States, the CJEU established the foundations for a constitutional framework for the EU as a whole that the citizenship constitutionalisation process was able to attach onto.⁹² It is this constitutional pressure, as exerted by the Court, that needs to remain balanced with the continuing conflicts between greater integration and national Member State competence that has always been a centrepiece of discussion on the political, social, and legal obligations of EU law and EU jurisprudence in the question of EU citizenship rights.⁹³

This section will analyse the first role of the CJEU in the constitutionalisation of EU citizenship. Chapters 2-3 will then build upon that foundation to examine the jurisprudence on the specific scope of rights in much more depth.

1.4.1: The fundamental nature of EU citizenship status

There are two key cases that enshrine the concept of EU citizenship as a fundamental status with constitutional weight and thereby explicitly link the status of European citizen to the constitutional ‘primacy’ of the Treaty over other aspects of EU law: *Grzelczyk* and *Zambrano*.⁹⁴

Grzelczyk, which will be returned to in the discussion on nondiscrimination in Chapter 2, is most relevant here for the establishment of the seminal precedent at the CJEU of EU citizenship’s ‘destiny’ to be the fundamental status for all individuals possessing the nationality of a Member State.⁹⁵ Freedom of movement, until this point, was broadly accepted as referring to workers, or other individuals who fit easily into the ‘economic’ marketplace participation

⁹¹ Hoogenboom (n 86).

⁹² Wesemann (n 82).

⁹³ Meehan (n 30); Konstadinides (n 14).

⁹⁴ Meehan (n 30) 245.

⁹⁵ *Grzelczyk* (n 75) para 31; Gareth Davies, ‘The entirely conventional supremacy of Union citizenship and rights’ (2011) in Jo Shaw (ed), *Has the European Court of Justice Challenged Member-State Sovereignty in Nationality Law?*, EUI RSCAS Working Paper No. 2011/62, 5.

and met economic paradigm preconditions.⁹⁶ Those who ceased to qualify as workers, or who had never easily met other economic preconditions, were therefore no longer eligible to access social security benefits.⁹⁷ *Grzelczyk* rethought the application of social security benefits to workers by stipulating that EU nationality *became* a discrete category separate from the category of economic workers and therefore took precedence over previously existing residency requirements of Belgian nationality law.⁹⁸

At the time, this gave rise to the thinking that the EU would move towards greater integration in matters of citizenship, nationality, and immigration policies. This theory has proven over the following decade to have been perhaps unrealistically optimistic, as it introduced greater complexity into adjudicating benefit entitlements that arose from EU citizenship coupled to Member State nationality.⁹⁹ The *Grzelczyk* decision was the one that cemented EU citizenship as a status ‘superimposed’ upon Member State nationality while remaining coupled to Member State nationality itself.¹⁰⁰

Zambrano can usefully be interpreted in light of the fundamentality of EU citizenship, as following through from *Grzelczyk*: the CJEU held in *Zambrano* that Member States are precluded from adopting any national policy that would infringe upon an EU citizen enjoying

⁹⁶ See, for example, Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State OJ L142 24-26; Council Directive 73/183/EEC of 28 June 1973 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self-employed activities of banks and other financial institutions OJ L194 1-10; Council Directives 90/364/EEC, 90/365/EEC, 90/336/EEC.

⁹⁷ Case C-85/96 *Maria Martinez Sala v Freistaat Bayern* [1998] ECLI:EU:C:1998:217 (see Chapter 2 of this thesis for implications on non-discrimination and equal treatment) indirectly reinforces this, by confirming that the claimant had been lawfully resident in Germany as a worker and was therefore protected by non-discrimination and equal treatment on the same basis as German workers on the grounds of her EU citizenship as well as her worker status. See also: Albertina Albors-Llorens, ‘A broader construction of the EC treaty provisions on citizenship?’ (1998) 57 CLJ 429.

⁹⁸ *Grzelczyk* (n 75) paras 33, 35.

⁹⁹ Thym (n 57) 17. See Chapters 3-4 for more.

¹⁰⁰ Charlotte Denizeau, ‘La citoyenneté européenne: une valeur en quête d’identité’ (Citoyenneté: Conférence-débat, Paris, 2013) < <https://centre-droit-public-compare.assas-universite.fr/fr/evenements/la-citoyennete-conference-debat-ndeg1/> > accessed 13 February 2022.

the substance of their citizenship rights, thereby further enshrining EU citizenship as a fundamental status within a constitutional framework that guarantees individual rights not only for the citizen, but for the individuals that contribute to that citizen's capacity to benefit from those rights.¹⁰¹ The constitutional weight of *Zambrano* was in confirming that an individual might be in possession of a fundamental right as guaranteed under EU law so significant as to trump competing interests, and that that right might even be extended to protect other individuals not in possession of that status because of their contribution to the practical applicability of the fundamental right in question.¹⁰² According to the Opinion of AG Sharpston, for citizenship of the Union to be anything other than merely symbolic it would need to carry the possibility of extended individual protections even in the face of competing Member State claims.¹⁰³

The throughline of jurisprudence, from *Grzelczyk* to *Zambrano*, confirms the fundamentality of the EU citizenship status and its personal scope of rights even in the absence of trans-border movement and a personal scope of rights so extensive it could even bring in derivative rights for individuals not under the ambit of the Treaty. EU citizenship is therefore operating as a status of constitutional weight operating at a 'primary' level, requiring Member States adapt any relevant legislation to be in compliance with it.

1.4.2: Bringing cases of EU citizenship into the ambit of EU law

The CJEU also used its jurisprudence to confirm the fundamental status of EU citizen in the way it addressed questions of whether or not EU citizenship, in cases of contested nationality,

¹⁰¹ Hoogenboom (n 86) 314; Wesemann (n 82) 124; Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECLI:EU:C:2011:124 paras 42-43.

¹⁰² Wesemann (n 82).

¹⁰³ *Zambrano* (n 101) Opinion of AG Sharpston paras 141, 143.

could fall under the ambit of EU law rather than solely Member State competence. The two primary cases here are those of *Micheletti* and *Rottman*.¹⁰⁴

Micheletti confirmed that it is not for a second Member State to make a decision that would potentially impact the ability and discretion of the first Member State to determine who it awards citizenship to by restricting which of those nation-state citizens would have access to European benefits in the secondary nation-state.¹⁰⁵ Of more importance, arguably, was the establishment of the somewhat circular principle that disputed questions of nationality were questions of EU competence, rather than solely the competence of individual Member States – even while reaffirming that awards of nationality fall solely to the remit of a Member State.¹⁰⁶ While it does not completely remove the acquisition and removal of nationality from the competence of the Member States, a decision later affirmed in *Rottman*, it does reserve to European competence any questions of discrimination based on nationality law when a worker is invoking their right to establish themselves across a border, and expands non-discrimination on the basis of nationality to *any* citizen who benefits from the nationality law of their Member State of origin, regardless of how that nationality was acquired.¹⁰⁷

The paradoxes inherent in EU citizenship became particularly apparent in 2010, when the case of *Rottman* came to the CJEU. *Rottman* affirms the principle that, while nationality remains within the competence of the Member States, Member States *must have due regard to Union law* when making decisions on the subject of nationality awards that have implications for EU citizenship – such as, for example, the loss of Member State nationality that would also

¹⁰⁴ Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* [1992] ECLI:EU:C:1992:295; Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010] ECLI:EU:C:2010:104.

¹⁰⁵ *Micheletti* (n 104).

¹⁰⁶ Hanneke van Eijken, 'European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals' (2010) 27 *Utrecht Journal of International and European Law* 65; see also Boeles (n 19).

¹⁰⁷ *Micheletti* (n 104).

entail the loss of EU citizenship – and that the parameters of EU citizenship, additional as it is to Member-State nationality, should be considered as a matter of EU competence.¹⁰⁸

‘Due regard to Union law’ is a broad remit, and the Court failed to indicate what ‘due regard’ would, could or should look like. The judgment in *Rottman* does seem to indicate that in matters of revoking a naturalisation that would also entail the loss of rights previously enjoyed under EU citizenship, EU law must be taken as the primary source of jurisprudence rather than the Member State itself. This judgment was also the one that brought into scope questions of proportionality – that the stripping of citizenship rights and privileges cannot be considered justifiable unless it is a decision proportionate to the threat presented to the social fabric of the Member State by the individual.¹⁰⁹ Again, it must be stressed that the CJEU did not offer any kind of guidance on what would be considered ‘proportional’. The CJEU did not go so far as to stipulate that EU citizenship is inalienable. However, the stripping of Member State nationality (when re-acquiring original nationality is not automatic or even guaranteed) that would result in losing EU citizenship should be avoided, because of the fundamental nature of EU citizenship and the importance of the rights attendant to EU citizenship.¹¹⁰ This also introduces the concept of ‘favorability’ of EU citizenship, in the sense that any potential infringement upon EU citizenship rights incurred by the implementation of Member State

¹⁰⁸ Rotmann (n 104) Opinion of AG Poiares Maduro paras 16, 23; Davies (n 18); Denizeau (n 100); Oxana Golynger, ‘The correlation between the status of Union citizenship, the rights attached to it and nationality in Rottmann’ (2011) in Jo Shaw (ed), *Has the European Court of Justice Challenged Member-State Sovereignty in Nationality Law?*, EUI RSCAS Working Paper No.2011/62, 19; Willem Maas ‘European Governance of Citizenship and Nationality’ (2016) 12 *Journal of Contemporary European Research* 532. See also Case C-181/23 *European Commission v Republic of Malta* [2025] ECLI:EU:C:2025:283 – the acquisition of European Union Member State nationality (and, by analogy, the loss of it) entitles an individual to the benefits of EU citizenship, and so it must be protected by the appropriate authorities in order to maintain those rights and benefits.

¹⁰⁹ *Rottman* (n 104) para 55.

¹¹⁰ *ibid* para 60.

competence in nationality acquisition and removal *must* be balanced against the scope and weight of EU citizenship rights that might be lost.¹¹¹

Taken together, then, the throughline of case law as evidenced in *Micheletti* and *Rottman* are the confirmation of both the fundamentality of EU citizenship rights and their enforceability at the CJEU level.¹¹² The acquisition of EU citizenship remains, fundamentally, a question of Member State competence because of its link to Member State nationality, but if the removal – or restriction – of access to the rights of EU citizenship as imposed by a Member State is too onerous, it will strip the EU citizen of their genuine enjoyment of the substance of their rights.¹¹³ Such an imposition by a Member State would run counter to the constitutional primacy of EU citizenship itself.

1.4.3: Conclusion: What is the role of the CJEU?

The CJEU has not always been definitive in how it clarifies questions of obligations and has contributed to the confusion and arbitrariness of who, exactly, is entitled to EU citizenship protections and the strict constitutional basis of those protections.¹¹⁴ National and European courts have often found that there is non-intentional discrimination in the protection of those core freedoms, as it is the act of moving across a European border that triggers rights protections in the cases of workers, students, and family members; but it is perhaps contrary to

¹¹¹ Rottman (n 104); Case C-165/16 *Toufik Lounes v Secretary of State for the Home Department* [2017] ECLI:EU:C2017:862; David A.G. de Groot, 'Free Movement of Dual EU Citizens' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *EU Citizenship Under Stress: Social Justice, Brexit, and Other Challenges* (Brill Publishing 2020); Maciej Szpunar and Maria Esther Blas Lopez, 'Some Reflections on Member State Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017); Theodore Konstadinides, 'La fraternité européenne? The extent of national competence to condition the acquisition and loss of nationality from the perspective of EU citizenship' (2010) 35 EL Rev 401; Helen Oosterom-Staples, 'The Triangular Relationship Between Nationality, EU Citizenship and Migration in EU Law: A Tale of Competing Competences' (2018) 65 NILR 431.

¹¹² Wesemann (n 82); *Zambrano* (n 101) Opinion of AG Sharpston para 77.

¹¹³ Hoogenboom (n 86); Golynger (n 108); Konstadinides (n 111); Oosterom-Staples (n 111).

¹¹⁴ Niamh Nic Shuibhne, 'Seven Questions for Seven Paragraphs' (2011) 36 EL Rev 161; Dimitry Kochenov, 'EU Citizenship: Some Systemic Constitutional Implications' (2018) 3 European Papers 1061.

the principle of EU citizenship rights protection that only those Europeans who elect to move to a new Member State should be protected by a body of laws that, in the words of the CJEU itself are inspirationally meant to apply to the entirety of territorial Europe.¹¹⁵

What, then, is the role of the CJEU in constitutionalising and interpreting citizenship? Throughout the establishment of the protection of citizenship at the European level since the 1990s, the CJEU has taken multiple different roles dictated by the shifting priorities of the time. Originally the CJEU was solidifying and codifying the power of the primary source of law, which grounded primary rights of people living in the European Union as holders of EU rights that were triggered when EU citizens left their Member State of nationality to take up employment and legal residence in another Member State. Because of the complexity of the citizenship law, and the overlapping of rights that originate in both the Treaties (Articles 18, 20-21 TFEU) and the secondary legislation of the directives (the Citizenship Directive, the worker and family members regulations), the case law dealing with and establishing the limits of EU citizenship was and is both unpredictable and ambiguous, and sometimes contradictory.¹¹⁶

The throughline of citizenship protections throughout the case law that will be examined in Chapters 2-3, therefore, will fall into the broad themes of ‘citizenship-enhancing’ pre-*Zambrano* and ‘citizenship-clarifying’ post-*Zambrano*.¹¹⁷ The passage of secondary legislation will inevitably impact on the interpretation of the Court of both past and future case-law, as well as the political evolution within the Member States and shifting priorities of the

¹¹⁵ De Witte (n 23); *Grzelczyk* (n 75) para 31.

¹¹⁶ Nathan Cambien, ‘Residence Rights for EU Citizens and Their Family Members: Navigating the New Normal’ in Nathan Cambien, Dmitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill 2020); Nathan Cambien ‘Union Citizenship and Immigration: Rethinking the Classics?’ (2012) 5 EJLS 10; Phil Syrpis, ‘The relationship between primary and secondary law in the EU’ (2015) 52 CML Rev 461, 480-481.

¹¹⁷ Niamh Nic Shuibhne, *EU Citizenship Law* (OUP 2023); Syrpis (n 116) 483.

EU legislature.¹¹⁸ The CJEU does not exist in a vacuum, and the limitations offered on access to welfare rights and social security benefits, rights of residence, and acquisition of permanent residence for TCN family members and EU citizens are perhaps a response to the increased concerns of Member States as to their immigration policies and welfare systems without the CJEU having to abandon its commitment to the protections of the fundamental nature of freedom of movement and EU citizenship rights, dating from the period where such rights were not considered radical.¹¹⁹

The priority of the CJEU, especially once the EU had expanded beyond the original six members to twenty-seven Member States with different standards of living, was to promote and protect the right of workers to cross borders and be protected by non-discrimination and equality provisions once accessing the host Member State's educational, social welfare, and health systems, and to promote and protect the linking of those rights to a fundamental status of EU citizen that would carry constitutional primacy over potentially competing claims within both the EU order and the Member States. The commitment to freedom of movement in the nascent stages of the EU was a commitment to political and social ideology and the initial stages of citizenship-enhancing case law, in line with increased derivative rights protections for family members – more generous in some cases than the immigration laws of national Member States allowed – was reflective of that initial commitment. This will be examined in more detail in Chapter 2.

1.5: Sources and hierarchy of citizenship rights

¹¹⁸ Syrpis (n 116) 487.

¹¹⁹ Nic Shuibhne (n 117); Barnard and Butlin (n 20).

The framework of EU citizenship is a legal patchwork – comprising rights that originate in many different ‘places’, such as treaties, regulations, directives, and fundamental rights protections in the Charter – developed incrementally since the introduction of the concept in 1992.¹²⁰ This is a direct result of the fact that EU citizenship, by its nature and history, is a legal status comprised of several different strands, and the primary and secondary legislation that protects it at the European level is a layering of multiple different treaty provisions, directives, and CJEU decisions. That layering of rights throughout the deepening constitutional ties of the Union is, of course, part of why the jurisprudence of EU citizenship lacks a clear through-line of precedence, and why the CJEU regards each case on the basis of its individual argumentation.

There is no ‘definitive’ definition of EU citizenship, or even a definitive piece of legislation that one can point to and say: “There, there is the originating point of all legal protections for the category of ‘EU citizen’; there can we refer to settle any debates or query on points of fact”.¹²¹ The closest is probably the Citizenship Directive, which ties the right to freedom of movement to the status of EU citizenship; TFEU, specifically Articles 20 and 21; and of course the Treaty of Maastricht which articulates the concept of EU citizenship itself.¹²² These texts and their constitutional impacts are, however, limited by the nature of the EU and the boundaries established on its regulatory frameworks: the primary rights of citizenship, including rights of residence, access to benefits and education, family and nationality law, still lie firmly within the independent competence of the Member States; and the CJEU is only

¹²⁰ Charter of Fundamental Rights of the European Union [2000] O.J. C364/01.

¹²¹ Maas (n 17); Thym (n 57). He furthers this argument and makes the constitutional role of the Court in determining and establishing European citizenship more explicit in his further contribution to the book, ‘The Evolution of Citizens’ Rights’, pgs. 111-134.

¹²² Citizenship Directive (n 50).

called upon to clarify the boundaries of EU competence within those fields and how far EU citizenship can supersede on what is allowable under domestic law.¹²³

The legislative and normative frameworks of EU citizenship were created to give legal weight to a political ambition that already existed at the inception of the EU, with the Schuman Declaration of 1950.¹²⁴ The explicit addition of a citizenship clause in the Treaty of Maastricht was the formal endowment of a legal status for a citizenship that had, *de facto*, been growing in rights and principles since 1952.¹²⁵ EU citizenship is a legal category created by the layering of two disparate statuses: it is coupled to the nationality of a nation-state's while also existing as a discrete legal category that carries its own guarantors of protection from European bodies.¹²⁶ EU citizens find themselves in the unique position of being in possession of two, entirely discrete, legal statuses that complement each other while also opposing questions of legal and governmental competence: a liminal space in which the conflict between rights-based approaches to citizenship and migration law and Member State competence is exemplified.¹²⁷

EU citizenship derives other rights across the social and political spectrum, such as the right to family life and family reunification.¹²⁸ Those derivative rights have also expanded both in scope and in strength of protection as the status of EU citizen gained credence at the CJEU

¹²³ Konstadinides (n 14).

¹²⁴ Maas (n 17).

¹²⁵ *ibid.*

¹²⁶ Dmitry Kochenov (n 114); Mark Dawson and Daniel Augustin, "After Brexit: Time for a Decoupling of European and National Citizenship?" (*Verfassungblog*, 14 July 2016) < <https://verfassungsblog.de/brexit-decoupling-european-national-citizenship/> > accessed 22 October 2021; Maas (n 17).

¹²⁷ O'Neill (n 69); Konstadinides (n 111); Dmitry Kochenov, 'Two Sovereign States vs a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters' in Jo Shaw (ed), *Has the European Court Challenged Member-State Sovereignty in Nationality Law?*, EUI RSCAS Working Paper No.2011/62, 11; de Witte (n 23); Francesca Strumia, 'European Citizenship and Transnational Rights: Chronicles of a Troubled Narrative' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Oxford Hart Publishing 2017); Hyltén-Cavallius (n 12) also makes this point in the introductory chapter of her book.

¹²⁸ Nic Shuibhne (n 15) 1578, 1599-1600.

in the years leading up to *Zambrano*, the zenith of the ‘liberal’ and ‘expansionist’ readings by the CJEU of European citizenship protections and its derived rights.¹²⁹

It is unclear – especially in the light of the exit from the EU of the United Kingdom, which will be examined in depth in Chapter 5 – which source of EU citizenship rights will be given priority in any given situation of contested facts or sources of law.¹³⁰ There are multiple ‘sources’ of EU citizenship, each with a different level of ‘constitutional’ priority. This following section will offer a brief discussion of each of those sources, and the hierarchical relationship and interplay that exists between them. This thesis’s overarching argument is that the shifts in the constitutionalisation of EU citizenship follow which sources of law were being given interpretative priority by the CJEU: the ‘rights-expanding’ jurisprudence was expanding Treaty rights, whereas the ‘rights-delimiting’ jurisprudence was primarily based upon the secondary law instrument of the Citizenship Directive. It is therefore important to set out the different sources of EU law for EU citizenship rights.

1.5.1: Primary law

The primary source of EU citizenship rights is found in Articles 20-24 TFEU, which establish EU citizenship and set out the rights that are attendant to it. The Treaty is one of the two documents that form the constitutional basis of the EU, along with the Treaty on European Union which aimed to address the ‘democratic deficit’ and inefficiencies within European governance.¹³¹ Article 20 of the TFEU is the ‘umbrella’ article, which establishes EU citizenship as a status and defines who is an EU citizen; Articles 21-24 clarify and explain the

¹²⁹ Alina Tryfonidou, ‘Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach’ (2009) 15 ELJ 634.

¹³⁰ Maas (n 17); Syrpis (n 116).

¹³¹ The Consolidated Treaty on European Union OJ C115/13. Since the TEU did not specifically address citizenship provisions, it lies outside the scope of this thesis.

rights that EU citizens hold.¹³² The right of primary importance to this thesis (and arguably to EU citizenship as a whole, because of EU citizenship's origins within free movement of workers; see next section) is that enshrined in Article 21, that of free movement and residence for all EU citizens and their family members, as defined by and articulated for within the scope of the Treaties and any other limiting instruments as laid out under EU law.¹³³ Article 21 has been suggested as interpretable as both a personal guarantee, as well as overtly restricting what limitations might be placed on the right directly:

Lastly, as a fundamental right, it merits a broad interpretation, which entails a highly restrictive interpretation of any conditions to be attached, confining such conditions, in the name of the principle of proportionality, to the aspects strictly indispensable in order to safeguard any collective values which might limit freedom, whilst not undermining the scope of that freedom.¹³⁴

The Charter also operates on the level of primary source of rights within the context of EU citizenship, when the Treaty of Lisbon elevated it to the level of primary law and made it binding in force on all Member States when they are acting within the scope of EU law.¹³⁵ The Charter acts as a legally binding instrument that outlines and protects the fundamental rights of all EU citizens, essentially solidifying and enhancing their citizenship rights by providing a comprehensive list of personal, civic, political, economic, and social rights that must be respected within the EU framework. This level of protection adds an extra layer of 'enforceability' that EU citizens may rely on these rights when interacting with EU institutions

¹³² TFEU (n 16) Articles 21-24; Nic Shuibhne (n 117).

¹³³ TFEU (n 16) Article 21.

¹³⁴ Case C-408/03 *Commission v Belgium* [2005] ECLI:EU:C:2005:638, opinion of AG Ruiz-Jarabo Colomer para 33.

¹³⁵ Treaty of Lisbon OJ C306/01; Sionaidh Douglas-Scott, "Whither, the EU Charter of Fundamental Rights" (*Verfassungsblog*, 30 October 2024) available at < <https://verfassungsblog.de/whither-the-eu-charter-of-fundamental-rights/>>, accessed 12 August 2025.

and national governments, ensuring a higher level of protection across Member States.¹³⁶ The Charter also offers an extra layer of protection for TCNs residing within the EU.¹³⁷ The Charter is not a ‘citizenship’-driven instrument, as it is intended to cover and protect the fundamental rights of individuals living within the EU and bind all Member State institutions when they are applying EU law. It serves as an extra ‘layer’ of protection for citizenship rights, rather than a source of them, and it is in that context that it will serve as an instrument of citizenship rights protections within the EU system.

These same sources of rights broadly apply when looking at the rights of TCN family members of EU citizens, excepting the Treaty (the Treaty confers autonomous rights only on EU citizens and not their family members; the rights of TCN family members are enshrined only in secondary law instruments). There are multiple sources of law from where TCNs residing in the EU draw rights and protections *in their own stead* – rights that apply to all residents in the EU, rather than rights that derive onto the TCN because of their family relationship to an EU citizen – including from the Charter itself.¹³⁸ However, the scope of this thesis concentrates only on the TCNs who *derive* a right to reside in the European Union from *their familial relationship to an EU citizen*, as the strength of protections for the TCN due to the due regard of EU citizenship is the question at scope here.¹³⁹

The right to family life through derivative rights is considered both a fundamental right under the Charter (Articles 7-8), and can be used to ‘reinforce’, or make the right more justiciable, a TCN’s right to reside in the Member State of residence of their EU citizen family

¹³⁶ Tobias Lock, ‘Rights and principles in the EU Charter of Fundamental Rights’ (2019) 56 CML Rev 1201; Sara Iglesias Sánchez, ‘Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?’ (2014) 20 ELJ 464.

¹³⁷ Aida Torres Pérez, ‘The federalizing force of the EU Charter of Fundamental Rights’ (2017) 15 ICON 1080.

¹³⁸ The Charter (n 120) Chapters 1-4 are universal and can be invoked to protect TCNs in the Member States in situations where Member States are applying EU law. See Chapter 4 for more.

¹³⁹ This means that the Family Reunification Directive falls outside the scope of this thesis, as that directive applies solely to the reunification rights of TCNs who are residing lawfully in the territory of the European Union and do not possess any other familial link to protections of EU law.

member.¹⁴⁰ EU law regarding family reunification for those EU citizens who exercise free movement rights is more lenient than respective Member State policy in theory, especially contrasted with the relatively more arduous paths to asylum and family reunification claims under the domestic policies of most Member States.¹⁴¹ In practice, however, it requires a careful balancing of competing constitutional provisions and European and Member State competence.¹⁴²

Finally, one brief word on the European Convention on Human Rights (the ECHR) and the European Court of Human Rights (the ECtHR): the ECHR will be of some relevance when the angle of analysis turns to the United Kingdom, in Chapters 4-5, as it was incorporated into UK law by the Human Rights Act 1998.¹⁴³ The ECHR is in, however, a somewhat unique position in regards to this thesis as being both an important source of EU law but also out of scope of the discussion. It is not an instrument that links specifically to EU citizenship, nor can it really be considered – for the purposes of the argumentation here – as an instrument of constitutionalisation within the wider EU, as it operates as a more traditionally international legal instrument. All members of the EU are obligated to implement the rights in the ECHR and operate in such a way that is not considered a violation of the rights enshrined within, irrespective of citizenship or the scope of applicability of EU law – whereas the Charter, discussed above, which does fall within the jurisdiction of the CJEU, is only applicable when

¹⁴⁰ Kalaitzaki (n 43) 46; Hester Kroeze, ‘Distinguishing Between Use and Abuse of EU Free Movement Law: Evaluating Use of the ‘Europe-route’ in Family Reunification to Overcome Reverse Discrimination’ in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020) 255; Lock (n 136).

¹⁴¹ Susanne K. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of the Case Law* (OUP 2018) 189-193 (this cited chapter is a discussion of the reactions of the different Member States to *Zambrano* but provides a helpful summary of how Member States adapted their asylum, nationality, and immigration policies to limit the over-arching possibilities of the *Zambrano* precedent).

¹⁴² Kroeze (n 140) 270; Kalaitzaki (n 43) 65; Iyiola Solanke, ‘Using the citizen to bring the refugee in: *Gerardo Ruiz Zambrano v Office National de l’Emploi*’ (2012) 75 MLR 101, 108; O’Brien (n 15) 233. See Chapters 4-5 for the specific example of the United Kingdom.

¹⁴³ Convention for the Protection of Human Rights and Fundamental Freedoms (1950); Human Rights Act 1998.

the Member State is implementing EU law.¹⁴⁴ There is some relevance to the ECHR to this thesis because of the relationship between the CJEU and the ECtHR: the CJEU does make reference to ECtHR case law in questions of rights violations, and when necessary uses ECtHR findings to support their case law on the constitutional imperatives of EU citizenship and its attendant rights (namely, the Article 8 right to a private and family life and the Article 12 right to marry and found a family of the Convention).¹⁴⁵ It is a guarantor of human rights rather than explicitly EU citizenship rights, and so while there is some relevance to this thesis it does also lie outside of the scope of deeper analysis.

1.5.2: Secondary law

The second key source of EU citizenship rights is the Citizenship Directive, introduced in 2004 with the main purpose of codifying and simplifying the secondary sources that govern citizenship rights within the EU and the implementing Member States.¹⁴⁶ The Citizenship Directive consolidated nearly all previously existing legislation, creating a single instrument on the acquired residence rights of workers and their families.¹⁴⁷ The Citizenship Directive did not significantly depart from previous legislation, but did follow on from the Treaty of Maastricht to confirm the rights of residence and free movement for workers and their families as a Treaty and EU right bound up in the status of EU citizen rather than solely that of a worker moving across borders.¹⁴⁸ The Directive is the instrument that facilitates the exercise of

¹⁴⁴ Tobias Lock, *The European Court of Justice and International Courts* (OUP 2015).

¹⁴⁵ *Jeunesse v Netherlands* App no 12738/10 (ECtHR, 3 October 2014); Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrari and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

¹⁴⁶ Citizenship Directive (n 50); Nic Shuibhne (n 117); Niamh Nic Shuibhne, 'The Third Age of EU Citizenship' in Phil Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012).

¹⁴⁷ Citizenship Directive (n 50).

¹⁴⁸ *ibid* Preamble.

individual freedom of movement rights and cannot be interpreted restrictively, by either the Member States or the CJEU.¹⁴⁹

The seven chapters of the Directive convey its structure. The key ones for the purposes of this thesis are those limiting and defining the ‘beneficiaries’ of the CRD; namely, EU citizens and their relevant family members (Chapter 1); the right of entry and exit for those EU citizens and their family members (Chapter 2); the rights of residence and permanent residence and their acquisition (Chapters 3-4); and restrictions on entry and residence on grounds of public policy, public security, or public health (Chapter 6). The Citizenship Directive is, although an instrument of secondary law, in the unique position of potentially limiting the scope of rights as awarded in Articles 20-21 TFEU, in cases where the CJEU chooses to interpret the restrictive measures of secondary law as having priority over the more generalized principles of primary law, such as those found in the Treaties.¹⁵⁰

The Citizenship Directive allows for the free movement and residence of EU citizens and their family members in a Member State of which they are *not* a national.¹⁵¹ The CRD allows for the following family members to count as beneficiaries of the protections of the CRD: the spouse of the EU citizen; the partner with whom the EU citizen has a registered partnership; direct descendants who are under the age of 21 and are dependent on the spouse or partner; and the dependent direct relatives in the ascending line of the spouse or partner.¹⁵² It is for the Member State to facilitate the entry and residence of these family members, and no

¹⁴⁹ *ibid* Article 4; Eleanor Spaventa, Nicolas Rennuy and Paul Minderhoud, ‘The legal status and rights of the family members of EU mobile workers’ (European Commission, Directorate-General for Employment Social Affairs and Inclusion, November 2021), available at < https://www.gisti.org/IMG/pdf/ke-09-21-467-en-n_-_family_members_of_eu_citizens.pdf>, accessed on 12 March 2023.

¹⁵⁰ Syrpis (n 116) 481.

¹⁵¹ Derivative rights holders who need to rely on the protections of EU law in Member States in which the EU citizen to which they have a family relationship are a national need to rely on other instruments of EU law. This becomes of relevance in Case C-434/09 *Shirly McCarthy v Secretary of State for the Home Department* [2011] ECLI:EU:C:2011:277, discussed in Chapter 2.

¹⁵² Citizenship Directive (n 50), Article 2 paragraph 2.

immigration control may be imposed on them at the border other than identity verification and verification of the family relationship. Similarly, the Member State is to facilitate the entry and residence of any family members, irrespective of nationality, who are dependent on or members of the household of the EU citizen having the primary right of residence, or a partner with a durable (and attested) relationship.¹⁵³ TCN family members also have a right of residence in the Member State of their EU citizen's own nationality if they are the primary carer of a dependent EU citizen under Articles 20-21 TFEU, but those protections fall outside of the scope of the Citizenship Directive and often have to be arrived at by other means of EU law (see later in this section).

More significantly, the Citizenship Directive was important for the way it implemented protection of derived rights of residence for family members of EU citizens, including TCNs.¹⁵⁴ The Citizenship Directive expanded previously existing legislation, which had imposed conditionality on the residence of both the citizen and the derivatively residing family members, and expanded the right of acquisition of permanent residence to a more generous provision for those who found themselves unable to continue to work – the basis for CJEU rulings in landmark cases such as *Baumbast*, *Ibrahim* and *Teixera*.¹⁵⁵ The Directive also elevated into a right intimately linked with the right to freedom of movement and residence the right to not be denied residence automatically in a host Member State if a citizen (or their family member, a provision added in the Directive rather than solely in the case law itself)

¹⁵³ *ibid* Article 3 paragraph 2. This was also confirmed by Case C-89/17 *Secretary of State for the Home Department v Rozanne Banger* [2018] ECLI:EU:C:2018:570 and *Coman* (n 145).

¹⁵⁴ Citizenship Directive (n 50) Article 5.

¹⁵⁵ *ibid* Article 15; *Baumbast* (n 54); Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* [2009] ECLI:EU:C:2010:80; Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECLI:EU:C:2010:83.

found themselves in a position of relying on the social and financial assistance of the host Member State.¹⁵⁶ This was directly built upon the judgment issued in *Grzelczyk*.

It is at this point in the case law that the freedom of movement, linked to the status of EU citizen, became a freedom that could not be infringed upon by the Member State in any policy that would create any perceived infringement on an EU citizen utilising that freedom of movement right. And because it was a right linked to EU citizenship itself, the right of family members to move across borders – and be supported in the state across the border – could also not be infringed upon, as the inability to move and live with a family member could potentially create an impairment to the utilisation of free movement rights.

1.5.3: The case law of the CJEU

The case law of the CJEU is an important source of law for the rights of EU citizenship because of the role the CJEU has played both in the constitutionalisation of EU citizenship (see above section 1.3), and the importance of the case law itself in analysing the historical patterns of EU citizenship. The relative weight of the sources of EU citizenship rights can be analysed and observed in the way the CJEU issues its jurisprudence on citizenship and derivative rights.

There are, as previously stated, several distinct phases of constitutionalisation of EU citizenship, which the jurisprudence of the CJEU has both served and mirrored: the period of constitutionalisation through rights-enhancement (see Chapter 2) was served by the jurisprudence of the CJEU expanding citizenship rights for EU citizens and their TCN family members by emphasising the constitutional principles of EU citizenship as interpreted through the rights of primary law; and the period of constitutionalisation of EU citizenship through rights-definition, when the CJEU interpreted citizenship rights mainly through the lens of the

¹⁵⁶ Citizenship Directive (n 50), Article 14.3..

limiting instruments of secondary law such as the Citizenship Directive. The CJEU began to issue judgments that relied on the Treaties, specifically Article 21 TFEU, when making decisions on case law that interacted with EU citizenship rights but that did not fall within the obvious, easily delineated lines of freedom of movement protections.

The CJEU, when interpreting citizenship and derivative rights in situations where active economic participation is not at stake, took Article 21 TFEU as the main constitutional source of rights when interpreting those rights.¹⁵⁷ This connection is exemplified in the bridging of derivative rights for the family of workers when the family members are children and a third-national spouse who continue in their residency rights even after the worker has lost their status, as in the case of *Baumbast*.¹⁵⁸ This case provides what can be seen as the beginning of the bridge between strict freedom of movement provisions for family members of workers and the constitutional right of a derivative right of residence for family members of Union citizens. To remove the children or their primary carer – in the case of *Baumbast*, their non-citizen mother – after the establishment of the family in the host Member State had become the children's status quo would be to deny the children their rights under Article 12 of Regulation 1612/68 and would be unlawful under the freedom of movement provisions of the rights for EU citizens.¹⁵⁹

The reason this case is a bridging judgment between purely freedom of movement provisions and EU citizenship is because while the children and the wife of Mr Baumbast were granted permanent residence in the United Kingdom, Mr Baumbast was not granted right of residence as he was no longer qualified under the freedom of movement rights as a worker –

¹⁵⁷ Catherine Jacqueson, 'Union citizenship and the Court of Justice: Something new under the sun? Towards social citizenship' (2002) 27 EL Rev 260, 270.

¹⁵⁸ *Baumbast* (n 54).

¹⁵⁹ *ibid* para 74; Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, Article 12.

he had ceased employment and so therefore could not rely on his Community rights to reside in a Member State other than that of his nationality. While the derivative right of his family did not exist *a priori* to his being a worker moving across borders, their right continued *de facto* even as the *premise* of the right ceased to exist. The creation of this precedent is what enabled the CJEU, in later judgments, to move towards codifying the continuing existence of rights that could derive from non-workers in the first place.

The expansion of derivative rights of residence at the CJEU can be traced in a similar pattern as the case law of the CJEU on EU citizenship more broadly. The development of protections for bearers of derivative rights followed the development of citizenship beyond the principles of free movement for workers, through non-discrimination and equality on the basis of nationality as protected by Treaty rights, and into the ‘genuine enjoyment of the substance of citizenship rights’ era when citizenship begins to be considered as a fundamental status.¹⁶⁰

The link between the fundamental status of EU citizenship and active rights protection as drawn by the CJEU can be exemplified by briefly examining the jurisprudence of the CJEU when looking at the way the rights of EU citizen children, and the derivative rights of their adult TCN family members, have been prioritised and protected to a higher level than equivalent cases where the EU citizen with a derivative rights claim was an adult.¹⁶¹ By their very nature, children are economically inactive and are therefore reliant on the migratory and economic choices of their primary carers rather than making independent use of their own autonomous freedom of movement and residence rights, and so any links to EU law that would bring the Charter into scope in protections of those rights are going to be explicitly linked to the status of *EU citizen* rather than any freedom of movement – thereby increasing the emphasis on the constitutionally fundamental status of EU citizen, rather than that of economic

¹⁶⁰ Maas (n 17).

¹⁶¹ *ibid.*

movement.¹⁶² The CJEU, therefore, has intervened judicially to establish that children are independent rights-bearers in their own stead, and are recipients of Article 20 TFEU protections without having to refer specifically to any potential economic participation.¹⁶³ In the case of children, therefore, rather than adults, the national authority of the Member State must look first to ensuring the guarantee of their rights under Article 20 – namely, the ‘genuine enjoyment’ test rather than the ‘impediment to the freedom of movement’ test.¹⁶⁴

The question of derivative rights as they apply to children is particularly complex, especially if there exists a combination of factors that could be drawn upon when determining the scope of a derivative right that relies on the original citizenship right of a child citizen: does a TCN married to an EU citizen and who is the primary carer of an EU citizen child derive their right from their spouse or from their child? In the cases of *Baumbast*, *Ibrahim*, and *Teixeira*, which draw their primary justification from the earlier case of *Gaal*, the primary source of the derivative right is originally the working EU partner, but the derived right carries on in the child beyond the right as the spouse of an EU worker.¹⁶⁵ The right to reside beyond the length of employment for the TCN therefore derives from the *child’s* right to residence, access to education, and integration.

While the confirmation in the cases of *Alarape* and *Jobcenter Krefeld* that even non-EU citizen children can guarantee rights to their TCN primary carers, this line of caselaw is not

¹⁶² Niamh Nic Shuibhne, ‘(Some of) The Kids Are All Right: Comment on *McCarthy* and *Dereci*’ (2012) 49 CML Rev 349; O’Brien (n 15) 237-238; Torres Pérez (n 137); Iglesias Sánchez (n 136).

¹⁶³ Nic Shuibhne (n 162) 350; also Case C-200/02 *Zhu and Chen* (n 55); Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECLI:EU:C:2003:539, and of course *Zambrano* (n 101); Kristine Kruma, ‘Family reunification: A tool to shape the concept of EU citizenship’ in Maribel Pascual and Aida Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge 2017) 133, 141.

¹⁶⁴ Stephanie Reynolds, ‘Exploring the ‘intrinsic connection’ between free movement and the genuine enjoyment test: reflections on EU citizenship after *Iida*’ (2013) 38 EL Rev 376.

¹⁶⁵ *Baumbast* (n 54); *Ibrahim* (n 155); *Teixeira* (n 155); Case C-209/03 *The Queen on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2006] ECLI:EU:C:2005:169; Case C-7/94 *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal* [1995] ECLI:EU:C:1995:118.

wholly positive (in the purely rights-enhancing sense) as it does still place an important brake on the permanence of derivative rights of residence protections.¹⁶⁶ This ambiguity centres around the importance and primacy of the Citizenship Directive in determining what is considered lawful residence of EU citizens in host Member States and, if necessary, their TCN family members. It was established in earlier case law that in situations of contested residence, only residence accomplished that met the requirements laid out in the Citizenship Directive could be considered by national authorities when determining the length of residence required to acquire a right of permanent residence as well as what could constitute lawful residence.¹⁶⁷ *Alarape* confirms that residence as a primary carer of another individual with a right to reside does not satisfy the requirements of the Citizenship Directive and therefore cannot be counted as years of lawful residence towards the acquisition of permanent residence.¹⁶⁸ The case law of the CJEU on the rights of EU citizenship therefore can also be called ‘patchwork’, as is the different sources of citizenship rights more broadly.

1.5.4: The hierarchy and relationship between the sources of EU citizenship rights

On the face of it, the hierarchy of sources of citizenship rights goes as follows: in first place the Treaty and the Charter, in second place the Citizenship Directive and relevant regulations, and operating on a parallel but equivalently important footing, the interpretive case law of the CJEU. The relationship between those sources, however, has changed and amended as the constitutionalisation process of EU citizenship in its totality has fluctuated.¹⁶⁹ The hierarchy and the constitutional relationship between the different sources of EU citizenship rights is

¹⁶⁶ Case C-529/11 *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department* [2013] ECLI:EU:C:2013:290; Case C-181/19 *Jobcenter Krefeld – Widerspruchsstelle v JD* [2020] ECLI:EU:C:2020:794.

¹⁶⁷ Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Group* [2008] ECLI:EU:C:2008:630.

¹⁶⁸ *Alarape* (n 166) para 48.

¹⁶⁹ *Kostakopoulou* (n 1).

relatively simple on the surface but complex once one attempts to define it. The Treaties function as the foundational constitutional document of the EU, and serves as the ‘primary’ barometer with which any legislation must comply as per the nature of hierarchy of constitutional norms as exists in constitutional frameworks.¹⁷⁰ These demands of compliance include not only legislation (such as the Citizenship Directive) issued by the European institutions, but also the policies of the Member States as implemented to both control and regulate intra-EU migration, and how EU citizens are interacting with the authorities and institutions of the host Member States when they have utilised the core right of their EU citizen to move and work in another Member State of their nationality.¹⁷¹

Articles 20-24 TFEU, and their unambiguous claims to the fundamental nature of EU citizenship and its unqualified right to move and reside freely within the territory of the Member States, can be accepted therefore as the symbolic aim of EU citizenship – the constitutional goal of a status that is universally accepted and prioritised by both the constitutional framework of the EU and the participating Member States.¹⁷² The case law of the 2000s and early 2010s seems to support this constitutional priority: establishing the supremacy of the status of EU citizen, and including in it rights that carried it beyond being the ‘mere shadow of its national counterpart’ and creating a position that enshrines the core freedom at the heart of EU citizenship, that of being able to move freely in order to work and engage in the rights and benefits that come along with that, as a right that cannot be infringed upon by the Member States.¹⁷³

Citizenship of the Union took on greater significance, in contrast to the perception of individuals as purely economic actors which had underlain the EC Treaty. The

¹⁷⁰ Wesemann (n 82); Koen Lenaerts, Piet Van Nuffel, and Tim Corthaut, *Citizenship of the Union* (OUP 2022).

¹⁷¹ Jenson (n 24).

¹⁷² Barnard and Leinarte (n 65); Kochenov (n 61); Jenson (n 24); O’Neill (n 69).

¹⁷³ Kostakopoulou (n 1) 625; Jenson (n 24); Harvey and O’Connor (n 71).

conditions on which freedom of movement may depend are now no longer economic in nature, as they still were in the 1990 directives. The only ‘limitations and conditions’ attached to freedom of movement now are imposed on grounds of public policy, public security and public health.¹⁷⁴

But such a movement towards increased rights, rights that could potentially be divorced from purely economic standing as they had been in cases such as *Grzelczyk*, *Baumbast*, *Carpenter*, and *Bidar*, while continuing to enshrine EU citizenship as a constitutional concept that served as both the increased integration and institutionalisation of a wider European identity, was always going to press up against the counterpoint of national immigration policies and the priorities of Member States to restrict access to their welfare systems to their own state nationals.¹⁷⁵

The passage of the Citizenship Directive serves, therefore, as both an increased constitutionalisation of EU citizenship – it is another document that codifies and clarifies the rights not only of EU citizens, but their TCN family members, and offers Member States a guiding instrument in how to interpret the rights of those EU citizens – and also as a limiting instrument that has served to qualify the unlimited rights of residence and movement as hinted at in Articles 20-24 of the TFEU.¹⁷⁶ This, in itself, serves as part of the constitutionalisation process of EU citizenship, by offering two separate perspectives on that constitutionalisation: the rights-enhancing phase as interpreted by the CJEU, and the definitional phase of constitutionalisation when the rights of citizenship were not retrenched (as argued by some scholars), but rather more strictly defined.¹⁷⁷ The interpretation of the limits of EU citizenship by the CJEU moved away from the marginal cases, as the outer limits had already been defined

¹⁷⁴ *Grzelczyk* (n 75) Opinion of AG Alber para 52.

¹⁷⁵ Barnard and Leinarte (n 61); Spaventa (n 5); K. Schmidt (n 61).

¹⁷⁶ Kostakopoulou (n 1); Nic Shuibhne (n 117); Syrpis (n 116); Kochenov (n 21).

¹⁷⁷ Nic Shuibhne (n 117).

and it was now the centre of the citizenship rights that was being filled in by both the CJEU and the Member States.¹⁷⁸

There are gaps in the citizenship law of the EU that existed before the CJEU began to actively uphold citizenship rights as directly effective rights. Article 20-21 TFEU came to be seen as legitimate groundings of precedent for court decisions, as highlighted by the judgments that ground the family rights of workers as irrevocable even when the worker loses their status but that would not exist without that worker status in the first place.¹⁷⁹ It is a quirk of EU law that an economically active migrant who ceases to be economically active is excluded from the personal scope and protection of EU law even as their dependants continue to derive their own rights from that citizenship status.¹⁸⁰ Family members of an EU citizen who had relied on freedom of movement rights could continue to rely on those rights despite the worker losing his worker status, and the change in the status of economic participation from the original deriver of rights was immaterial to those rights continuing in applicability for the family members.¹⁸¹ However, the CJEU did reinforce the notion that the rights of the bearer of those rights in the first place were entirely dependent on economic participation because the worker himself ceased to have the broad residence rights granted to their family when they were no longer working themselves.¹⁸²

Another way of analysing the relationship between the sources is by going back (see section 1.1 of this chapter) as to what, exactly, the purpose and aim of EU citizenship *is*. If one is of the opinion that EU citizenship is, as some scholars critique, merely a symbolic status that

¹⁷⁸ Kostakopoulou (n 1); Kochenov (n 28); Ashley Mantha-Hollands and Jelena Dzankic, 'Ties that bind and unbind: charting the boundaries of European Union citizenship' (2022) 49 *Journal of Ethnic and Migration Studies* 2091; Kostakopoulou (n 17); Shaw (n 21) 304.

¹⁷⁹ Wagner (n 52); *Baumbast* (n 54); *Ibrahim* (n 155); *Teixeira* (n 155); Kostakopoulou (n 1); Kochenov (n 21).

¹⁸⁰ Golyner (n 53); de Witte (n 71).

¹⁸¹ *Ibrahim* (n 155) paras 28-29; *Baumbast* (n 54) para 69.

¹⁸² Nic Shuibhne (n 42).

fails to create increased European integration or identity, then to accept the undefined yet broad scope of Articles 20-24 TFEU and the Charter as both the primary and sole source of citizenship rights is indicative of that ‘unfinished’ nature of EU citizenship.¹⁸³ If, however, one is of the opinion that EU citizenship is a legal status created to codify the rights of workers to free movement and simplify their enforcement by both the EU institutions and the Member States, the Citizenship Directive as an instrument, which repealed and replaced a number of previous regulations linked to free movement of persons rights, is both the main interpretative and most relevant instrument of EU law.¹⁸⁴

In both analyses, the CJEU plays a role in the interpreting and relativising of the different sources and instrument of law – and oftentimes chooses to prioritise a different instrument of law based on the individual nature of the facts, and the individual citizen at the root of the contested interpretation.¹⁸⁵ The analysis of this thesis, as established in the introduction and in the first section of this chapter, is that EU citizenship is a status that contains elements of all three of the ‘Marshallian’ triptych of citizenship provisions: there are political, democratic, and social rights bound up in the status of EU citizen layered with that of Member State national. The rights originate in an economic marketplace but have since developed beyond simply that economic status. The instruments that have been added to that status have served to both anchor those rights in a constitutionally enforceable framework as well as creating the rights in the first instance – hence the fluctuating relationship between the sources, and the different weights granted to them at different moments of the jurisprudence.¹⁸⁶

¹⁸³ Kostakopoulou (n 1) 628.

¹⁸⁴ Jenson (n 24); Hoogenboom (n 86).

¹⁸⁵ Lenaerts (n 9); Takis Tridimas, ‘Precedent and the Court of Justice: A Jurisprudence of Doubt?’ in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012).

¹⁸⁶ Shaw (n 62) and Shaw (n 21); Kostakopoulou (n 17).

EU citizenship is a ‘composite’ status – it exists because of another status, that of Member State nationality, and it is governed by multiple instruments of different scope and enforceability. The case law on EU citizenship and its protections is, therefore, complex, oftentimes contradictory, and with unclear paths forward, because of the supranational, ‘cobbled-together’ status of EU citizenship itself. It is a status, and a set of attendant rights, whose constitutionalisation is constantly in flux, and is amended in part and constantly by the interventions of the CJEU.¹⁸⁷

1.6: Concluding remarks

This chapter has set out a normative argument for the role of EU citizenship both within the EU, as well as an argument for why it matters that it is considered a constitutional status and to what extent individuals can rely on it for protection. It then established the role of the Court in not only creating the status of EU citizen, but in linking the constitutional nature of it to the four freedoms, specifically that of freedom of movement of persons, that form the core of EU rights and protections. This chapter then highlighted the different sources of rights for EU citizen and the interplay between those sources.

While citizenship rights, including the derivative rights of TCN family members, in the EU do remain linked to the actualisation of freedom of movement rights, there has been a shift in prioritisation towards the expansion of the ‘genuine substance’ protections from being only, and specifically, attached to economic participation. This takes into consideration the gradual expansion of freedom of movement protections from workers in the coal and steel community, to workers and their families, to workers, students, jobseekers, those reintegrating the labour market after a period of rehabilitation or unavailability, the prioritisation of integration of the worker and their family, to the equality principle being applied to not only workers and their

¹⁸⁷ Šadl and Hermansen (n 82).

families but to any person who utilised their free movement right to move across borders, to the creation of the status of citizen itself and the linking of those fundamental freedoms to that status explicitly in the Treaty of Maastricht and the resultant Directives and case law. However, the protection of the freedom of movement could also be extended beyond those who fall strictly in the definition of worker and would include protections along the constitutional and general principles of EU law of nondiscrimination, equal treatment, proportionality, and fundamental rights.

Freedom of movement of workers across the internal borders of the EU was one of the key provisions of early agreements between the Member States and, in the initial days of European integration, an important prerequisite to cases being heard by the CJEU: the CJEU could only have jurisdiction in cases in which free movement was utilised, had been utilised, or would be in significant danger of being curtailed in future because of the decision of a Member State.¹⁸⁸ This was the beginning of the shift away from purely cross-border situations falling within the ambit of EU jurisdiction, and a preview of how the Court would establish citizenship rules within Member States even in situations previously considered ‘wholly internal’.

The CJEU first stepped in within the citizenship jurisprudence by taking a position on the definition of worker, intervening to ensure that Member States could not interpret the benefit of the protections of that status too narrowly; or unfairly narrow the scope of who could be protected by that status under the free movement provisions. The definition of worker has come under European jurisdiction because of the importance of the definition of the term ‘worker’ itself in determining who may benefit from the protections awarded by the Treaties and other relevant Directives and provisions. Because of this, the CJEU has held that ‘worker’

¹⁸⁸ Maas (n 17); Barnard (n 33) 203.

may not be interpreted narrowly by Member States because of its specific EU meaning and its European-wide importance in determining access to protections and benefits when utilising freedom of movement provisions.¹⁸⁹ The CJEU followed the decision in *Trojani* by taking the view that the origin of employment, the amount of employment, the origin of the funds used to pay the salary to the worker and the level of obligation for the worker to take up that employment could not be considered by the national court as indicators of whether or not the employment was genuine.¹⁹⁰

However, the protection of the freedom of movement could also be extended beyond those who fall strictly in the definition of worker: if the national court found that a claimant could not rely on the definition of worker for residence rights, the national court would have to also take into consideration whether or not the claimant could have any grounds for residence under the protections of their status as EU citizen to take up residence in any of the Member States.¹⁹¹ Not only would it be considered unlawful for that Member State to move towards immediately expelling an EU citizen who was considered to fall outside the scope of worker protections as well as being overly reliant on the social security system of the Member State without having due regards to proportionality and EU law, it would be considered discriminatory on the grounds of nationality to refuse that citizen access to the subsistence payments as a non-national.¹⁹² This finding establishes the precedent that: (1) the status of worker should be assumed as the default and read as broadly permissive by the Member States and the national courts; (2) even if an EU citizen is resident in a Member State not of their

¹⁸⁹ Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECLI:EU:C:2004:488 para 15; *Martinez Sala* (n 97); Niamh Nic Shuibhne *EU Citizenship Law* (OUP 2023).

¹⁹⁰ Case C-188/00 *Bülent Kurz né Yüce and Land Baden-Württemberg* [2002] ECLI:EU:C:2002:694 para 32; *Trojani* (n 189) paras 16-17.

¹⁹¹ Joined cases C-22/08 and C-23/08 *Athanasios Vatsouras & Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 90* [2009] ECLI:EU:C:2009:344 paras 36, 40, 43; *Grzelczyk* (n 75); *Martinez Sala* (n 97)

¹⁹² *Vatsouras* paras 45, 44; Nic Shuibhne (n 42). This reading of non-discrimination in access to social security benefits is what makes the explicit exclusion of *Zambrano* carers from those benefits in the United Kingdom so difficult to square against established EU precedent and law (see Chapter 4 for more details).

nationality and is found not to be a worker, they should still be granted the protections of Article 18(1) of the Treaty of Maastricht; and (3) the national courts must have due regard to proportionality and nondiscrimination on the grounds of nationality in determinations of any grants of benefits and subsistence payments.¹⁹³ This confirms the trend of the citizenship jurisprudence towards a right to move *and* reside rather than simply a right to move for the purpose of taking up employment. The trend at the CJEU, therefore, was to default towards considering those making applications to the protection of freedom of movement provisions as workers rather than *not* – unless there was a significant reason for the national court to consider that the claimant was outside of the ordinary course of the labour market, such as working in a rehabilitation programme or in prison.¹⁹⁴

Freedom of movement is not, however, a uniformly protected right. It is made up of different historical layers of court judgments allowing different freedoms and setting up different prescriptions under different labels.¹⁹⁵ This complexity follows through in the citizenship law, when the two (free movement and citizenship) become lexically and de facto linked through the constitutionalisation of EU citizenship as a status that grafted onto the freedom of movement provisions and expanded those rights into a status that could, potentially, cover more protective ground than simply moving workers.¹⁹⁶

The development of rights for EU citizens and their TCN family members as *EU citizens* rather than simply workers or jobseekers as the shift in emphasis on status is reflective of the increased constitutionalisation and commitment to strength of EU citizenship by the CJEU. The EU citizen, as grounded within the primary constitutional framework of the EU that

¹⁹³ *Martinez Sala* (n 96).

¹⁹⁴ *Trojani* (n 189) paras 20-22; *Vatsouras* (n 191) para 30 (emphasis mine); Barnard (n 33).

¹⁹⁵ Daniel Thym, 'The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens' (2015) 52 CML Rev 17; Davies (n 18).

¹⁹⁶ Davies (n 18); Nic Shuibhne (n 42).

is the TFEU, has a right to mobility that also carries with it rights to the four other key constitutional principles of EU citizenship, namely nondiscrimination, equal treatment, proportionality, and fundamental rights. Not only does the constitutional status of EU citizenship protect that EU citizen, it also protects the TCN family members who also possess the ‘mobility’ right of EU citizenship.¹⁹⁷ The next chapter will explore the continuing ‘rights-expanding’ jurisprudence, this time anchoring the constitutional principles of equal treatment and nondiscrimination and proportionality as necessary ‘prerequisites’ to any Member State infringement upon EU citizenship rights.

¹⁹⁷ Sandra Mantu, Elspeth Guild and Paul Minderhoud, ‘Introduction’ in Sandra Mantu, Elspeth Guild and Paul Minderhoud (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Publishing 2020).

Chapter 2: Constitutionalisation of EU citizenship through rights-expanding jurisprudence

2.1: Introduction

The previous chapter established the chronology of EU citizenship as it mapped onto freedom of movement rights for workers, and how ‘free movement’ thereby became the ‘core freedom’ at the heart of EU citizenship.¹ That free movement was, before the introduction of EU citizenship in 1992, linked specifically to the right to work, or for those who were economically active or independently self-sufficient.² Case law that predates the Treaty of Maastricht and the establishment of EU citizenship focuses on enshrining the primacy of freedom of movement rights for workers, and the establishment of nondiscrimination in terms of nationality in questions of employment and equal treatment under the law of the resident Member State if different than the Member State of nationality.³ The movement of families with workers was considered an incentive for those who seek to cross a border for the purpose of seeking active employment, in line with EU citizenship originating as a market citizenship rather than a discrete legal category and entitlement.⁴ The CJEU therefore had the role of clarifying which aspects of nationality law fell under the remit of EU jurisdiction, to confirm that there would be no discrimination on the basis of nationality for either the worker or the family member and to protect the supremacy of freedom of movement rights in all situations that would involve the crossing of an internal border.

¹ Floris de Witte, ‘The Liminal European: Subject to the EU Legal Order’ (2021) 40 YEL 56.

² Pieter Boeles, *European Migration Law* (2nd edn, Intersentia, 2014); Catherine Jacqueson and Frans Pennings, ‘Equal Treatment of Mobile Persons in the Context of a Social Market Economy’ (2019) 15 Utrecht Law Review 64; Willem Maas, ‘The Origins, Evolution and Political Objectives of EU Citizenship’ (2014) 15 GLJ 797; Saara Koikkalainen, ‘Borderless Europe: Seven Decades of Free Movement’ (3 June 2021, Migration Policy Institute) accessed 27 June 2026 <<https://www.migrationpolicy.org/journal/feature/borderless-europe-seven-decades-free-movement>>.

³ Gavin Barrett, ‘Family matters: European Community law and third-country family members’ (2003) 40 CML Rev 369, 373.

⁴ Lorin-Johannes Wagner, ‘Member State nationality under EU Law – To be or not to be a Union citizen?’ (2021) 28 MJ 304, 312.

The increase in protections for bearers of derived rights of residence along the key constitutional principles – nondiscrimination, equal treatment, fundamental rights, and proportionality – is reflective of the strength of the commitment to increased EU citizenship protections in this ‘rights-expanding’ phase of constitutionalisation.⁵ Nondiscrimination, equal treatment, and proportionality are ‘constitutional’ principles of the EU because of their nature as governing principles of EU law, their application on Member State interpretation and enforcement of EU law, and the personal and effective scope granted those principles by their placement within primary law instruments.⁶ If a Member State wishes to restrict the access of EU citizens and their TCN family members to the substance of their EU citizenship rights, those restrictions must fall within the limitations provided by the protective constitutional principles of non-discrimination and equal treatment, proportionality, and with due regard paid to the protection of the fundamental rights of EU citizens and their TCN family members.⁷

Proportionality is the constitutional principle that underpins and protects the access to the other two in cases of contested EU citizenship rights for EU citizens and their family members.⁸ This is most clearly expressed in the jurisprudence that has protected derivative rights of residence for TCN family members of EU citizens: the removal of residence rights,

⁵ Robin White, ‘Free movement, equal treatment and citizenship of the Union’ (2005) 54 ICLQ 885; Martijn van den Brink, ‘Time to Abolish the Substance of EU Citizenship Rights Test?’ (2021) 23 EJML 13; Hanneke van Eijken, ‘Connecting the Dots Backwards, what did Ruiz Zambrano Mean for EU Citizenship and Fundamental Rights in EU Law?’ (2021) 23 EJML 48; Catherine Barnard and Emilija Leinarte, ‘The Creation of European Citizenship: Constitutional Miracle or Myopia?’ (2022) 24 CYELS 24; Elspeth Guild, ‘EU Citizens, Foreign Family Members and European Union Law’ (2019) 27 EJML 358.

⁶ The Consolidated Treaty on European Union OJ C115/13 Articles 2, 5(4); Consolidated Treaty on the Functioning of the European Union [2012] OJ C326/56 Articles 19-21; Charter of Fundamental Rights of the European Union [2000] O.J. C364/01 Articles 20-21, 23, 52.

⁷ Steve Peers, ‘Free movement, Immigration Control and Constitutional Conflict’ (2009) 5 ECL Rev 173; Francis Jacobs, ‘Citizenship of the European Union – A Legal Analysis’ (2007) 13 ELJ 591; van Eijken (n 5); White (n 5); Nicole Lazzarini, ‘The Scope and Effects of the Charter of Fundamental Rights in the Case Law of the European Court of Justice’ in Giuseppe Palmisano (ed), *Making the Charter of Fundamental Rights a Living Instrument* (Brill Publishing, 2015); Wolf Sauter, ‘Proportionality in EU Law: A Balancing Act?’ (2013) 15 CYELS 439.

⁸ Koen Lenaerts ‘Proportionality as a matrix principle promoting the effectiveness of EU law and the legitimacy of EU action’ (ECB Legal Conference, 25 November 2021) <https://www.ecb.europa.eu/press/conferences/shared/pdf/20211125_legal/ECB-Symposium_on_proportionality_25_November_2021.en.pdf>.

or the restriction of access to other rights that would support the residence rights (such as that of social security, education, and housing support) disproportionately impacts on the rights, including the fundamental rights, of EU citizens and their ability to utilise their freedom of movement rights and so fails the ‘proportionality’ assessment of EU law protections.⁹

The expansion of derivative rights of residence at the CJEU can be traced in a similar pattern as the case law of the CJEU on EU citizenship more broadly, including where the jurisprudence has incorporated the key principles of nondiscrimination, equal treatment, proportionality and fundamental rights, and offered those principles as the barometer for Member State enforcement of citizenship rights, since 1992.¹⁰

The definitive case in terms of derivative rights protections, and the CJEU decision that afforded the broadest reading of purely EU citizenship rights, is that of *Zambrano*, which this thesis argues is the zenith of rights-expanding EU citizenship jurisprudence.¹¹ Leading up to *Zambrano*, the CJEU took on the role of expanding citizenship provisions and protections for EU citizens and their TCN family members, an indication of the strength of commitment to those EU citizenship protections in the time when it needed creating and protecting before moving into a period of time where citizenship was established and the parameters were more in need of defining in the post-*Zambrano* years.¹² These rights-expanding cases strengthen the underpinning of EU citizenship rights to the constitutional framework of the EU by linking EU citizenship to the right to nondiscrimination and equal treatment, creating a formal link between

⁹ Iyiola Solanke, ‘Race, gender and discrimination – learning from *Zambrano*’ in Michael Adler (ed), *A Research Agenda for Social Welfare Law, Policy and Practice* (Edward Elgar Publishing 2022); Heli, Askola ‘A Tale of Two Citizenships? Citizenship, Migration and Care in the European Union’ (2012) 21 S & LS 341; Peers (n 7); Lenaerts (n 8).

¹⁰ Maas (n **Error! Bookmark not defined.**).

¹¹ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)* [2011] ECLI:EU:C:2011:124.

¹² Alina Tryfonidou, ‘Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach’ (2009) 15 ELJ 634; Barrett (n 3); Susanne K. Schmidt, ‘No match made in heaven: Parliamentary sovereignty, EU over-constitutionalisation and Brexit’ (2020) 27 JEPP 779; Gareth Davies, *Nationality Discrimination in the European Internal Market* (Wolters Kluwer 2003).

the ‘fundamental status’ of EU citizenship and a fundamental principle of EU constitutional law.¹³ The jurisprudence that defined restrictions on EU citizenship and freedom of movement rights as ‘contrary to the scope of EU law’, and thereby expanded EU citizenship rights in this stage of constitutionalisation, was important for its formal linking of the constitutional principles of EU law – specifically the principle of proportionality – to EU citizenship rights enforcement.¹⁴ This chapter will therefore provide an analysis of the important jurisprudence of the CJEU on citizenship and derivative rights of residence.¹⁵

2.2: Equal treatment and nondiscrimination

Along with freedom of movement, the right to equal treatment is one of the primary constitutional principles linked to EU citizenship, as it attaches directly to the main ‘emotional’ driver of it.¹⁶ EU citizens and their family members are to be treated, on the face of it, as equal to nationals of the host Member State when availing themselves of the services to which they are entitled in the host Member State.¹⁷ To a certain extent, it has been used as the ‘backup’ protective mechanism when citizenship provisions are applicable but the exact scope of those citizenship protections is legally unclear.¹⁸ The foundational case law of equal treatment fixed upon two critical points: first, free movement rights are about much more than equal treatment

¹³ Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECLI:EU:C:1998:217 paras 60-61; Anne Wesemann, *Citizenship in the European Union* (Edward Elgar Publishing 2020) 116.

¹⁴ Wesemann (n 13) 119.

¹⁵ An important note: no single case will fall neatly into a single constitutional principle. There are elements of the jurisprudence that lend its precedential weight to all four categories, and so most of the cases will find themselves mentioned in each of the subsections of this chapter as an exemplar of the potential for increased constitutionalisation of EU citizenship therein.

¹⁶ White (n 5).

¹⁷ TFEU (n 6) Article 18. This is why the *Commission v Malta* decision (discussed briefly in Chapter 1) is so interesting: it introduces a philosophical concept into the legal framework of EU citizenship, of the need to ‘earn’ EU citizenship in order for the EU to be able to impose the requirements of it on the enforcing Member States.

¹⁸ Gareth Davies, ‘When Do Union Citizens and Their Families Have the Right to Equal Treatment on Grounds of Nationality in EU Law?’ (2024) 26 EJML 267; Herwig Verschueren, ‘Equal treatment as an instrument of integration: The CJEU’s case law on social rights for third-country nationals under the EU migration directives’ (2023) 25 EJSS 243; Jo Shaw, ‘Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law’ (2015) 17 CYELS 247.

with host State workers; second, certain concepts should be defined and controlled at EU level because of their importance to EU-wide protections and constitutional values.¹⁹

As established in Chapter 1, the expansion of the freedom of movement protections from strictly workers to all those who moved across internal EU borders to reside in another Member State, whether for purposes of employment, self-employment, study, or simply to reside because they had the means to do so and would not be considered a burden on the social safety net of the Member State, also expanded the protections of Article 18 TFEU, namely the protection from discrimination on the grounds of nationality. Practically speaking, this meant that any benefit available to the national of a Member State should – within the provisions of the relevant Treaties and Directives – must also be made available to an EU citizen who had pursued their freedom of movement into the boundaries of another Member State.²⁰ Family members, including TCN family members, were also protected by equal treatment and nondiscrimination provisions of freedom of movement law, as an extension of the protection to EU citizens – the ability to move with your family, and for the family to be considered as part of the same ‘umbrella’ of protections as EU citizens, was necessary to promote freedom of movement and increasing EU integration.²¹

Equal treatment is the practical expression of the general principle of EU law, and nondiscrimination is the specific expression of that right to equal treatment – the right of EU citizens who have utilised their freedom of movement to be treated, on balance, equally to the nationals of that Member State in their access to services.²² By addressing the case law on nondiscrimination in greater detail, this section is arguing the normative principle that equality is a constitutional foundation of EU citizenship, and imposes a requirement on Member States

¹⁹ Niamh Nic Shuibhne, ‘Reconnecting free movement of workers and equal treatment in an unequal Europe’ (2019) 43 EL Rev 477; Davies (n 18).

²⁰ Nic Shuibhne (n 19).

²¹ White (n 5); Peers (n 7); Barrett (n 3); Davies (n 18).

²² White (n 5); Davies (n 18); The Consolidated Treaty on European Union OJ C115/13 Articles 2 and 3; TFEU (n 6) Article 18.

to apply it to EU citizens or display sufficient justification for why equal treatment is not applicable. Nondiscrimination, specifically on the grounds of nationality, is the expression of the principle of equal treatment as it applies to EU citizenship constitutionalisation and jurisprudence.²³

The prohibition of nondiscrimination applies, however, not only to host Member States, but to Member States of *origin* as well: the Member State of origin is precluded from treating returning EU citizens, i.e. citizens who have utilised their right to move but have now chosen to take up residence once more in their Member State of nationality, less favourably than they would nationals who had not moved.²⁴ To not facilitate the return of the EU citizen would be considered, effectively, as a ‘barrier’ or an ‘obstacle’ to free movement and would be therefore a violation of EU law.²⁵ These ‘obstacles’ were often typified, in the case of returning EU citizens, as denials of residence permits for TCN family members – either spouses or children – when the family life had developed in the host Member State and was being ‘exported’ back to the Member State of nationality.

2.2.1: Returning EU citizens and their TCN family members

There are three important pieces of jurisprudence that established the principle of nondiscrimination for EU citizens and their TCN family members in cases of ‘reverse’ free movement rights, i.e., an EU citizen who had moved but was now returning to their Member

²³ Virginie Guiraudon, ‘Equality in the making: implementing European non-discrimination law’ (2009) 13 Citizenship Studies 527.

²⁴ Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v R.N.G. Eind* [2007] ECLI:EU:C:2007:771 para 32; Opinion of AG Mengozzi paras 101-106.

²⁵ Jeremy Bierbach, ‘The reality test of residence goes through the looking glass’ (2017) 13 EuConst 383; Nathan Cambien, “Cases C-456/12 O. and B. and C-457/12 S. and G.: Clarifying the inter-state requirement for EU citizens?” (*European Law Blog*, April 11 2014) < <https://www.europeanlawblog.eu/pub/cases-c-45612-o-and-b-and-c-45712-s-and-g-clarifying-the-inter-state-requirement-for-eu-citizens/release/1> > accessed 12 December 2024.

State of nationality: *Singh, O and B*, and *Eind*.²⁶ These cases were important as they served to establish the jurisdiction of EU law in cases where, presumably, only national law would apply: all of the individuals from which the derivative rights claims originated in were own-state nationals returning to reside in the state of their nationality, and therefore it would have been considered that their rights, as nationals of that state, were adequately protected without needing to resort to EU law.²⁷ However, in all three cases it was held that EU law does still apply when the returning EU citizen would be, in effect, forced to give up a right that they were granted in another Member State, and would be considered as discriminating against a EU citizen on the basis of their use of their freedom of movement rights.²⁸

These cases fall under the definition of ‘rights-enhancing’ because in each of the cases discussed, the right of the EU citizen under EU law ‘trumped’ the rights as would have been available to the individual under domestic regulation or under national law as a national of the Member State. The CJEU therefore allowed them greater rights, either of family reunification, a derived right of residence for a TCN family member that would not have been granted under domestic law, or the right to access social security benefits or educational advantages that they were entitled to because of their status as an EU citizen.

Singh, a case that was brought specifically on a derived right of residence when it was still a consideration of freedom of movement rights as it pre-dates Maastricht, found that a Member State could not deny the TCN spouse of an own-state national a right of residence if the right of residence, on the basis of EU law, had been granted in the Member State of residence when the national was exercising freedom of movement rights in that Member State.

²⁶ Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECLI:EU:C:1992:296; Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B.* [2014] ECLI:EU:C:2013:837; *Eind* (n 24).

²⁷ *White* (n 5); *Singh* (n 26) para 14.

²⁸ Susanne K. Schmidt, Michael Blauburger and Dorte Sindbjerg Martinsen, ‘Free movement and equal treatment in an unequal union’ (2018) 25 JEPP 1391; Sarah Schoenmaekers and Alexander Hoogenboom, ‘Singh and Carpenter revisited: some progress but no final clarity’ (2014) 21 MJ 494; also Case C-165/16 *Toufik Lounes v Secretary of State for the Home Department* [2017] ECLI:EU:C:2017:862.

Singh is of importance because it sets the line of jurisprudence that establishes the ‘right of return’ for EU citizens and their TCN spouses.²⁹ If the EU citizen could not rely on her rights as an EU worker to travel freely with her spouse in both the host and origin Member State, she might not have exercised her freedom of movement rights to travel to the host Member State in the first place. To deny the TCN spouse lawful residence as the spouse of a Union worker invoking her right to move, even in the Member State of the worker’s original residency and nationality, would serve as a retroactive impediment to the right to freedom of movement and therefore was precluded.³⁰

The impact of *Singh* was twofold. The immediate, practical impact was that it increased the number of people who could apply for legal residence in the UK and expect it to be granted under the more lenient EU law than the stringent British residency rules. It also expanded the category of people who could rely on European protections against the Member State of their residency *even if* that Member State is the Member State of their original nationality.³¹ *Singh* set the scene for discussions of administrative management on when and how TCNs might trigger EU law protections within the context of free movement of their economically active rights-bearer. While the principle of proportionality must always be taken into consideration by the national courts, national authorities could also point to ‘genuine’ residence and integration as the benchmarks for whether or not freedom of movement had been legitimately utilised or whether EU law was being invoked in an attempt to circumvent the national

²⁹ Chiara Berneri, “Family Reunion for EU citizens living in their own Member State: clarifying the Surinder Singh and Carpenter judgments” (16 February 2014, EU Law Analysis) accessed 23 October 2021 <<https://eulawanalysis.blogspot.com/2014/02/family-reunion-for-eu-citizens-living.html>>. See also Joined Cases C-456/12 and C-457/12 *O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L* [2012] ECLI:EU:C:2012:776 Opinion of AG Sharpston. This will also be of relevance in Chapter 5, when the rights of EU citizens living in the UK under the Withdrawal Agreement are discussed in more depth.

³⁰ *Singh* (n 26) paras 18-19, 23.

³¹ Karin Fløistad, *The EEA Agreement in a Revised EU Framework for Welfare Services* (Springer 2018) 128-133.

legislation of the Member State.³² This emphasis on non-discrimination and equal access feeds into the protections encoded within the obligation for the Member State to not pass or restrictively enforce legislation that would potentially infringe on the ability of an EU citizen to exercise their freedom of movement right by setting higher standards for the mobility of their TCN spouse than is accepted in another Member State or EU law.³³

The CJEU has found that because a community member is not *necessarily* reliant on community rights – i.e., a British national is returning to the United Kingdom after availing herself of her community rights to reside and work in another Member State –, it does not mean that those community rights cease to exist at the point of resumption of original Member State nationality protections. By extension, therefore, the community rights extended to protect the residency status of the community member’s spouse.³⁴ If a spouse could not be guaranteed residency in the entirety of the territory of the EU, that would potentially create a barrier to an EU citizen from exercising their individual right to freedom of movement and for that reason residency must be granted to the spouse of a citizen if they have exercised their free movement right to return to their Member State.³⁵

This ‘genuine enjoyment’ can be applied in cases against a worker’s Member State of nationality and original residence as, following on the premise set in *Singh*, if a family member is not granted the right of residence in the original Member State equivalently with the host Member State, then a worker might be dissuaded from moving in the first place.³⁶ A policy that would deny a family member a right of residence in the original Member State, such as found in *Eind*, would create a deterrent in seeking employment in another Member State if the worker

³² Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010] ECLI:EU:C:2010:104 para 55; Catherine Barnard, *The Substantive Law of the EU* (6th edn, OUP 2019) 208.

³³ *Singh* (n 26) para 23.

³⁴ *ibid* para 20.

³⁵ *ibid* para 21.

³⁶ *Tryfonidou* (n 12).

could not import the integration and residence of his family members back to the home Member State, even if he was not working in the home Member State upon his return.³⁷ *Eind* reinforces the right, originally seen in *Singh*, that EU citizens and their family members have a distinct EU right to the protection of their family life, a positive linking of Article 45 TFEU (the liberty to circulate) to Article 21 TFEU (the right of all EU citizens to move and reside freely), and it is for the Member State to promote that liberty by not imposing any restrictions to family reunification that could be interpreted as a deterrent to an EU citizen's moving, and would be considered discriminatory.³⁸

This is evidence of a further constitutionalisation of EU citizenship because the right is linked to the benefits of the EU citizen's movement: if they moved and profited from that move, the benefits of that move are permanent even if the mobility itself is not. It is a right linked to the unchanging nature of individual possession of EU citizenship, rather than that of being (in this case) a temporary worker in a host Member State.³⁹ That right of return with a family member is not unconditional, but everything in the power of the Member State should be done to promote it, and certainly not to propose any deterrents to it.⁴⁰ The EU right, that of prioritising family residence and integration, can therefore be enforceable against a Member State even if a border has not been permanently crossed.

Where *Singh* and *Eind* were dealing very specifically with the free movement right of workers (Article 45 TFEU), *O. and B.* builds upon those two judgments to confirm that EU citizens, not just workers, could be discouraged from utilising their freedom of movement rights if the right to be joined by their spouses upon their return to the home Member State was

³⁷ *Eind* (n 24) paras 35-36.

³⁸ Case C-18/95 *F.C. Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland* [1999] ECLI:EU:C:1999:22 para 58; Case C-385/00 *F.W.L. de Groot v Staatssecretaris van Financiën* [2002] ECLI:EU:C:2002:750 para 89; *Eind* (n24) paras 35, 37, 45.

³⁹ *Eind* (n 24) paras 39, 41, 43-45.

⁴⁰ *ibid* para 37.

not extended to apply to them.⁴¹ That right, however, would extend – by analogy, as argued in the judgment – to any EU citizen who, if not covered by the Citizenship Directive because the contested residence is occurring in the home Member State, could and do derive a right of residence for their TCN spouses under Article 21 TFEU, provided of course that freedom of movement had been utilised by the EU citizen.⁴² This case was not a straightforward ‘victory’ for the supremacy of Treaty rights over the limiting restrictions of secondary law instruments, however; as the *O. and B.* judgment laid down the precedent that only ‘sufficiently genuine residence’ that fulfilled the preconditions as laid out in the Directive should be considered as an ‘effective’ application of freedom of movement.⁴³ Not only is the requirement of freedom of movement still applicable to derive any residence right for the TCN – when the citizen in question is an adult and not a child; see section 2.5 on fundamental rights and Chapter 3 for a more specific discussion on the differences in treatment by the CJEU between citizen children and citizen adults – but the freedom of movement has to comply with the preconditions as laid out in the Directive, even if the Directive is not the instrument that applies to the right being enforced.⁴⁴ This approach can be considered as rather formalistic, even if it offers an easier test of applicability for the national courts – a box-ticking exercise that would enable national authorities to ‘at a glance’ determine the genuineness of an EU citizen’s residence, if not necessarily the genuineness of the family life created during that residence.⁴⁵

A final case that is worth briefly mentioning in the ‘non-discrimination’ as it applies to returning EU citizens is that of *Coman*.⁴⁶ *Coman* addressed the question of whether same-sex couples could be protected by the definition of ‘spouse’ under the Citizenship Directive when

⁴¹ Cambien (n 25).

⁴² *O. and B.* (n 26) paras 50, 55.

⁴³ *ibid* para 56.

⁴⁴ Cambien (n 25); Bierbach (n 25).

⁴⁵ *ibid*.

⁴⁶ Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrari and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

applying for residence in a Member State that does not recognise the validity of same-sex marriages. The CJEU, in an example of a rare break from prioritising the limiting impact of the Citizenship Directive in the 2010s case law (see Chapter 3), considered that the rights Mr Coman was exercising as a returning EU citizen fell under the rights in the Treaty, specifically Articles 18 and 21, and that for Romania to not recognise the right of Mr Coman's spouse would not only discriminate against him on the basis of sexuality, but would also discriminate against him as an EU citizen exercising his right to free movement.⁴⁷ The CJEU also specified that the recognition of a lawfully-contracted marriage in another Member State for the purpose of a derived right of residence could not be construed as a legitimate threat to the social fabric of the original Member State.⁴⁸

The conclusion that can be drawn from this line of case law, therefore, is that the Directive does not apply to returners *prima facie* as they cannot be denied residence in the state of their own nationality as a matter of international law, and thereby *their TCN family members cannot derive a right under the Citizenship Directive to reside in the Member State of nationality either*.⁴⁹ The Citizenship Directive is only intended to cover EU citizens taking up residence in host Member States; however, Article 21 and Article 18 TFEU must apply when analysing the derivative rights of residence of TCN family members of returning EU citizens, and, most importantly, the Directive cannot be applied in isolation in a way which would weaken a citizen's rights to protections under Articles 18 and 21 TFEU.⁵⁰ This is because to discriminate against those returning citizens would impact upon the genuine enjoyment of their substance of EU citizenship rights, by potentially creating an obstacle that would prevent them

⁴⁷ Dimitry Kochenov and Uladzislau Belavusau, 'After the celebration: Marriage equality in EU Law post-Coman in eight questions and some further thoughts' (2020) 27 MJ 549; *Coman* (n 46) paras 20-25, 40.

⁴⁸ *Coman* (n 46) para 45.

⁴⁹ *O. and B.* (n 26) para 42; *Eind* (n 24) paras 24-25 (on Regulation No 1612/68, one of the regulations which was repealed when the Citizenship Directive went into effect in 2008). Emphasis mine.

⁵⁰ *Lounes* (n 28) paras 46, 48-49, 55; *O. and B.* (n 26) paras 45, 61.

from having used their freedom of movement rights in the first place if they would face lower standards of protection upon return.⁵¹ EU citizenship, as defined by the constitutional document that is the Treaty, are therefore constitutionalised as being broadly more ‘powerful’ than Member State policies implementing national law, and the limiting power of the secondary law instrument that is the Directive. The importance of nondiscrimination, as attached to the constitutional status of EU citizenship, is here in a rights-enhancing, phase.

2.2.2: EU citizens and their TCN family members in the host Member State

As established in the previous subsection, freedom of movement was still a necessary precondition that must be fulfilled by EU citizens in order to access the nondiscrimination provisions on EU law – however, as with the case law delineated in the section above, the provisions of nondiscrimination, specifically attached to nationality, applied irrespective of the status of the EU citizen and the role they were fulfilling within the host Member State, or their reason for residing there.⁵²

There are several cases that would fit the mold of ‘important’ nondiscrimination cases, and that broadened the scope of applicability of Treaty rights for EU citizens exercising their freedom of movement rights as EU citizens and not simply workers.⁵³ The most important

⁵¹ *Lounes* (n 28) paras 58-60; *Singh* (n 26) paras 23, 25; *Eind* (n 24) para 37; *O. and B.* (n 26) para 42.

⁵² Case C-46/12 *NY v Styrelsen for Videregaende Uddannelser og Uddannelsesstøtte* [2013] ECLI:EU:C:2013:97; Case C-209/03 *The Queen on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2006] ECLI:EU:C:2005:169 paras 34-35; Case C-274/96 *Pretura Circondariale di Bolzano, Sezione Distaccata di Silandro v Horst Otto Bickel and Ulrich Franz* [1998] ECLI:EU:C:1998:563 paras 15-16; Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECLI:EU:C:2003:539 para 24; Case C-224/98 *Marie-Nathalie D’Hoop v Office national de l’emploi* [2002] ECLI:EU:C:2002:103 paras 29-34.

⁵³ A by no means exhaustive list: Case C-184/99 *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECLI:EU:C:2001:458; *D’Hoop* (n 52); *Bidar* (n 52); Case C-456/02 *Michel Trojani v Centre public d’aide sociale de Bruxelles* [2004] ECLI:EU:C:2004:488; Joined Cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECLI:EU:C:2009:344; Case C-258/04 *Office national de l’emploi v Ioannis Ioannidis* [2005] ECLI:EU:C:2005:559; Case C-85/96 *Maria Martínez Sala v Freistaat Bayern* [1998] ECLI:EU:C:1997:335; *Garcia Avello* (n 52); *NY v Styrelsen* (n 52); Case C-367/11 *Déborah Prete v Office national de l’emploi* [2012] ECLI:EU:C:2012:668; Case C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* [2010] ECLI:EU:C:2010:181. The following section will draw, to an extent, on several of these cases, but will primarily focus on the ones set out in this footnote.

cases to reference here are that of *Grzelczyk* and *Martínez Sala*. These cases broadened the scope of both what is considered discrimination on the basis of nationality and who may benefit from the ‘freedom of movement’ core freedom of the TFEU, while also establishing the seminal precedent at the CJEU level of citizenship as the core aspiration of EU political integration. Freedom of movement, until this point, was broadly accepted as referring primarily to those who had satisfied clear economic preconditions (workers, the self-employed, and former workers) – and in the case law delineated in the subsection above, all the returning EU citizens who were emphasising the derivative rights of their TCN family members were pursuing a nondiscrimination claim that originated in provisions of EU law. The nondiscrimination possibilities as attached to the status of EU citizen, rather than worker, and that governed not merely residence rights for TCN family members but access to social security benefits for the EU citizen or their family member, was more complex.⁵⁴

Martínez Sala is also an example of this nondiscrimination angle.⁵⁵ María Martínez Sala, a Spanish national, was a longtime resident in Germany and was applying to the German state for a child-raising benefit allowance to supplement the welfare allowance she was already collecting. The CJEU found that she was eligible for this child-raising supplement, and that the German courts had been in error in assessing her as ineligible for it, since she had been lawfully resident in Germany prior to the application being made. Her right to reside in Germany was based solely on her right as an EU citizen, rather than being based on any current or previous economic status. The national authority had therefore erred in not granting her the child-raising stipend, as any other citizen – or indeed any other citizen of other Member State nationality –

⁵⁴ Davies (n 18); Guiraudon (n 23); White (n 5); Francis Jacobs (n 7); Sandra Mantu ‘EU citizenship, integration, and equal treatment: The worker-citizen divide’ (2021) Nijmegen Migration Law Working Papers Series 2021/01; Dimitry Kochenov, ‘Citizenship without Respect: The EU’s Troubled Equality Ideal’ (2011) Jean Monnet Working Paper 08/10; Victoria Wooton, ‘Is article 14 the new article 18? Social welfare access, fundamental rights, and non-discrimination in Europe’ (2022) 29 JSSL 172.

⁵⁵ *Martínez Sala* (n 53).

would be entitled under national law to that benefit. The denial of this social benefit was, therefore, unlawful under the ambit of EU law, as it was interpreted by the CJEU to be discriminatory on the basis of nationality – explicitly provided, by Article 18 TFEU, as a violation of her Treaty right to nondiscrimination. *Sala* was even cited in *Grzelczyk* as an affirmation of the strength of the non-discrimination and equality principles of the TFEU.

Prior to the line of case law established in *Grzelczyk*, therefore, the right of nondiscrimination on the grounds of nationality was linked to those who had pursued genuine employment in the host Member State – they were not to be denied their access to social security as to preclude them from doing so would treat them differently than nationals of the host Member State, violating their right to non-discrimination as a worker pursuant under EU law.⁵⁶ A Member State could, therefore, drawing on matters of its own competence, decide to award that access to social security benefits *solely* to workers of EU extraction. *Grzelczyk* rethought the application of social security benefits to workers by stipulating that EU citizenship became a discrete category separate from the category of economic workers – also including economic workers – and therefore took precedence over previously existing residency requirements of Belgian nationality law.⁵⁷

The fundamental impact of *Grzelczyk*, however, is not any of the legal principles that led to the broadening of interpretations of both Article 6 and Article 8 TFEU, but rather the following affirmation made by the judges of the CJEU: “Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject

⁵⁶ Guiraudon (n 23).

⁵⁷ Hanneke van Eijken, ‘European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals’ (2010) 27 Utrecht Journal of International and European Law 65; *Grzelczyk* (n 53) para 46.

to such exceptions as are expressly provided for”.⁵⁸ The CJEU, therefore, used *Grzelczyk* to confirm that all cases involving questions of nondiscrimination provisions on the basis of nationality fell within the scope of citizenship provisions and Treaty rights.⁵⁹ The creation of the status of citizen under Maastricht allowed the nondiscrimination protections of Article 7 of Regulation 1612/68 to apply to those *other* than strictly workers, including students as illustrated by the *Grzelczyk* ruling.⁶⁰

The CJEU therefore confirmed that the equal treatment principle applies to *any* citizen of the Union, irrespective of their economic status.⁶¹ Even as the rights of mobile EU citizens were reinforced by the CJEU, the links to EU jurisdiction were still contingent upon freedom of movement being a factor: a citizen had to either move or prove to the CJEU that the decision of a Member State national authority could provide a reasonable barrier to a freedom of movement being exercised, either in the future or retroactively, for any reason that the freedom of movement was being utilised, either to work or to study.⁶² This is exemplified by the line of case law that allows for higher protections of family life even when no explicit or immediately obvious freedom of movement has occurred, but EU law still came into play to afford protections for TCN family members of EU citizens.

This protection was to become essential in CJEU rulings on further matters of welfare benefits and other state-authorised assistance schemes for those moving across borders and their TCN family members. The nondiscrimination provisions of the Directive were considered as being violated by the governments of Member States not awarding benefits to those *lawfully*

⁵⁸ Davies (n 18); *Grzelczyk* (n 53) para 20.

⁵⁹ Catherine Jacqueson, ‘Union citizenship and the Court of Justice: Something new under the sun? Towards social citizenship’ (2002) 27 EL Rev 260.

⁶⁰ *ibid* 273.

⁶¹ *Grzelczyk* (n 53) paras 33, 35-36; *D’Hoop* (n 52) paras 31, 33-36. Emphasis mine.

⁶² *D’Hoop* (n 52) para 30; *Singh* (n 26) para 23; Martijn van den Brink, ‘A typology of reverse discrimination in EU citizenship law’ (2023) 1 European Law Open 57.

residing in a Member State *after* benefitting from a right of free movement and that would have applied to an equivalently eligible citizen of the Member State.⁶³ The attachment of nondiscrimination protections to nationality through Article 18 TFEU and being explicitly linked to EU citizenship gave that principle direct effect and rendered it binding on Member States, leading to the case law that would be relied on to apply equality principles in the case law of derivative rights bearers' access to benefit schemes in the Member State of their residence.

The nondiscrimination provisions in Article 18 are also reiterated in the Citizenship Directive, which stipulates that the members of a family moving with a citizen *should also be protected by the principles of nondiscrimination on the grounds of nationality*.⁶⁴ This has been read to mean that both migrant workers and their families can enjoy the social advantages of family life in the host Member State – a right of the EU citizen that is established and must be enforced on the Member State itself.⁶⁵ Nondiscrimination on the grounds of nationality is a fundamental part of ensuring freedom of movement, and thereby one of the key tenets of EU citizenship rights, is not to be infringed upon by the Member States.⁶⁶ This right of nondiscrimination was not, however, held to be as absolute by the Member States as initially held by the CJEU, as the 'rights-delimitation' chapters of this thesis looking at the restriction on EU citizenship rights and the narrowing of the standard of EU citizenship rights in the United Kingdom will show.

There has been discussion and debate about the downward trend in CJEU protections for fundamental rights linked to nondiscrimination in the cases of access to welfare benefits by

⁶³ *Trojani* (n 53) paras 40, 43-44; *Vatsouras* (n 53) paras 40, 45-46; *Ioannidis* (n 53) paras 22, 26, 29; *Prete* (n 53) paras 25, 49, 52; *Bressol* (n 53) paras 33, 82.

⁶⁴ Davies (n 18); Mantu (n 54); Guirandon (n 23); Wooton (n 54); White (n 5). Emphasis mine.

⁶⁵ For example, *Reed* (n 63) para 29.

⁶⁶ Nic Shuibhne (n 19).

non-economically active EU citizens, and *Brey* has been cited as the last case in which the CJEU allowed for more permissive readings of welfare benefits and equal access to those benefits by economically inactive EU citizens.⁶⁷ In decisions post-*Brey*, certainly in the those concerning only adults, the focus of the CJEU shifts to allow the Member State greater autonomy in determining who is considered to be a burden on the public finances. In *Brey*, however, the fact of relying on benefits assistance from the state is not in and of itself indicative of an inability to support oneself or a reason to automatically consider an individual to be a financial burden.⁶⁸ This judgment was interpreted as a first step towards a more permanent linkage of EU citizenship rights to the fundamental rights of non-discrimination.⁶⁹

The ‘stepping-stone’ of nondiscrimination on the basis of nationality in the awards of benefits payments for EU citizens was an important step in the decisions of the CJEU leading to the height of permissive CJEU citizenship judgments, those based on the principle of ‘genuine enjoyment of the substance’ of the rights of EU citizenship. Those judgments will be examined below as the next building block of EU citizenship constitutionalisation.

2.3: Proportionality

The third of the key constitutional principles of EU citizenship is that of proportionality.⁷⁰ Proportionality reinforces the constitutionalising of EU citizenship by continuing, along with nondiscrimination and equal treatment, to emphasise the importance of the scope of Treaty rights of EU citizenship, while also offering an ‘escape valve’ of sorts to the constitutional

⁶⁷ Adrienne Yong, ‘Driving a wedge between friends?: The Court of Justice of the EU and its citizens in the case of welfare benefits’ (2016) 6 EHRLR 664, 668-669; Case C-140/12 *Pensionversicherungsanstalt v Peter Brey* [2013] ECLI:EU:C:2013:565.

⁶⁸ *Brey* (n 67) para 75.

⁶⁹ Yong (n 67) 670.

⁷⁰ A brief clarifying note on terminology: proportionality is a general principle of EU law which mandates that actions taken by EU institutions should not exceed what is necessary to achieve their intended objectives. As it applies to Member State implementation of EU law, especially as regards citizenship law, proportionality requires that advantages due to limiting the right are not outweighed by the disadvantages to exercise the right.

pressures within Member States to limit ‘unfettered’ access of EU citizens and their TCN family members to social security benefits.⁷¹ Proportionality is the thread of EU constitutionalisation that underlies the rest of the three key principles, as the proportionality principle, while also offering limiting options to the Member States, also effectively functions as a check on the power of the Member States to limit access of EU citizens and their TCN family members to the rights that they are constitutionally entitled to within their host Member States, specifically those of nondiscrimination and equal treatment.⁷²

The pendulum on proportionality has swung most towards the Member States in question of limiting access to social security benefits (see Chapter 3 for more on this ‘definitional’ phase of CJEU jurisprudence).⁷³ Along with the reinforcement of the rights to nondiscrimination and equality, the main theme of the line of case law discussed in the previous two sections was that the national measures in question in each of the facts in question were *disproportionate responses to the perceived threat*. The disproportionate responses, which failed to pay due regard to EU law or the rights of EU citizens, were in and of themselves a violation of the general principle of proportionality, as well as the constitutional provisions of EU citizenship.⁷⁴

The CJEU, very clearly, has established a precedent of a test that must be passed in order for a Member State measure to be considered proportional, that of the ‘four limbs’: (1) legitimacy (whether the measure has a legitimate aim, i.e., encouraging own-state nationals to take up higher education places in the Member State rather than filling those places with EU citizens by not offering them the subsistence payments that would be offered to own-state

⁷¹ Francesco Luigi Gatta, ‘The If and How: Losing the EU Citizenship, but with Due Regard to the Due Process of (EU) Law’ (2024) 9 European Papers 131; Sauter (n 7); White (n 5).

⁷² White (n 5); Davies (n 18).

⁷³ Victoria Wooton, ‘A tale of two citizens: The Brey-Dano proportionality gap in UK courts and tribunals’ (2021) 23 EJSS 144.

⁷⁴ ‘Proportionality’ and ‘due regard to Union law’ or ‘Union citizenship rights’ often go together in proportionality case law, as will be examined in this section.

nationals, as in *Bressol*), (2) suitability (whether the measure is appropriate to achieve the aim), (3) necessity (whether the measure is necessary to achieve the aim), and (4) proportionality *stricto sensu* (whether the measure's positive and negative sides are in balance).⁷⁵ This test is strictly applied by the CJEU in cases that touch upon the fundamental rights or the fundamental status of EU citizenship, such as nondiscrimination and equal treatment, particularly because of the importance that EU citizenship plays as a constitutional feature of the EU legal order.⁷⁶ There are two separate lines of analysis in proportionality case law that are helpful to use as an illustration of this principle: nationality deprivation and its impact on EU citizenship, and family rights of EU citizens in cases of immigration enforcement against a TCN family member.

2.3.1: Nationality deprivation and its impact on EU citizenship

The case law on the deprivation of nationality and its impact on EU citizenship serve as an illustrative example of how proportionality is adjudicated in questions of EU citizenship. Because of the accepted understanding at both the CJEU and the EU that acquisition and loss of nationality is a matter of solely Member State competence, however, in any case that would involve the loss of EU citizenship rights by the removal of nationality, *due regard must be paid to both EU law and the substance of the EU citizenship that would be forfeited by the removal of the nationality itself*.⁷⁷ This includes due regard to the right to family life and residence of

⁷⁵ TEU (n 22) Article 5 paragraph 4; Case C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECLI:EU:C:1990:391.

⁷⁶ Vadim Poleshcuk, "Statelessness, Proportionality and Access to (EU) Citizenship" (*EUI Global Citizenship Observatory*, 15 June 2021), available at < <https://globalcit.eu/statelessness-proportionality-and-access-to-eu-citizenship/#:~:text=How%20should%20proportionality%20be%20tested,could%20arguably%20decide%20either%20way> > accessed 15 February 2025. This is also reinforced in cases of EU citizenship acquired through Member State nationality acquisition, as seen in Case C-181/23 *European Commission v Republic of Malta* [2025] ECLI:EU:C:2025:283.

⁷⁷ Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* [1992] ECLI:EU:C:1992:295; C-192/99 *The Queen v Secretary of State for the Home Department, ex parte Manjit Kaur* [2001] ECLI:EU:C:2001:106; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECLI:EU:C:2004:639; Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010] ECLI:EU:C:2010:104; *Zambrano* (n 11); *Lounes* (n 50); Case C-221/17 *M.G. Tjebbes and*

an EU citizen's TCN family member if their rights would be adversely impacted by the removal of the EU citizen's citizenship.⁷⁸ There are three cases that will be discussed in this subsection: *Rottman*, *Tjebbes* and *JY v Wiener Landesregierung*.

Rottman affirms the principle that Member States must have due regard to EU law when making decisions on the subject of nationality awards that have implications upon EU citizenship – such as, for example, the loss of Member State nationality that would also entail the loss of EU citizenship and its attendant rights under Articles 20-21 TFEU.⁷⁹ EU citizenship should therefore be considered a discrete status, the loss of which would fall under EU competence.⁸⁰ Being made stateless is, after all, perhaps a disproportionate sanction when the crime in question is merely fraud – therefore failing on one of the four limbs of the proportionality test.⁸¹ 'Due regard to [Union] law' is a broad remit, and the CJEU deliberately left open-ended the question of what 'due regard' would, could or should look like.⁸² The judgment in *Rottman* does seem to indicate that in matters of revoking a naturalisation that

Others v Minister van Buitenlandse Zaken [2019] ECLI:EU:C:2019:189; Case C-118/20 *JY v Wiener Landesregierung* [2022] ECLI:EU:C:2022:34; Case C-673/20 *EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE)* [2022] ECLI:EU:C:2022:449; David de Groot, "CJEU asked to rule on acquisition of nationality in light of EU citizenship: The fundamental status on the horizon?" (*EUI Global Citizenship Observatory*, 16 June 2020) available at < <https://globalcit.eu/cjeu-asked-to-rule-on-acquisition-of-nationality-in-light-of-eu-citizenship-the-fundamental-status-on-the-horizon-c-118-20-jy-v-wiener-landesregierung/> > accessed on 15 February 2025. Emphasis mine.

⁷⁸ *Rottman* (n 77) para 56; Hanneke van Eijken, 'Tjebbes in Wonderland: on European citizenship, nationality and fundamental rights' (2019) 15 *EuConst* 714.

⁷⁹ Gareth Davies, 'The entirely conventional supremacy of Union citizenship and rights' (2011) in Jo Shaw (ed), *Has the European Court of Justice Challenged Member-State Sovereignty in Nationality Law?*, EUI RSCAS Working Paper No. 2011/62, 5; Charlotte Denizeau, 'La citoyenneté européenne: une valeur en quête d'identité' (Citoyenneté: Conférence-débat, Paris, 2013) < <https://centre-droit-public-compare.assas-universite.fr/fr/evenements/la-citoyennete-conference-debat-ndeg1/> > accessed 13 February 2022; Oxana Golyner, 'The correlation between the status of Union citizenship, the rights attached to it and nationality in *Rottmann*' (2011) in Jo Shaw (ed), *Has the European Court of Justice Challenged Member-State Sovereignty in Nationality Law?*, EUI RSCAS Working Paper No. 2011/62, 19.

⁸⁰ De Groot (n 77), *Rottman* (n 77) para 41. This precedent would be relied on, unsuccessfully, in the case challenging the loss of EU citizenship for UK nationals losing the benefits of EU citizenship due to the exit of the UK (that loss of citizenship was found to be proportionate as it belonged to the political decision and will of the Member State, rather than the loss of citizenship due to a criminal conviction considered severe in Austria). The Court has also held that acquisition of MS nationality might also fall under EU competence, because of the calls upon EU solidarity that EU citizenship awards, in *Commission v Malta* (n76).

⁸¹ *Rottman* (n 77) paras 57-58.

⁸² Although that question was, perhaps, partially answered by *Préfet du Gers* (n 77): para 53; *ibid* Opinion of AG Collins para 42.

would also entail the loss of rights previously enjoyed under EU citizenship, due regard must be paid to EU law rather than in potentially conflicting Member State nationality law. This judgment was also the one that brought into scope questions of proportionality – that the stripping of citizenship rights and privileges cannot be considered justifiable unless it is a decision proportionate to the threat presented public security by the individual.⁸³

Tjebbes then reinforced both the proportionality requirement in decisions made by Member State authorities in removing Member State nationality, and the necessity of ‘individual assessments’ in those nationality decisions in order adequately to understand what the full scope of the impact of the nationality removal might entail, including on TCN family members reliant on EU citizenship protections for the protections of their own rights.⁸⁴ *Tjebbes* included three joined cases, all individuals who possessed Dutch nationality but lost it after ten years (or more) of residing outside of both Netherlands and the territory of the EU.⁸⁵ The Court held in *Tjebbes* that automatic removal of Member State nationality was not precluded and was not necessarily disproportionate, but that individual assessments had to be made of the consequences of losing that nationality and its potential impact on EU citizenship rights.⁸⁶

the person concerned would be exposed to limitations when exercising his or her right to move and reside freely within the territory of the Member States, including, depending on the circumstances, particular difficulties in continuing to travel to the (...) [EU] in order to retain genuine and regular links with members of his or her family, to pursue his or her professional activity or to undertake the necessary steps to pursue that activity.⁸⁷

⁸³ *Rottman* (n 77) para 55. It is important to note that the test of ‘proportionality’ remains with the authorities of the Member State to decide, continuing to fall into the camp of both ‘pressure valve’ and ‘balancing check’.

⁸⁴ *Tjebbes* (n 77) para 44.

⁸⁵ Van Eijken (n 78). There is also an interesting facet to the nationality law of the Netherlands that acknowledges the link of Dutch nationality to the territory of the European Union, by allowing for residence in the territory of the Union to count towards maintaining Dutch nationality. The explicit link between being a Union citizen and a Member State national is therefore acknowledged in Member State nationality law.

⁸⁶ *Tjebbes* (n 77) para 48.

⁸⁷ *ibid* para 46.

Taken in light with previous CJEU jurisprudence on citizenship and Member State nationality, *Tjebbes* represents a somewhat mitigated example of rights-expansion jurisprudence.⁸⁸ The case strongly affirms that loss of nationality of a Member State raises an issue under EU law because it entails loss of EU citizenship and subsequent ‘fundamental’ rights as well as clarifying the outer limits of the ‘proportionality’ assessment as introduced in *Rottman* and bringing the rights enshrined in the Charter into the scope of assessment for nationality decisions.⁸⁹ When taking another perspective, however, the case demonstrates that the CJEU was not prepared to take the concept of EU citizenship forward as a status independent from national citizenship.⁹⁰ *Tjebbes* confirmed the importance of the proportionality test for individuals, and offers individuals in similar situations a strong set of rights that may be relied upon, without expanding the ‘fail-safe’ mechanism of the proportionality test more broadly to the institutions within Member States making nationality decisions.⁹¹

JY offers an interesting departure from the case law of *Rottmann* and *Tjebbes* for being a case that centered around the acquisition of nationality and its relationship to EU citizenship, rather than that of nationality loss.⁹² *JY* was an Estonian national who moved to Austria and undertook a naturalisation procedure, during which she sought an assurance from the Austrian authorities that the naturalisation would be granted and she could safely revoke her Estonian nationality. The assurance was granted but subsequently revoked, due to the Austrian authorities claiming that *JY* represented a danger to public security due to having committed

⁸⁸ Van Eijken (n 78); Katja Swider, ‘Legitimizing precarity of EU citizenship: *Tjebbes*’ (2020) 57 CML Rev 1163; Caia Vlieks, ‘*Tjebbes* and Others v Minister van Buitenlandse Zaken: A Next Step in European Union Case Law on Nationality Matters?’ (2020) 24 Journal of International and European Law 142.

⁸⁹ Van Eijken (n 78).

⁹⁰ Vlieks (n 88); Swider (n 88); Gatta (n 71); Swider (n 88).

⁹¹ Gatta (n 71).

⁹² Ilaria Gambardella, ‘*JY v Wiener Landesregierung*: Adding Another Stone to the Case Law Built Up by the CJEU on Nationality and EU Citizenship’ (2022) 7 European Papers 399.

two serious administrative offences while under the assurance of naturalisation; however she had already revoked her Estonian nationality, could not regain it (similar to the facts in *Rottman*) and so the decision of the Austrian authorities effectively rendered her stateless.⁹³ *JY* offers a further interesting observation on not only proportionality when implementing EU law by the Member States in questions of nationality, but also of the proportionality of nondiscrimination within the Member State in its differing treatment of own-state nationals and EU citizens.⁹⁴ *JY* lost her assurance of acquisition of Austrian nationality after committing two offences that, had they been committed by an Austrian national, would not have resulted in the same severity of sanction – they would not have had their driving license revoked, let alone their Austrian nationality.⁹⁵ *JY* was being held to a stricter standard of behaviour that failed the proportionality test, and could potentially have failed on the nondiscrimination test had that been included in the grounds of reference.⁹⁶ The individual rights of *JY* were upheld by the CJEU, as the CJEU found that the Austrian authorities had not acted with due regard to either EU law or the proportionality requirement therein, in stripping her of her assurance of Austrian nationality, and that they had denied her genuine enjoyment of the substance of her EU citizenship rights, as well as running contrary to the ‘fundamental’ nature of EU citizenship itself.⁹⁷ But the Court did not take a stance on nationality acquisition impacting upon EU law, or EU citizenship, that could or would protect other EU citizens in similar or analogous, but not exactly identical, situations.⁹⁸

The approach taken by the CJEU in the above three cases, therefore, underscores the role proportionality plays within the citizenship jurisprudence as both a ‘safety net’ for

⁹³ *ibid.*

⁹⁴ Guido Bellenghi, ‘The Court of Justice in *JY v. Wiener Landesregierung*: Could we expect more?’ (2023) 30 MJ 83.

⁹⁵ *JY* (n 77) paras 70-72.

⁹⁶ *ibid* para 73.

⁹⁷ *ibid* paras 47, 51.

⁹⁸ Bellenghi (n 94) 91.

individuals accessing their EU citizenship rights and a ‘pressure valve’ offered to Member States to mitigate competing constitutional pressures within the EU and the Member States.⁹⁹ The CJEU confirmed that the responsibility of proportionality assessments rests with the individual Member States: it is Member States’ responsibility to assess the proportionality of their own actions in regards to nationality acquisition and loss when that acquisition and loss would invoke EU law.¹⁰⁰ It was framed best in this analysis of the *Stadt Duisburg* judgment: ‘the Court of Justice does what it can: it does not intervene on the *if* but on the *how*, proceeding with caution by building the procedural protection of the European citizens against the – sometimes even unexpected and automatic – loss of their fundamental status.’¹⁰¹ This leads to a complex applicability of the proportionality principle when governing a status that is intended to be both fundamental and universally applicable to every EU citizen, regardless of whether or not they have utilised their freedom of movement. This is indicative, in and of itself, of the complex constitutionalisation of both the EU and EU citizenship: the proportionality principle is used as a balancing mechanism between the competence and authority of the Member State and the individual rights of EU citizens.¹⁰²

2.3.2: Immigration enforcement against the TCN family member of an EU citizen

The importance of proportionality to the constitutionalisation of EU citizenship is evident in another area that is, traditionally, regarded as strictly within the provenance of the authority of the Member States: immigration control, and particularly the immigration control of TCNs (as opposed to EU citizens utilising their freedom of movement, which since the 1950s has been

⁹⁹ *ibid.*

¹⁰⁰ Swider (n 88); Gatta (n 71); Lorin-Johannes Wagner, ‘The disruptive influence of EU law in nationality matters: the genuine link trajectory and judicial engineering in Udlændinge-og Integrationsministeriet’ (2024) 20 ECL Rev 615.

¹⁰¹ Joined Cases C-684/22 and C-686/22 *S. Ö and Others v Stadt Duisburg and Others* [2024] ECLI:EU:C:2024:345; Gatta (n 71) 143.

¹⁰² Gatta (n 71) 143; Sauter (n 70).

considered as part of the EU law doctrine of primacy over Member State sovereignty in specific issues).¹⁰³ Similarly to the case law on proportionality in matters of nationality loss and acquisition, proportionality offers both a check on Member States when restricting the rights of residence of TCN family members of EU citizens on immigration control grounds, while offering an opportunity for Member States to justify those limitations on grounds of safety of the public security or welfare systems.¹⁰⁴

Carpenter is of primary importance as the first (chronologically) extant case where the EU citizen's right to family life and genuine enjoyment of the substance of their EU citizenship rights was protected as a *citizen* rather than simply a mover, in the context of overturning an immigration decision taken by a Member State against a TCN spouse.¹⁰⁵ Mary Carpenter had illegally overstayed a visa and was therefore in breach of the immigration control of the United Kingdom; it was also submitted by the government of the United Kingdom that her husband had no claim to the protections of family life under EU law because he was a United Kingdom national resident in the United Kingdom. His spouse's breach of immigration control was therefore purely a matter of domestic law. The CJEU, however, held that since Mr Carpenter regularly provided services in another Member State and relied on his spouse to provide childcare while he was out of the country, to remove her under domestic regulations would be 'detrimental to their family life and, therefore, to the conditions under which [the EU citizen] exercises a fundamental freedom'.¹⁰⁶

The constitutional importance of EU citizenship here serves to reinforce the constitutional principle of proportionality, and expands it to also offer protections for TCN

¹⁰³ Peers (n 7).

¹⁰⁴ *ibid*; Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECLI:EU:C:2002:434; Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECLI:EU:C:2008:449; Case C-165/14 *Alfredo Rendón Marín v Administración del Estado* [2016] ECLI:EU:C:2016:675.

¹⁰⁵ Peers (n 7).

¹⁰⁶ *Carpenter* (n 104) para 39.

family members who have breached domestic immigration controls: the right to residence for EU citizens is conferred directly by Treaty, and the consequence is therefore that EU citizens can assert free movement rights that are in compliance with EU legislation *even* if this compliance is not in line with purely domestic immigration control.¹⁰⁷ Expulsion of the EU citizen's spouse could not be considered an appropriate or proportional response to the infraction of domestic immigration policy.¹⁰⁸ *Carpenter* tied this level of proportionality requirement to the right of the EU citizen to enjoy the scope of the genuine substance of their fundamental rights, including family life, even in their Member State of nationality.¹⁰⁹ It was held in subsequent judgments that the requirement of proportionality and individual assessment applied not only to EU citizens, but their TCN family members, even in cases of breaches of immigration policy by the TCN family member.¹¹⁰

Taken together, this can be read as a direct step taken by the CJEU to establish an explicit assumption of a role in protecting a constitutional status previously linked solely to domestic constitutionality and competence.¹¹¹ The TCN family member is protected by the same level of proportionality as to the response to a breach of immigration policy as the EU citizen, meaning they cannot be expelled as a result of violating an immigration order in the way another TCN solely subject to the domestic regulations of the host Member State would be, because of the role they play in the pursuit of the genuine substance of EU citizenship rights of the EU citizen. This case also reinforced the legal principle that Member States must aim to

¹⁰⁷ Peers (n 7). Emphasis mine.

¹⁰⁸ Case C-363/89 *Danielle Roux v Belgian State* [1991] ECLI:EU:C:1991:41; Council Directive 2004/38/EC 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC OJ L158/30, Articles 5(5), 8(2), 9(3), 25, 26.

¹⁰⁹ Eleanor Spaventa, 'From Gebhard to Carpenter: Towards a (non-)economic European constitution' (2004) 41 CML Rev 743; Peers (n 7).

¹¹⁰ Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State* [2002] ECLI:EU:C:2002:461.

¹¹¹ Spaventa (n 109).

strike a balance between the competing claims of their own national rules of immigration, the family right claims of the EU citizen, and the perceived level of threat posed by the TCN family member infringing upon the immigration laws, in a balancing act that prioritises the constitutional principles and protections of the EU citizenship status.¹¹² The fact that due regard must be paid to the safeguarding of the right of family life was an important precedent for the Court to set and then revisit in later judgments.¹¹³

Metock overruled a previous decision taken by the court in *Akrich*.¹¹⁴ The claim raised by the appellants was that the right to reside in the territory of the Member State was dependent singly upon the family relationship to their EU citizen spouse, and that that family relationship was the only relevant circumstance as an extension of the EU rights of their spouses to family reunification within the context of the Charter and Articles 18-21 of the TFEU.¹¹⁵ With *Metock*, the CJEU reversed its decision in *Akrich*, giving the opinion that the Citizenship Directive, which was adopted post-*Akrich*, expanded the rights of free movements and the right to family life, and the refusal of a host Member State to allow entry to an EU citizen's spouse would unfairly dissuade the EU citizen from exercising their treaty rights to take up lawful residence in that Member State.¹¹⁶ A Member State is therefore precluded from denying residency to the TCN spouse of an EU citizen, regardless of how the spouse initially entered the territory of the Member State – a continuation of the precedent previously set in *Zhu and Chen*, as well as *Carpenter* and *MRAX*.¹¹⁷

The *Metock* ruling can be considered as more in line with previous jurisprudence of the CJEU in line with the proportionality assessment set in *Carpenter* and *MRAX*; it has been

¹¹² *Carpenter* (n 104) para 43.

¹¹³ *ibid* para 44.

¹¹⁴ Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECLI:EU:C:2003:491.

¹¹⁵ *Metock* (n 104).

¹¹⁶ *ibid* para 65.

¹¹⁷ *ibid* para 99.

argued that *Akrich* was, in reality, the ‘reactionary’ judgment that limited the rights of a fundamental status that had already been established to extend its constitutional protections to TCN family members who provided for the substance of the genuine enjoyment of substance of citizenship rights.¹¹⁸ Because of the link between EU citizenship and free movement, and the link between family life and free movement, combining to create an element of necessity of protection of the right to family life in order to ensure the right to access freedom of movement rights, the regulation of rights of residence and movement for TCN family members of EU citizens was a matter of EU competence and that any impediment to those rights in Member State domestic immigration control would be an infringement of EU citizenship rights.¹¹⁹ The ‘trumping’ of domestic immigration control, even in cases of unlawful residence, by EU citizenship rights must therefore be accepted as part of the constitutional weight of EU citizenship protections.¹²⁰ Any limitation on that right must be proportionate to the threat posed by the TCN family member’s breach of immigration policy, or other offences committed, and the removal of that TCN family member would also have to be considered in the proportionality balance of how it would impact the genuine enjoyment of the substance of the EU citizen’s rights.¹²¹

The test of proportionality as it applies to the scope of rights that would potentially be infringed by the decision of a Member State of not just the TCN family member, but also the EU citizen, was confirmed in *Rendón Marín*; and unlike in *Metock* and *Carpenter*, these rules of proportionality applied under not only the Citizenship Directive, but to directly effective

¹¹⁸ Peers (n 7) 177-182.

¹¹⁹ *Metock* (n 104) paras 56, 58, 59.

¹²⁰ *ibid* para 66; also Case C-551/07 *Deniz Sahin v Bundesminister für Inneres* [2008] ECLI:EU:C:2008:755 paras 32-33, 40.

¹²¹ *Spaventa* (n 109); Peers (n 7); *Metock* (n 104) paras 71-74.

Treaty rights as well (namely, Articles 20-21 TFEU).¹²² Article 20, therefore, could be interpreted as the Article granting the *effet utile* of EU citizenship rights, applicable in both host Member States and Member States of origin, as an effective test of ‘last resort’ should applicability of other provisions of EU law fail to fully protect the EU citizen and their TCN family member.¹²³ In *Rendón Marín*, the Court ruled that the removal of the TCN parent would deprive the EU citizen child of the effective enjoyment of the substance of their citizenship rights, and that this removal of the child’s substance of rights was in and of itself not proportional to the threat posed by TCN parents who had served a prison sentence.¹²⁴ The right of the child to continue living on the territory of the Union must be considered to supercede the right of the Member State to remove undesirable migrants, unless that migrant poses so significant a threat that it justifies another individual losing their rights as well – and a prison sentence is not a sufficient level of threat.¹²⁵

Taken together, the line of case law in cases of both nationality deprivation or acquisition and immigration control exemptions to the TCN family members of EU citizens suggests that the CJEU is willing to scrutinise the appropriateness of national measures on grounds of proportionality *even if the link to EU law is predicated solely upon the impact on the fundamental status of EU citizenship*.¹²⁶ The CJEU has shown itself willing to act as a constitutional court willing to protect individual EU citizens from unnecessary, unjust or

¹²² *Rendón Marín* (n 104); see also Case C-304/14 *Secretary of State for the Home Department v CS* [2016] ECLI:EU:C:2016:674; Katarina Hyltén-Cavallius, ‘Who cares? Caregivers’ derived residence rights from children in EU free movement law’ (2020) 57 CML Rev 399.

¹²³ Hyltén-Cavallius (n 122) 419.

¹²⁴ *Rendón Marín* (n 104) para 87; *CS* (n 122) para 50.

¹²⁵ This will be relevant in Chapter 4 when examining the immigration implications on the transposition of the Citizenship Directive in individual Member States, particularly the United Kingdom.

¹²⁶ Paivi Neuvonen, ‘EU citizenship and its ‘very specific’ essence: *Rendón Marín* and *CS*’ (2017) 54 CML Rev 1201.

disproportionate regulation that might impact on the genuine enjoyment of the substance of their rights.¹²⁷

2.4: The constitutional implications of the fundamental rights aspect of EU citizenship: a minimum standard of protections required

As briefly touched upon in both above sections, nondiscrimination and proportionality as constitutional principles both feed into and bolster the third constitutional principle in scope of EU citizenship constitutionalisation, that of fundamental rights.¹²⁸ Fundamental rights protection can therefore, potentially, serve as the constitutional reinforcement of the fundamental status that is the aim of EU citizenship.¹²⁹

Fundamental rights, in this thesis's discourse, refers to the core grouping of rights that are intimately linked to the status of EU citizen; or, as the CJEU has found in its fundamental rights jurisprudence, the rights that are fundamental to the enjoyment of the substance of EU citizenship rights.¹³⁰ The jurisprudence of EU citizenship rights has focused primarily on the fundamentality of the right to move and reside, along with TCN family members. Freedom of movement is considered a fundamental right granted to the *status of EU citizen* – a status granted to *personhood* rather than strictly an economic one. Introduction of obstacles to freedom of movement could be construed as a violation of the fundamental right to move and reside attached to EU citizenship, as exemplified in *Carpenter* or *Metock*.¹³¹ Member States can no longer deprive EU citizens of the 'genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union', and certainly cannot impose policies

¹²⁷ Spaventa (n 109) 766.

¹²⁸ Sara Iglesias Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?' (2014) 20 ELJ 464.

¹²⁹ Martijn van den Brink, 'EU citizenship and (fundamental) rights: Empirical, normative, and conceptual problems' (2019) 25 ELJ 21.

¹³⁰ Chiara Raucea, 'Fundamental rights: The missing pieces of European citizenship?' (2013) 14 GLJ 2021, 2024.

¹³¹ Iglesias Sánchez (n 128).

or decisions that would have consequences that could lead to such a deprivation.¹³² This ‘substance’ of EU citizenship rights has expanded to include other rights included in the Charter: the right to family life and the best interests of the child in cases that involve a child EU citizen and TCN parents. This sets the scene for a development of the protection of derivative rights of residence through the genuine enjoyment of the substance of citizenship rights, which includes the right to family and private life, on the grounds of EU citizenship protections rather than as an extra incentive to economic movement.¹³³ These culminate in the ‘genuine enjoyment of the substance of EU citizenship rights’ benchmark of protections that was exemplified by the decision in *Zambrano*.¹³⁴ It is the jurisprudence that sets this ‘genuine enjoyment of the substance of rights’ test that this section will focus on, paying particular attention to *Zambrano* as the definitional example of such a test.

2.4.1: The substance of EU citizenship rights: freedom of movement and residence

The constitutional weight of the core freedoms of EU citizenship, as interpreted by the CJEU, lie in being able to enjoy them within the limitations placed upon them by the EU Treaties and EU secondary law instruments, and not in the limitations that a Member State might impose on an individual wishing to exercise those rights.¹³⁵ That is what enshrines the ‘fundamentality’ of those rights: Member States may not make decisions or impose restrictions on the EU citizen or their TCN family member, if that restriction – such as denying residence to a TCN who does not fall under the protective legislature of the Citizenship Directive, the Family Reunification Directive, or the Long-Term Residence Directive – will impede on the EU citizen’s ability to enjoy, now or in the future, their right to movement and residence in the Union.¹³⁶ The source

¹³² *Zambrano* (n 11) para 42; Iglesias Sánchez (n 128); van den Brink (n 129).

¹³³ Niamh Nic Shuibhne, ‘The ‘territory of the Union’ in EU citizenship law’ (2019) 38 YEL 267.

¹³⁴ Van den Brink (n 129); Rauceau (n 130).

¹³⁵ Iglesias Sánchez (n 128); White (n 5); Peers (n 7).

¹³⁶ Rauceau (n 130); Chiara Ragni ‘The impact of EU citizenship on the traditional balance between national migration policies and the protections of fundamental rights’ (2017) 4 Il Diritto dell’Unione Europea, available

of the fundamental rights associated with EU citizenship *is the status of EU citizen itself*.¹³⁷ The fact that the case law has established a burden of proof upon the Member State – it is for the Member State to justify why any limitations are proportional and in compliance with EU law – has reinforced the constitutional priority that is the status of EU citizen, and the protections afforded to it along the constitutional principles laid out in this chapter.¹³⁸ This is addressed in the case law examined in this chapter, and additionally reinforced by the decision in *Zhu and Chen*.

Zhu and Chen, which concerned the EU citizenship rights of a child citizen (Catherine) and her TCN family member (her mother, Mrs Chen) were resident in the United Kingdom. Catherine was an Irish national, having been born in Northern Ireland; her mother, however, was a Chinese national whose right to reside in the UK relied entirely upon her daughter's position within EU law. When Mrs Chen applied for a long-term residence permit for herself and her daughter to reside in the UK on a permanent basis, the application was rejected because the Home Office found that, as an infant, Catherine was not exercising any of the economic rights that would entail freedom of movement protections, so therefore was exempt from the Union regulations that would permit her mother to live with her in the UK. The case was referred to the CJEU, which found that Catherine was in possession of Treaty protections and freedom of movement rights, despite not participating in any economic function.¹³⁹

Taking that one step further, the CJEU also determined that the protections of freedom of movement rights, as enshrined in primary and secondary law, were not conditional upon reaching the age at which economic participation would be feasible, as that would potentially,

at <https://www.dirittounioneuropea.eu/Article/Archive/print_html?idn=4&ida=26&idi=-1&idu=-1&print=1>, accessed 5 September 2025.

¹³⁷ *D'Hoop* (n 52) para 29; *Grzelczyk* (n 53) para 33; Case C-228/07 *Jörn Petersen v Arbeitsmarktservice Niederösterreich* [2007] ECLI:EU:C:2008:494 Opinion of AG Colomer paras 28, 34.

¹³⁸ Case C-20/12 *Giersch v État du Grand-Duché de Luxembourg* [2013] ECLI:EU:C:2013:41.

¹³⁹ *Zhu and Chen* (n 77) para 19.

and unjustly, limit the scope of the rights of the individual EU citizen.¹⁴⁰ Since Catherine did therefore have a right of freedom of movement, even decoupled from economic participation, this entailed a derivative right of residence upon her mother, as Catherine was financially and emotionally dependent upon Mrs Chen and the removal of Mrs Chen – or, in this case, the denial of a long-term residence permit – would also entail the removal of Catherine, an EU citizen, from the territory of the EU, which would be a direct violation of her rights under Article 18 TFEU and would create an obstacle to the exercise of her freedom of movement rights.¹⁴¹ Any situation that could entail either the protection or the removal of freedom of movement rights could not, therefore, be assimilated to a purely internal situation, as the existence of freedom of movement rights would require the lack of any barriers to said free movement being erected.¹⁴² An EU citizen who was compelled to leave the European Union, even in childhood, because of their inability to reside in the territory of the Union without their TCN family member would, *prima facie*, be denied the substance of their EU citizenship rights.¹⁴³ This was the precedent upon which later cases of proportionality, such as *CS, Rendón Marin*, and *Zambrano* itself were decided.

When interpreting the derivative rights of EU citizenship post-*Zhu and Chen*, the CJEU case law relies most notably on the ‘genuine enjoyment of the substance’ of citizenship rights. The genuine enjoyment test is an interesting example of the CJEU moving away from strictly ‘freedom of movement’ provisions and linking the protections of the Treaty to the status of EU citizen rather than linking it explicitly to the internal market.¹⁴⁴ This movement at the CJEU is what reaffirms Article 20 TFEU protections as attached to the status of *EU citizen*, further

¹⁴⁰ *ibid* paras 20-21.

¹⁴¹ *ibid* para 45.

¹⁴² Cathryn Costello, *The Human Rights of Migrants in European Law* (OUP 2016) 133-135.

¹⁴³ Peers (n 7). This will be of great relevance in Chapter 3, when discussing the ‘citizenship-clarifying’ jurisprudence of the post-*Zambrano* years, when the Court clarifies and defines the ‘genuine enjoyment’ test and the scope of its applicability.

¹⁴⁴ *van Eijken* (n 5).

constitutionalising its status as an endower of protections on multiple individuals, rather than specifically the status of worker.¹⁴⁵ The protections of the Treaty provisions have been stipulated in judgments to only be invoked when the protections of free movement and other economic protections are not applicable.¹⁴⁶ Even with that in consideration, however, the CJEU found in cases of EU citizenship that Article 20 can serve as a source of independent rights that can be claimed by an EU citizen, even and particularly in cases where Article 21 protections do not come into play because freedom of movement has not happened.¹⁴⁷ Union law still applies, however, because freedom of movement might happen in the future – and therefore the Member State must legislate in order to not actively be discouraging it.

While freedom of movement protections for the TCN family members of EU citizens was, as previously stated, linked to the protection of freedom of movement in the first place and as in *Singh*, *Sala*, and *Zhu and Chen*, judgments in the early 2000s did also move towards the establishment of derivative rights of residence as linked to the right to family life of EU citizens as part of the fundamental rights of EU citizenship and moving across borders. This was tied to the newfound prioritisation in the Citizenship Directive of favouring the integration of the family of the EU citizen or EU worker, in order to continually pursue the stated aim of abolishing any internal barriers to a common market within the EU.¹⁴⁸ Any Member State policy that did not favour or promote the integration of the family could, therefore, be seen as creating an obstacle to freedom of movement, which would not only bring in the application of EU law, but also be found to be contrary to EU law itself.¹⁴⁹ A derivative right of residence

¹⁴⁵ TFEU (n 6) Article 20(2); van Eijken (n 5).

¹⁴⁶ Elise Muir, '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' in Nathan Cambien, Dmitry Kochenov, and Elise Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020).

¹⁴⁷ Van Eijken (n 5).

¹⁴⁸ Samantha Currie, 'Accelerated justice or a step too far? Residence rights of non-EU family members and the court's ruling in *Metock*' (2009) 34 EL Rev 310, 322; Citizenship Directive (n 108) Article 21.

¹⁴⁹ Tryfonidou (n 12).

could apply, then, even when the residence predates the family relationship that would trigger the jurisdiction of EU law over the TCN's residence claim.¹⁵⁰

The right to family life can also be linked to other freedoms in the core freedoms of EU citizenship, such as the freedoms of establishment and residence, and not singularly the freedom of movement, as evidenced in *Carpenter*. The freedom to move and provide services across the territory of the Union would be impeded by the deportation of a TCN partner who provides the childcare, as the family unit would be broken up by Mrs Carpenter's removal to her country of origin; the impediment created in the enjoyment of the right to family life would therefore be construed as an obstacle to the freedom linked to EU citizenship and would be precluded as a violation of a constitutional right.¹⁵¹ While these two judgments (*Metock* and *Carpenter*) are not actively grounded or even binding on fundamental human rights discourse, they do make explicit parallels between the freedom of movement protections for EU citizens and the right to the protection of family life that they entail.¹⁵² It is the first step in linking the rights of individual EU citizens to a constitutional idea of fundamental rights implied by the status that the CJEU will protect as part of commitment to EU values.¹⁵³ It is this groundwork that the CJEU was able to continue building on when making the judgments on derivative rights of residence and the right to family life encoded therein as 'genuine enjoyment' of the substance of EU citizenship rights.¹⁵⁴ This would reach its culmination in *Zambrano*.

¹⁵⁰ *Sahin* (n 120) para 33.

¹⁵¹ *Carpenter* (n 104) paras 31, 33-34.

¹⁵² Cathryn Costello, 'Metock: Free movement and 'normal family life' in the Union' (2009) 46 CML Rev 587; Hester Kroeze and Peter Van Elsuwege, 'Revisiting *Ruiz Zambrano*: A Never-Ending Story?' (2021) 23 EJML 1.

¹⁵³ Theodore Konstadinides and Niamh Nic Shuibhne, 'A Constitutional Reading of EU Citizenship' in L. Besselink, N. Lupo and M. Wendel (eds), *Research Handbook on EU Constitutional Law* (Edward Elgar Publishing 2024).

¹⁵⁴ *Carpenter* (n 104) para 42; *Metock* (n 104); Costello (n 152) 598-600.

2.4.2: ‘The genuine enjoyment of the substance of EU citizenship rights’

The progression of CJEU case law in expansive citizenship rulings culminated in *Zambrano*. *Zambrano* is the seminal case of derivative rights of residence, a case so significant in EU citizenship jurisprudence that it introduced a new type of immigration terminology: the *Zambrano* carer, a TCN parent with custodial responsibility of a citizen child with right to remain on the territory in question. This case was referred to the CJEU by the Belgian courts. It concerns Mr Zambrano, a Colombian national unlawfully resident in Belgium, having been denied both a permanent visa as the antecedent and primary carer of two Belgian children (who were born on Belgian soil after Mr Zambrano and his wife were denied refugee status in Belgium but continued living there) and a work permit.

The finding in *Zambrano*, in its most simplified summary, is that a TCN cannot be removed from the territory of the EU if their removal would also cause an EU citizen to lose their right to the genuine enjoyment of the substance of their citizenship rights.¹⁵⁵ The main question referred to the CJEU was whether or not a TCN, regardless of how they came to be the primary carer of an EU citizen child, has a derivative right to reside under the TFEU in the territory of the EU in light of the rights of EU citizenship of their child.¹⁵⁶ The CJEU ruled, in perhaps the shortest judgment yet analysed here, that all EU citizens under the TFEU have a right to *genuine enjoyment of the benefits of their citizenship*, the least of which is to reside in the territory of the Union itself – and any decision by national authorities that would deny the citizen that right is precluded by EU law.¹⁵⁷ To deny Mr Zambrano the work and residency permits that he was requesting would entail his inability to remain in Belgium and thereby the territory of the Union; and as his EU citizen children could not remain without him, they would

¹⁵⁵ *Zambrano* (n 11) para 42.

¹⁵⁶ *ibid* para 36.

¹⁵⁷ Niamh Nic Shuibhne, ‘Seven Questions for Seven Paragraphs’ (2011) 36 EL Rev 161; *Zambrano* (n 11) para 42.

also be forced to leave. The removal of a TCN, irrespective of how that TCN arrived in the territory of the Union and how their children came to acquire EU citizenship, who is the primary carer of an EU citizen child would entail the child losing the substance of their rights and so is never a solution available to the authorities of the Member State.¹⁵⁸

The *Zambrano* case, when heard by the CJEU, set the precedent of derivative rights protection that all subsequent judgments have either based themselves on or attempted to retrench.¹⁵⁹ It established the precedent of genuine enjoyment of the substance of EU citizenship rights as well as raising questions about what, precisely, genuine enjoyment and substance of EU citizenship rights specifically entailed.¹⁶⁰ *Zambrano* was a significant contributor to the thinking that the rules of EU citizenship should – or even could – be extended, perhaps beyond the textual boundaries of the citizenship itself, to ensure that EU children’s rights were protected even in situations that seemed wholly internal, without recourse to freedom of movement.¹⁶¹ The response to *Zambrano*, however, severely narrowed the number of people who could rely on its precedent for protections, by limiting the scope of protections to TCNs who are primary carers of dependent, EU-citizen *children* while excluding family members that fall outside of that narrow definition.¹⁶² This will be discussed in more detail in Chapter 3, when the ‘citizenship-delimiting’ stage of the constitutionalisation of EU citizenship is analysed.

While initial discussion of *Zambrano* centred around whether or not this was the Court taking a stance on broader readings of protections granted to EU citizens under Article 20-21

¹⁵⁸ *Zambrano* (n 11) para 45.

¹⁵⁹ Kay Hailbronner and Daniel Thym, ‘Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, not yet reported’ (2011) 48 CML Rev 1253, 1264.

¹⁶⁰ Kroeze and Elsuwege (n 152).

¹⁶¹ Van den Brink (n 129).

¹⁶² Anja Wiesbrock, ‘Union Citizenship and the Redefinition of the ‘Internal Situations’ Rule: The Implications of *Zambrano*’ (2011) 12 GLJ 2077, 2087.

TFEU, protecting the right to reside as well as the right strictly to move, that discussion was never able to move beyond the ‘initial’ stage of what it might mean for development of EU citizenship provisions.¹⁶³ Even in the very earliest days of the discussion surrounding *Zambrano*, however, there were questions being raised about the constitutional implications of the judgment and the role of the Court, the opacity of the judgment itself, and the lack of clarity on the role fundamental rights should play in any future CJEU jurisprudence touching on citizenship rights and protections.¹⁶⁴ Almost immediately after *Zambrano* was decided, discussion about it as a case judgment were being held in the same space as judgments that could have built on the principle of genuine enjoyment of citizenship rights for all citizens, not merely for minor children or those who relied entirely on the TCN whose right to reside was at issue, but very explicitly did not take those same expansive lines.¹⁶⁵

Zambrano was a revolutionary CJEU judgment for many reasons, but one of the more important of them is that it is the high point of permissiveness in CJEU rulings of derivative rights of residence. The government of every Member State of the EU which issued submissions to the Court (Belgium, Denmark, Germany, Greece, Ireland, the Netherlands,

¹⁶³ Hanneke van Eijken and Sjoerd de Vries, ‘A new route into the promised land? Being a European citizen after Ruiz Zambrano’ (2011) 36 EL Rev 704; Iyiola Solanke, ‘Using the citizen to bring the refugee in: *Gerardo Ruiz Zambrano v Office National de l’Emploi*’ (2012) 75 MLR 101, 110-11; Nic Shuibhne (n 157) 161-162; Dimitry Kochenov and Richard Plender, ‘EU Citizenship: from an incipient form to an incipient substance? The discovery of the treaty text’ (2012) 37 EL Rev 369, 387; Stephen Coutts, ‘The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Rights’ (2019) 21 CYELS 318; Iglesias Sánchez (n 128); van den Brink (n 129); Jože Štrus and Nina Peršak, ‘The Charter of Fundamental Rights and EU Citizenship: The Link with EU Law Re-Examined’ in Elspeth Guild, Cristina Gortázar Rotaecche, and Dora Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Publishing 2014).

¹⁶⁴ Hailbronner and Thym (n 159); Kochenov and Plender (n 163) 391; Anja Lansbergen and Nina Miller, ‘European citizenship rights in internal situations: an ambiguous revolution? Decision of 8 March 2011, *Case C-34/09 Gerardo Ruiz Zambrano v Office National de l’emploi (ONEM)*’ (2011) 7 EuConst 287, 291, 305; Van Eijken and de Vries (n 163) 718.

¹⁶⁵ Stanislas Adam and Peter van Elsuwege, ‘Citizenship and the federal balance between the European Union and its Member States: Comment on Dereci’ (2012) 37 EL Rev 37; Anja Wiesbrock, ‘Disentangling the ‘Union citizenship puzzle’? The *McCarthy* case’ (2011) 36 EL Rev 861, 865-866; Kochenov and Plender (n 163) 389; Tryfonidou (n 12) 514; Sandra Mantu, ‘European Union citizenship 2011: *Zambrano*, *McCarthy* and *Dereci*’ (2012) 26 JIANL 40, 52; Tom Richards, ‘*Zambrano*, *McCarthy* and *Dereci*: reading the leaves of EU citizenship jurisprudence’ (2012) 17 JR 272, 283-285; Sarah Pender, ‘After *Zambrano* and *McCarthy*, we now have *Dereci*...’ (*Freemovement*, 23 January 2012) available at < <https://freemovement.org.uk/article-20-of-the-tfeu-after-zambrano-and-mccarthy-we-now-have-dereci-2/>> accessed 17 December 2021.

Austria, and Poland) argued that they had no jurisdiction to issue a judgment in this case as it was a purely internal situation and therefore there was no scope for the Zambrano family to rely on EU law, as EU law at this point only extended solely to those EU citizens who had utilised their freedom of movement rights to reside in another Member State than that of their nationality and their family members.¹⁶⁶ Unlike in the previous, most closely analogous case of *Zhu and Chen*, the Zambrano children had never resided in any Member State other than that of their nationality and so should not, under a strict interpretation of the law, have been beneficiaries of Articles 18-21 TFEU.¹⁶⁷

The decision in *Zambrano* was also pivotal in opening a perspective in the case law of the EU that children can, and should be, considered as discrete rights-bearers with their own legal standing, and that rights of adults might derive from the pre-existing rights of children.¹⁶⁸ This is a precedent that the CJEU was able to build on to establish the obligation of factoring in the best interests of the child in questions of deportation of responsible adults, as well as what enabled the CJEU to continue to consolidate the notion that EU citizenship and all the attendant rights and privileges, as referenced in *Grzezyk*, is meant to be the ultimate aim of European integration.¹⁶⁹ However, while *Zambrano* raised a great deal of expectation in some constitutional legal scholars as to the potential expansion of EU citizenship rights to supercede

¹⁶⁶ *Zambrano* (n 11) para 37; van Eijken (n 5) 48, 50; Nathan Cambien, ‘Residence Rights for EU Citizens and Their Family Members: Navigating the New Normal’ in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020) 202.

¹⁶⁷ Nathan Cambien, ‘The impact of Union citizenship on member-states’ immigration laws: Some potentially perverse side effects resulting from recent ECJ case-law’ (SSRN, 2012); *Zhu and Chen* (n 77).

¹⁶⁸ Ellen Nissen, ‘A Children’s Rights Perspective to Ruiz Zambrano and Chavez-Vilchez: An Examination in Light of Theory, Practice and Child Development Research’ (2021) 23 EJML 68, 73.

¹⁶⁹ Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* [2017] ECLI:EU:C:2017:354; *Grzelczyk* (n 53); Iris Goldner Lang, “Extending the Scope of EU Law to Internal Situations: In the Child’s Best Interests We Swear, but not one step further” for *EU Immigration and Asylum Law and Policy*, 29 June 2018, available at <<https://eumigrationlawblog.eu/extending-the-scope-of-eu-law-to-internal-situations-in-the-childs-best-interests-we-swear-but-not-a-step-further/>> accessed 7 January 2022; see also Cambien (n 167).

restrictive migration and welfare policies within Member States, the judgment was sparse in its reasoning and failed to clarify some of the arbitrariness it caused.¹⁷⁰

The practical legacy of *Zambrano* is a complex one: that Member States may not impose penalties, or narrowly apply immigration rules, that infringe on an EU citizen's right to their enjoyment of their substantive EU citizenship rights, but that what the genuine enjoyment of the substance of rights actually *entails* is, in and of itself, to be interpreted quite narrowly. The clearest-cut example of that would be the exact factual nature of the circumstances in the *Zambrano* case: compulsion to leave the territory of the Union would be an infringement – but what, short of compulsion, could also be an infringement has not been codified or clarified by the CJEU, and remains up to the interpretation of the Member State until a new challenge makes it to the CJEU.¹⁷¹ The wish to keep the family together, for example, does not constitute a strong enough justification to confer a derivative right to reside.¹⁷² *Zambrano* went further than any other case in establishing a supranational protection of derivative rights of residence, by opening up secondary avenues for pursuing the protection of those rights at the European level and removing the cross-border element as a prerequisite for gaining the protections of TFEU, but the fact that the CJEU immediately backed down from any possibility of carrying those rights further in subsequent judgments leads to believe that it was more of a testament to the exceptional circumstances of the *Zambrano* case – circumstances that have not, as of yet, been repeated.¹⁷³

Zambrano serves as the illustration of a straightforward example of 'rights-expanding' constitutionalisation of EU citizenship to date. There was no emphasis on the limiting aspect

¹⁷⁰ Kroeze and van Elsuwege (n 152) 2.

¹⁷¹ Delia Ferri and Giuseppe Martinico, 'Revisiting the Ruiz Zambrano Doctrine and Exploring the Potential for its Extensive Application' (2021) 27 EPL 690, 692.

¹⁷² Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECLI:EU:C:2011:734; Kroeze and van Elsuwege (n 152) 6.

¹⁷³ Kroeze and van Elsuwege (n 152) 7; Lang (n 169).

of EU secondary law instruments, merely the standard set that no Member State may take an action that would impact or deny an EU citizen the genuine enjoyment of the substance of their EU citizenship rights.¹⁷⁴ It was the introduction of a new, ‘elastic’ standard that offered the promise of a greater intermeshing of citizenship rights with fundamental rights, and the possibility of EU citizenship provisions applying even within Member States in a greater show of ending reverse discrimination (the fact that static EU citizens are oftentimes ‘less well off’ in their access to the principles of EU citizenship than their mobile counterparts) than has been hinted at in previous judgments, or followed up on in subsequent judgments.¹⁷⁵

The fact that the CJEU took a clarifying rather than an expanding role in subsequent judgments is not, however, a sign that *Zambrano* was not a lasting commitment to expanding the constitutional protections of derivative rights of residence. Rather it was the CJEU returning to its role as a constitutional arbiter and allowing Member State sovereignty to stand intact in situations of wholly internal disputes *unless* a grave infringement of EU law was to take place as well as perhaps limiting the scope of applicability of EU law that EU citizens can use against the Member State of their own nationality if they have not made previous use of free movement rights.¹⁷⁶ The lasting impact of the introduction of the ‘genuine enjoyment of the substance of rights’ test is summed up best here:

[This case] ensure[s] a basic protection uniformly awarded by the Union to the citizens notwithstanding the previous exercise of free movement, reinforcing the bond between the Union and the citizen ensuring protection of the most basic attributes of membership (nationality and residence). Moreover, in this revolutionary case-law, the Court has continued to develop ‘the social and the civil elements in the concept of citizenship, making it a source of rights of and on its own’, managing to respect the rigid structure of the Treaty that awards Member States the role of the ultimate gatekeeper of citizenship and scrupulously abiding by the limitations of the Charter... The formula put forward to allow this development, ‘the genuine enjoyment of the substance of rights conferred by citizenship of the Union’, is an elastic formula, susceptible to be adjusted to further developments deemed necessary according to the ripeness of the

¹⁷⁴ Iglesias Sánchez (n 128).

¹⁷⁵ *ibid*; Štrus and Peršak (n 163); van den Brink (n 129).

¹⁷⁶ Konstadinides and Nic Shuibhne (n 153); Ferri and Martinico (n 171) 693; Cambien (n 166); de Groot (n 77).

integration process and the political climate. Therefore, a reconsideration of the strict interpretation of the formula and of the strict separation between citizenship and rights is not excluded.¹⁷⁷

The ultimate legacy of *Zambrano* is a complicated and multi-layered one: it is a landmark CJEU judgment in the sense that it dominated scholarly attention both in its immediate aftermath and now, almost fifteen years on. It is, similarly to *Grzelczyk*, a fundamental building-block in the CJEU jurisprudence on both the commitment to and intended fundamental status of EU citizenship.¹⁷⁸ The judgement as well as the opinion of the AG in *Zambrano* set the foundations for the CJEU to, if they had so chosen, to explicitly link the right to family life to the right of EU citizenship as interpreted and protected by TFEU, as well as to establish EU citizenship as a category that entailed protections even without freedom of movement and even within the Member State of nationality.¹⁷⁹ *Zambrano* was a landmark judgment in a practical instead of purely hypothetical way as well: it left a lasting impact on further, equally important, case law; it created a new category of persons protected by EU citizenship rights within the Member States as well as within the EU; and it created a new category and terminology of immigration provisions.

2.5: Concluding remarks

While the legacy of *Zambrano* does perhaps not live up entirely to the potential of its revolutionary aspect when first handed down, its importance as a piece of judicial decision-making must be underscored.¹⁸⁰ The practical and legal legacy of *Zambrano* has certainly been mitigated, not only by the CJEU's later clarifying judgments but by the responses of the Member States to the *Zambrano* rulings itself, to be considered truly landmark: for example,

¹⁷⁷ Iglesias Sánchez (n 128) 480-481.

¹⁷⁸ *Zambrano* (n 11) Opinion of AG Sharpston para 68.

¹⁷⁹ *ibid* paras 81-89.

¹⁸⁰ Susanne K. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of the Case Law* (OUP 2018).

as will be examined more closely in Chapter 4, the UK explicitly introduced amendments to the immigration regulations of EEA citizens that excluded *Zambrano* carers from social security benefits that nationals and EU citizens who could prove their lawful residence would be entitled to. This thesis, however, considers *Zambrano* to be a landmark judgment because of the aspiration that *Zambrano* stands for, in the clearest throughline yet from that stated in *Grzelczysk*: the genuine enjoyment of the substance of citizenship rights was the right to exist in the Union, with your family members. *Zambrano* set the outer edge of citizenship protections for derivative rights bearers; the cases that immediately followed it are the ones that set the legal clarity of how, when, and where to apply the *Zambrano* tests and exclusions.¹⁸¹

This chapter has followed on the analysis of Chapter 1, which discussed the creation of ‘citizenship’ as a category discrete from strictly economic protections, and offered an analysis of how that status was further developed by the CJEU through its citizenship jurisprudence also to also create room for greater protection of EU citizens as linked to that status. This chapter established the greater constitutionalisation of EU citizenship along the lines of the constitutional principles of non-discrimination and equal treatment, proportionality, and fundamental rights, through the case-line of ‘rights-enhancing’ jurisprudence.

In the case law analysed in this chapter, the CJEU gave greater deference to the constitutional status of EU citizen and the rights that it entailed, rather than falling in line with the restrictions along secondary law or national law instruments that the Member States were submitting. The practical examples that highlight this trend in this phase of CJEU jurisprudence on citizenship were: 1) the greater allowances made for returning EU citizens to return to their Member State of origin with their TCN family members, even if those TCN family members did not have a residence right under national migration control; 2) the cases of nationality

¹⁸¹ Tryfonidou (n 12).

acquisition and loss that allowed for EU citizenship to serve as a status with rights that it would be disproportionate for a Member State national to lose; 3) the equal treatment of mobile EU citizens on the same level of own-state nationals in access to social security and educational places; and finally 4) the creation, in the seminal *Zambrano* judgment, of the ‘genuine enjoyment of the substance of Union citizenship rights’ test that Member States could not fall below in their adjudication of EU citizens’ and their families’ residence and work status in the Member States.¹⁸² The throughline of citizenship protections throughout the case law examined in Chapters 1-2, therefore, has fallen into the broad theme of ‘citizenship-enhancing’ pre-*Zambrano*.

There were questions raised by the *Zambrano* judgment about the exact scope of citizenship and immigration integration within the EU, and to what extent the CJEU would expand its readings of derivative rights to allow greater family reunification rights. These debates were, to a certain extent, curtailed by the CJEU itself in subsequent judgments, including the judgments which emphasised the exceptional nature of *Zambrano*, which returned the CJEU to a position of reading derivative rights in a more strictly interpretative way.¹⁸³ From a practical perspective, however, such an expansion remains politically as well as potentially legally problematic, as the Member States would potentially resist the greater

¹⁸² On point 3: there is an interesting parallel to be drawn here with a current line of jurisprudence in the United States on access to abortion rights, and the idea that ‘rights without meaningful access to the enforcement of those rights’ basically amounts to the meaningless nature of the rights themselves (Giulio Fornaroli, ‘Meaningful and meaningless rights proclamations’ (2022) 13 *Jurisprudence* 545). This line of thinking has been adopted by the more hardline critics of the ‘retrenchment’ phase of CJEU jurisprudence on access to social security benefits for mobile EU citizens, as well as the more vocal critics of the reverse discrimination of static vs mobile citizens within EU jurisprudence more broadly. See primarily Charlotte O’Brien, ‘The Great EU Citizenship Illusion Exposed: equal treatment rights evaporate for the vulnerable’ (2021) 46 *EL Rev* 801 and Charlotte O’Brien *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Oxford Hart Publishing 2017); van den Brink (n 62) and (n 129); Mel Cousins, ‘“The baseless fabric of this vision”: EU citizenship, the right to reside and EU law’ (2016) 23 *JSSL* 10.

¹⁸³ Martijn van den Brink, ‘Is It Time to Abolish the Substance of EU Citizenship Rights Test?’ (2021) 23 *EJML* 13; Ciara Smyth, ‘A turn towards fundamental rights or just a swerve? The jurisprudence of the CJEU on family reunification for static Union citizens and third country national immigrants’ (2019) 33 *JIANL* 283, 300-301; Kroeze and Elsuwege (n 152); Cousins (n 182); Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECLI:EU:C:2011:734; Case C-434/09 *Shirly McCarthy v Secretary of State for the Home Department* [2011] ECLI:EU:C:2011:277; *Carpenter* (n 104); *Akrich* (n 114).

integration of EU citizenship rights. In a post-Brexit EU, it is also not out of the realm of credibility that the European institutions would shy away from any actions that could potentially alienate the remaining Member States. The clarifying, but potentially restrictive, rulings of the CJEU post-*Zambrano* are of course not argued as attempts to placate recalcitrant Member States into not leaving the European Union; but the concerns in the Member States over the permissiveness of CJEU rulings in the expanding of EU citizenship and citizenship rights into areas that had been previously the domain of solely Member State competence cannot be completely discounted either.¹⁸⁴

This can be seen in the CJEU decisions that have followed *Zambrano*: the decisions in matters of citizenship and derivative rights that have taken greater permissiveness in the establishment of citizenship and derivative rights against the Member States could be seen, retroactively, as stepping in only in situations of ‘extreme urgency’; in later, clarifying, judgments of situations that lacked that level of urgency, the CJEU rendered judgments that were more limiting in scope.¹⁸⁵ Chapter 3 will offer an analysis of both the *Zambrano* judgment as the best and last example of the CJEU’s liberal and expansionist approach to EU citizenship rights, and the more prescriptive role that the CJEU took in establishing citizenship and derivative rights protections in its aftermath.

¹⁸⁴ Michael Blauberger, Anita Heindlmaier, Dion Kramer, Dorte Sindbjerg Martinsen, Jessica Sampson Thierry, Angelika Schenk and Benjamin Werner, ‘ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence’ (2018) 25 JERP 1422,1422; Charlotte O’Brien, ‘Civis capitalist sum: Class as the new guiding principle of EU free movement rights’ (2016) 53 CML Rev 937.

¹⁸⁵ Wiesbrock (n 165); Niamh Nic Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47 CML Rev 1597 and Nic Shuibhne (n 19); O’Brien (n 184).

Chapter 3: Constitutionalisation through delimitation of the scope of EU citizenship rights

3.1: Introduction

In the post-*Zambrano* years, a decade synonymous in the historical and political timeline of the EU with the Eurozone crisis and the refugee and asylum crisis caused by the Syrian civil war (2009-2014 and 2014-2016, respectively), the CJEU handed down citizenship judgments that were considered by some scholars as a ‘retrenchment’ of the rights applied to EU citizenship.¹ This especially concerned the case law on the derived residence rights of TCN family members of EU citizens and the access of EU citizens and their family members to the social security and welfare systems of the host Member States.² There was a strict limitation placed on social security access to EU citizens who could prove to meet economic preconditions, such as being in work, in order to be considered as lawfully resident.³ The post-*Zambrano* judgments that this chapter will consider have been criticised by some scholars as unnecessarily, or unfairly, limiting the rights of EU citizens as well as the scope of their

¹ Paul de Grauwe, ‘Towards a New Euro Crisis?’ (2022) 57 *Review of European Economic Policy* 273; Jérôme Vignon, ‘The hasty return of Syrian refugees would not serve European interests’ (*Jacques Delors Institute*, 17th December 2024), accessed 3 October 2025, available at < [² Martijn van den Brink, ‘Is It Time to Abolish the Substance of EU Citizenship Rights Test?’ \(2021\) 23 *EJML* 13; Charlotte O’Brien, ‘Civis capitalist sum: Class as the new guiding principle of EU free movement rights’ \(2016\) 53 *CML Rev* 937; Charlotte O’Brien, ‘The Great EU Citizenship Illusion Exposed: equal treatment rights evaporate for the vulnerable’ \(2021\) 46 *EL Rev* 801; Mel Cousins, ‘“The baseless fabric of this vision”: EU citizenship, the right to reside and EU law’ \(2016\) 23 *JSSL* 10; Dimitry Kochenov, ‘The Right to Have What Rights? EU Citizenship in Need of Clarification’ \(2013\) 19 *ELJ* 502; Michael Blauberger and Susanne K. Schmidt, ‘Welfare migration? Free movement of EU citizens and access to social benefits’ \(2014\) 1 *Research & Politics* 1; Loïc Azoulai, ‘Le bon citoyen ou l’infortune d’être Européen’ \(2014\) *EUI Working Papers Law* 2014/14; Édouard Dubout, ‘L’échec de la citoyenneté européenne? Les mutations d’une citoyenneté complexe en période de crise identitaire’ \(2017\) 18 *Jus Politicum*.](https://institutdelors.eu/en/publications/the-hasty-return-of-syrian-refugees-would-not-serve-european-interests/#:~:text=It%20is%20estimated%20that%20a,also%20taken%20in%20Syrian%20refugees.> .</p>
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³ A brief note on terminology: for shorthand ‘ease’, this chapter will adopt the terminology of pre- and post-*Zambrano*. This loosely maps onto the two phases of constitutionalisation as laid out in the Introduction, namely the ‘citizenship-enhancing through rights’ phase of Chapters 1-2 (pre-*Zambrano*) and ‘citizenship-clarifying’ phase of this Chapter 3. The pre- and post-*Zambrano* terminology is useful because it identifies the chronological split in the narrative, rather than the thematic one.

protections.⁴ This thesis, however, does not consider that those judgments were arbitrarily limiting; rather, they are judgments that *clarify* the outer limits and scope of EU citizenship protections.⁵ While it is unavoidably the case that the CJEU did take a less expansive position in the cases post-*Zambrano*, it is this chapter's interpretation that those cases served to resolve the unanswered questions that had been posited by the *Zambrano* judgment as well as to *clarify* the scope and nature of EU citizenship, rather than simply retrench it or limit to whom it could apply.⁶ If the citizenship jurisprudence explored in Chapters 1-2 established the outer boundaries of that citizenship – the farthest edges that the constitutional protections within the citizenship status could stretch – the jurisprudence explored in this chapter will instead offer a clarification, by defining and streamlining the different strands of citizenship rights.⁷

It is inarguable that in some cases – specifically the cases on the limitation of social security access, see below section 3.3 – the scope of rights was 'limited', when compared to the 'expanded' rights in similar situations pre-*Zambrano*. These cases were decided in the same sense of similar judgments that limited interpretations of citizenship rights for EU citizens and their TCN family members to the rights enumerated in the Citizenship Directive, rather than the Treaty, unless there was a reason to believe that Treaty rights would be violated by too strict an adherence to the Citizenship Directive itself.⁸ This, however, can be seen as a natural response by the CJEU to clarify a residual ambiguity that had been established by the

⁴ Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 CML Rev 889; O'Brien 2016 (n 2); Michael Blauburger, Anita Heindlmaier, Dion Kramer, Dorte Sindbjerg Martinsen, Jessica Sampson Thierry, Angelika Schenk and Benjamin Werner, 'ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence' (2018) 25 JERP 1422, 1426.

⁵ Azoulai (n 4); Jesse Moritz and Daniel William Carter, 'Life after the 'Dano-Trilogy': Legal Certainty, Choices and Limitations in EU Citizenship Case Law' in Nathan Cambien, Dmitri Kochenov and Elise Muir (eds), *EU Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020).

⁶ Moritz and Carter (n 5).

⁷ Katarina Hyllén-Cavallius, 'The Unfolding Destiny of Union Citizenship: From a Fundamental Status to a Status of Genuine Substance' (2022) 24 EJML 430; Ashley Mantha-Hollands and Jelena Dzankic, 'Ties that bind and unbind: charting the boundaries of European Union citizenship' (2022) 49 Journal of Ethnic and Migration Studies 2091; Alicia Hinarejos, 'Citizenship of the EU: Clarifying 'genuine enjoyment of the substance' of citizenship rights' (2012) 71 CLJ 279; Alina Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (2009) 15 ELJ 634.

⁸ Niamh Nic Shuibhne, 'The Third Age of EU Citizenship' in Phil Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012).

Zambrano test (genuine enjoyment of the substance of rights), and even potentially a response to the political pressures exerted in the Member States as a response to the vagueness and potentially ‘slippery-slope’ nature of the *Zambrano* judgment itself.⁹ Because of the ambiguous nature of the facts in the *Zambrano* case itself and the largely undefined nature of the ‘genuine enjoyment’ test that it established, it was unavoidable that the CJEU would have to issue clarifying judgments. The introduction of the Citizenship Directive, which created a new source of secondary legislation from which citizenship and derivative rights could be interpreted, and the fact that *Zambrano* itself had set unrealistic expectations as to how far the CJEU would be willing to go in broad stances of citizenship and derivative rights protections, meant that that stance could not be maintained in further judgments. *Zambrano* was therefore to be enshrined as a case of exceptional circumstances that merited an exceptional treatment, that exceptionality stressed at both the European level and the level of individual Member States.¹⁰

Those clarifying judgments do not, however, necessarily limit the scope of EU citizenship, but rather highlight the constitutional complexities that were always inherent within it – and in so highlighting, contributed to the constitutionalisation of EU citizenship and its creation as a citizenship status with its own set of rights and protections, this time by reinforcing the ‘outer limits’ of that constitutional protection.¹¹ *Zambrano* was the last (for now) of the marginal cases: a situation, or individual, situated on the boundary of the legal category that was EU citizen. The questions raised about those marginal cases were answered

⁹ Urška Šadl and Suvi Sankari, ‘Why Did the Citizenship Jurisprudence Change?’ in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity* (Hart Publishing 2017); Blauberger et al (n 4); Susanne K. Schmidt, ‘Judicial Europeanisation: The Case of *Zambrano* in Ireland’ (2014) 37 W Eur Pol 769; Susanne K. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of the Case Law* (OUP 2018); Susanne K. Schmidt, ‘No match made in heaven: Parliamentary sovereignty, EU over-constitutionalisation and Brexit’ (2020) J27 EPP 779.

¹⁰ Sara Wallace Goodman, ‘EU Citizenship: A Tool for Integration?’ in Roxana Barbulescu, Sara Wallace Goodman, and Luicy Pedroza (eds), *Revisiting the Integration-Citizenship Nexus in Europe: Sites, Policies, and Bureaucracies of Belonging* (Springer Cham 2023) 284-285.

¹¹ *ibid* 196.

in the affirmative; yes, they did belong to the category of EU citizens and should be protected by the protections of that status. The ‘periphery’ cases were addressed in Chapters 1 and 2, in the rights-enhancing jurisprudence, and the attention to the CJEU now turns towards the ‘rights-clarifying’ jurisprudence.¹² It was time to specify the exact nature of the constitutional protections of EU citizenship, and where Member State sovereignty and competence once again becomes the dominant constitutional force, now that the constitutional nature of EU citizenship and its protections had already been established.

This chapter will analyse the clarifying nature of the post-*Zambrano* cases of citizenship rights derivative rights of residence, and how the *Zambrano* precedent of the genuine enjoyment of the substance of citizenship rights has served as an ‘elastic’ formula of rights protection.¹³

3.2: Clarifying the precise meaning of ‘genuine enjoyment of the substance’ of citizenship rights

The first test of clarification considered the exact meaning and scope of the ‘genuine enjoyment of the substance’ of citizenship rights as established in *Zambrano*. The phrase, though articulated in the *Zambrano* judgment, was not clarified by the CJEU. What, exactly, is the substance of Union citizenship rights? How broadly could that be assumed to create an exception in the domestic policy on migration or welfare control of a Member State? Those questions were answered by the introduction of a second test, as a part of the ‘genuine enjoyment’ test, that of compulsion to leave *the territory of the Union as a whole*. This answers both questions, if only in part: compulsion to leave the territory of the Union would deprive

¹² Azoulay (n 4).

¹³ Sara Iglesias Sánchez, ‘Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?’ (2014) 20 ELJ 464.

the EU citizen of their substantive EU citizenship rights. Only in cases of compulsion to leave the territory could the *Zambrano* exception, therefore, apply.¹⁴

Ultimately, what the CJEU sought to clarify immediately post-*Zambrano* was to what extent the genuine enjoyment of EU citizenship rights *was* still linked to the rights stipulated and protected under Article 21 TFEU: the right to free movement, and the right to bring family members with you as a way of facilitating that free movement.¹⁵ This new ‘testing mechanism’ was elaborated in a strand of case law that focuses upon the compulsion to leave the territory of the Union.¹⁶ The genuine enjoyment of the substance of EU citizenship rights is an intrinsic connection to the right of freedom of movement. However, as will be articulated in this section, the fundamental right to family life of EU citizens is *not* considered a sufficient link to EU law.¹⁷ This new definition of ‘genuine enjoyment of the substance of rights’ was articulated in the line of case law that this section will explore, divided into the analysis of *compulsion to leave* and *removal from the territory of the Union*.

3.2.1: Compulsion to leave...

The first complexity that needed clarification post-*Zambrano* was to establish the ‘baseline’ definition of compulsion; i.e., would the removal of the TCN family member also cause the EU citizen *to have to leave* with the TCN family member. There are two important cases that served to create the compulsion test: *McCarthy* and *Dereci*. *McCarthy* and *Dereci* are important to examine within the context of this thesis because they, similarly to *Zambrano*, bring into

¹⁴ Iyiola Solanke, ‘Using the citizen to bring the refugee in: *Gerardo Ruiz Zambrano v Office National de l’Emploi*’ (2012) 75 MLR 101.

¹⁵ Stephanie Reynolds, ‘Exploring the ‘intrinsic connection’ between free movement and the genuine enjoyment test: reflections on EU citizenship after *Iida*’ (2013) 38 EL Rev 376, 382.

¹⁶ Hyttén-Cavallius (n 7).

¹⁷ Peter van Elsuwege and Dimitry Kochenov, ‘On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights’ (2011) 13 EJML 443.

sharp focus the limits of the constitutional protections of EU citizenship for TCN family members.¹⁸

They both took into consideration EU citizens who had never made use of their freedom of movement rights to live and reside in another Member State but were making applications for derived rights of residence for their TCN family members as defined and adopted by the Citizenship Directive.¹⁹ Had the broad precedent set in *Zambrano* – that of allowing more expansive derived rights for TCN family members as under Article 21 TFEU – been followed in either case, both Mrs McCarthy’s spouse would have been found to have an EU-based derivative right to reside in the United Kingdom as Mrs McCarthy’s family member even though she had never utilised her right to free movement to reside elsewhere than in her home Member State of the United Kingdom. Mr Dereci would have been granted an equivalent right of residence in Austria irrespective of his initial illegal entry because to deny him residence would result in his family, which included an EU citizen, leaving the Union territory and therefore being deprived of the enjoyment of the genuine substance of their citizenship rights. However, in both cases the CJEU held that to deny residence rights to the individuals concerned would not lead to a *compulsion* on the part of the EU citizen to leave the territory of the Union and therefore could not rely on the precedent set in *Zambrano*.²⁰

These two cases, interpreted together, seem to indicate that the fundamental rights of EU citizenship do not necessarily include the autonomous and discrete right to move and/or reside, but rather the *linked* rights of movement *and* residence (i.e., a mobile EU citizen has a right to reside in another Member State than that of his nationality; a static EU citizen does not

¹⁸ Niamh Nic Shuibhne, ‘(Some of) The Kids Are All Right: Comment on *McCarthy* and *Dereci*’ (2012) 49 CML Rev 349; Tryfonidou (n 7).

¹⁹ *ibid.*

²⁰ Nic Shuibhne (n 18) 357; Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECLI:EU:C:2011:277 para 49; Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECLI:EU:C:2011:734 paras 66, 68. Emphasis mine.

have an independent right to reside in the Member State of origin under EU law).²¹ Taken together, the two judgments of *McCarthy* and *Dereci* serve to both delineate the limits of the *Zambrano* case law, while also emphasising the ‘genuine enjoyment’ test as the one that national authorities *must* pay due regard to when determining rights of residence claims.²² The *Zambrano* precedent was, in fact, to be interpreted as ‘exceptionally’ narrow, and only to apply in cases of extreme urgency.²³ The desire to maintain the family link could not be understood as synonymous with the compulsion of the family to leave the territory of the Union along with the TCN parent.²⁴ These findings reinforced the need for there to be an ‘emergency’ trigger to bring in *Zambrano* protections in future judgments, thus reinforcing the exceptional nature of the *Zambrano* ruling itself and contributing to the discrepancies in scope of derivative rights as applied to minor citizens and adult citizens.

The ‘emergency trigger’ applied to the *Zambrano* precedent, therefore, is that of *compulsion*. Had the genuine enjoyment of the substance of Mrs McCarthy’s citizenship rights as an EU citizen been threatened by the denial of a residency permit for her spouse, EU law could have stepped in to overrule the domestic limitation; *but her spouse’s right to reside in the United Kingdom was not considered by the CJEU as instrumental to her continued residence in the Union itself*.²⁵ Had she been dependent on her husband, perhaps the outcome would have been different, and more in line with the principle established in *Zambrano*. Here can be seen the first sketching of the line of case law that prioritises the relationship of dependency within the determination of ‘compulsion’ in determining the scope of derivative rights protections for TCN family members.²⁶ The ‘genuine enjoyment of the substance’ of

²¹ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)* [2011] ECLI:EU:C:2011:124 opinion of AG Sharpston para 101; *McCarthy* (n 20) para 41.

²² *Nic Shuibhne* (n 18).

²³ *Hinarejos* (n 7) 281.

²⁴ *Dereci* (n 20) paras 68, 66.

²⁵ *McCarthy* (n 20) paras 44-45, 52, emphasis mine; *Tryfonidou* (n 7) 513.

²⁶ See next section.

rights test could be more narrowly construed, or more specifically defined, to only apply in situations where an EU citizen would be *compelled* to leave the territory of the EU.²⁷

The *Dereci* judgment did also significantly raise the consideration for what would be ‘compulsion’ to leave the Union – probably, therefore, limiting the number of families who could rely on that right and leaving families who rely on benefits and other state assistance more vulnerable to Member States, and with less recourse to EU law, as the genuine enjoyment, compulsion, and dependency tests are now harder to evidence.²⁸ The judgment here was multi-layered and complex, and set the scene for the myriad of complications that would arise in later judgments. The CJEU could have found an explicit link between citizenship rights in the Union and rights to family life as expressed in Article 7 of the Charter and Article 8(1) of the ECHR but did not. It could have clarified what is meant precisely by ‘compulsion to leave the territory of the Union’ but did not. Perhaps most importantly, it could have found that relationships of dependency could be assumed to exist between not only a TCN parent and their citizen child but also that of a TCN spouse to their citizen spouse and children rather than solely one or the other, but did not.²⁹ The scope and extent of the ‘compulsion’ test as it applied post-*Dereci*, in situations of strict urgency and strict compulsion, was to be assumed by the Member States based on what the CJEU left out of the *Dereci* judgment rather than what it included.³⁰

The *Dereci* judgment also explicitly failed to make it compulsory for the national authorities of the Member State to take into account the right to family life of EU citizens as established in the Charter.³¹ *Dereci* reconfirmed that the wholly internal rule could not be disapplied unless in cases of extreme urgency, *such as* the compulsion to leave the territory for

²⁷ *McCarthy* (n 20) paras 57, 45-46, 48.

²⁸ Nic Shuibhne (n 18); Charlotte O’Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Oxford Hart Publishing 2017) 87.

²⁹ *Dereci* (n 20) Opinion of AG Mengozzi, para 46.

³⁰ Nic Shuibhne (n 18) 368-372.

³¹ *ibid* 375.

a minor EU citizen: in the case of *Dereci*, the children would have been able to remain in Austria as the dependants of an Austrian citizen.³² A stated preference to keep the family unit together could not be interpreted as compulsion for the family to relocate outside the Union territory should the right of residence for the TCN not be granted. As the dependence of Mrs Dereci on Mr Dereci for financial or emotional support in the raising of the children was not deemed relevant to the case, the CJEU could not therefore take into consideration anything beyond the strictest level of compulsion – and found that it did not exist. Because of the lack of urgency required to override the wholly internal rule, the application to EU law could also not be made by the national authorities to bring into scope the right to family life in the Charter that would be infringed upon with the removal of Mr Dereci from the Austrian territory.³³

Because of the supranational nature of EU citizenship, there was also a question raised on the territorial scope of protections for EU citizens and their TCN family members, as briefly touched upon in *McCarthy*: does the protection from expulsion of a TCN primary caregiver of an EU citizen apply to the Union in its entirety, or can it apply within individual Member States? In other words, would the TCN family member of a Union citizen resident *not* in the country of their nationality be found to have a derived right to reside *specifically* within that Member State, or does the right of residence – and therefore the right of the protection of the genuine enjoyment of their citizenship rights – apply only to the Union as a whole?

3.2.2: ... the territory of the Union as a whole

That question was answered in the line of case law examined in this section. Adult citizens of the EU cannot rely on Article 20 TFEU in internal situations, but EU citizen *children*, occasionally, can.³⁴ This is because the removal of a TCN spouse would not necessarily deprive

³² *Dereci* (n 20) paras 65-69.

³³ *ibid* paras 71-72.

³⁴ Nic Shuibhne (n 18) 357.

an EU citizen of the genuine substance of her citizenship rights, whereas the removal of a TCN parent (and therefore, almost automatically assumed by the authorities, a primary caregiver) could.³⁵ Adults in those situations, such as Mrs McCarthy, could *only* rely on the provisions of the Citizenship Directive – which she failed to meet.³⁶ Very quickly after *Zambrano*, the CJEU held that ‘genuine enjoyment of the substance’ of rights was interpreted to mean solely residence on *the territory of the Union as a whole*, and *simply* residence (except in the case of minor citizens; see later in this chapter).³⁷ This ‘strict residence’ interpretation, as is found in the Citizenship Directive, would be established into domestic law regarding the rights of EU citizens in the United Kingdom. To claim protections for TCN family members under Article 20 TFEU when Article 21 does not apply and the EU citizen does not meet the conditions as laid down in the Citizenship Directive, the individual EU citizen must be able to prove that the right is genuinely threatened by the policy adopted by the Member State.³⁸

In *Alokpa*, the CJEU had an opportunity to establish the *Zambrano* precedent to have a transnational element as well as an internal one. The CJEU found instead that the genuine enjoyment of the substance of citizenship rights applies only to the non-deportability from the territory of the Union rather than non-deportability from the state of residence if that state were not, coincidentally, the state of nationality.³⁹ In the case of *Alokpa* and her children, it was

³⁵ Case C-147/24 *V (Safi) v Staatssecretaris van Justitie en Veiligheid* [2026] ECLI:EU:C:2026:442; Case C-82/16 *K.A. and Others v Belgische Staat* [2018] ECLI:EU:C:2018:308; Case C-413/99 *Baumbast and R. v. Secretary of State for the Home Department* [2002] ECLI:EU:C:2002:493, Opinion of AG Geelhoed para 93; Case C-22/21 *SRS and AA v Minister for Justice and Equality* [2022] ECLI:EU:C:2022:683; Joined Cases C-389/87 and 390/87 *G.B.C. Echternach and A. Moritz v Minister van Onderwijs en Wetenschappen* [1989] ECLI:EU:C:1989:130; Joined Cases C-482/01 and 493/01 *Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg* [2004] ECLI:EU:C:2004:262; Nathan Cambien, ‘EU Citizenship and the ECJ: Why Care about Primary Carers?’ [2012], UACES annual conference, September 2012, accessed on 2 December 2025.

³⁶ *McCarthy* (n 20) para 49.

³⁷ Case C-86/12 *Adzo Dzenyo Alokpa and Others v Ministre du Travail, de l’Emploi et de l’Immigration* [2013] ECLI:EU:C:2013:645; *K.A.* (n 35); Joined Cases C-356/11 and C-357/11 *O, S Maahanmuuttovirasto and Maahanmuuttovirasto* [2012] ECLI:EU:C:2012:776; Case C-87/12 *Kreshnik Ymeraga, Kasim Ymeraga, Afijete Ymeraga-Tafarshiku, Kushtrim Ymeraga, Labinot Ymeraga v Ministre du Travail, de l’Emploi et de l’Immigration* [2013] ECLI:EU:C:2013:291.

³⁸ Nic Shuibhne (n 18) 367; Cambien (n 35).

³⁹ Chiara Rauce, ‘European Citizenship and the Right to Reside: ‘No One on the Outside has a Right to be Inside’?’ (2016) 22 *ELJ* 470, 479-480, 481; Dmitry Kochenov and B. Pirker, ‘Deporting the Citizens within the

considered sufficient by both the national authorities and the CJEU that they could reside legally in France, the Member State of the children's nationality, and so to deny Mrs Alokpa the residence permit she sought in Luxembourg would not deny her children the substance of their rights as EU citizens.⁴⁰ This piece of the case law served to reiterate the first layer of the 'double test' that the removal of the TCN will infringe the rights of the EU citizen by compelling them to leave the territory of the Union as a whole.⁴¹

Article 20 TFEU is the 'catch-all' of any family reunification claims made under derivative rights of residence as it applies to the citizenship rights of the Union citizen. What is interesting in the case law developing on family reunification where no previous freedom of movement exist is that any Article 20 claims will be considered stronger and more justified if the family unit *already exists* on the territory of the Union, rather than a wish to join a family unit in the Union. *Iida*, after all, explicitly states that no autonomous right to reside will be granted to TCNs by virtue of their family relationships and *Dereci* explicitly states that the wish for the family to remain together is not a strong enough justification to bring in Article 20 claims.⁴² This, again, reaffirms the difference in treatment for minor citizens who rely more entirely on their adult TCN family members than adult citizens who claim to depend upon their similarly adult TCN family members.⁴³

Article 21 TFEU protections are the first hurdle to clear to ascertain whether a derivative right of residence can be extended to a TCN.⁴⁴ If so, they are entitled to the protections of the Citizenship Directive. If, however, no freedom of movement link can be

European Union: A Counter-Intuitive Trend in Case C-348/09 P.I. V Oberbürgermeisterin der Stadt Remscheid' (2013) 19 Colum. J Eur. L 369, 374.

⁴⁰ *Alokpa* (n 37) para 33.

⁴¹ *McCarthy* (n 20) para 49; *O. and S.* (n 37) paras 52, 54, 56; *Ymeraga* (n 37).

⁴² Case C-40/11 *Yoshikazu Iida v Stadt Ulm* [2012] ECLI:EU:C:2012:691 paras 72, 78; *Dereci* (n 20) paras 68-69.

⁴³ *Ymeraga* (n 37) paras 34-35.

⁴⁴ Hester Kroeze, 'The substance of rights: new pieces of the Ruiz Zambrano puzzle' (2019) 44 EL Rev 238, 241.

made, Article 20 TFEU can be brought in to determine whether the derivative rights of residence claim or family reunification claim can be granted.⁴⁵ Unlike the children in *Dereci*, after all, Mrs Alokpa's children had no other EU citizen upon whom they could rely, so Article 20 protections would have been appropriate in this case. *Alokpa* also confirmed that, even in cases concerning children, 'compulsion to leave the territory of the Union' should be taken by the national authorities and the CJEU itself as compulsion to leave the territory of the Union *as a whole*. It is the totality of the territory of the Union that is most applicable, thereby, to the 'genuine enjoyment of the substance' of EU citizenship rights: a national of Germany who had to relocate from Germany to Romania with their TCN family member is not, theoretically, being deprived of their hypothetical future free movement use, as they will still be able to utilise their freedom of movement rights as an EU citizen from Romania. Unlike the children in *Zambrano* or *Chavez-Vilchez*, denying Mrs Alokpa the right to reside in the Member State of her residence would not compel her children to follow her outside of the Union; they could relocate to France.

Whether or not this solution was practical was not considered relevant by the Court or the national authorities: the denial of a residence right in Luxembourg would not mean the removal of the children from the territory of the Union, and so the compulsion test was not met. Residence in the territory of the Union is, according to *Alokpa* therefore, the outer *physical* limit of the genuine enjoyment of the substance of EU citizenship rights.⁴⁶ The compulsion to leave the territory of the Union *as a whole* as the 'deciding' factor when applying Article 20 TFEU protections was re-confirmed in the subsequent decisions of *Rendón Marín* and *CS*.⁴⁷ These two cases also reaffirmed Article 20 TFEU as being the 'determination of last resort'

⁴⁵ *ibid*; Cambien (n 35).

⁴⁶ Tryfonidou (n 7); Hyltén-Cavallius (n 7).

⁴⁷ Case C-165/14 *Alfredo Rendón Marín v Administración del Estado* [2016] ECLI:EU:C:2016:675; Case C-304/14 *Secretary of State for the Home Department v CS* [2016] ECLI:EU:C:2016:674.

to be applied when *no other route* to legal residence under EU law can be found.⁴⁸ Article 20, therefore, could be interpreted as the Article granting the *effet utile* of EU citizenship rights.⁴⁹

Rendón Marín and *CS*, both heard after *Alokpa* (heard in 2015 and decided in 2016), offer an example of why the scholarly argument that the post-*Zambrano* citizenship jurisprudence is universally ‘restrictive’ is perhaps short-sighted: *Rendón Marín* and *CS* both offer a more expansive reading of Article 20 protections than *Alokpa* did.⁵⁰ This was partly motivated by, in a somewhat stark reversal to the case law immediately preceding it, a tendency of the CJEU to incorporate Charter rights standards into their evaluations of compulsion and dependency.⁵¹ *Rendón Marín* and *CS* also brought back an explicit focus on the proportionality requirement in Member State policies that could preclude an EU citizen from enjoying the substance of their rights, re-embedding a layer of constitutional protection to the EU citizenship rights that had been lacking in the preceding case law.⁵² This continued with the 2026 judgment in *Safi*, which held that even though there is a theoretical possibility for an EU citizen child and their TCN parent to move to another Member State, the TCN parent must be granted a derivative right to reside in the Member State of nationality when it is in the best interest of the child to remain in their Member State of nationality - a reaffirming of the ‘right not to move’, and an increase in the level of protections for rights solely to reside for EU citizen children and their TCN parents.⁵³

⁴⁸ Katarina Hyltén-Cavallius, ‘Who cares? Caregivers’ derived residence rights from children in EU free movement law’ (2020) 57 CML Rev 399, 419.

⁴⁹ *ibid.*

⁵⁰ Hyltén-Cavallius (n 7).

⁵¹ Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* [2017] ECLI:EU:C:2017:354 para 70.

⁵² Hyltén-Cavallius (n 7).

⁵³ *Safi* (n 35) paras 30, 50, 52-59; see also Hanneke van Eijken, ‘Nationality, Union Citizenship and Constitutional Values after *Commission v Malta*’ (2026) 22 ECL Rev 1; Jeremy Bierbach, ‘Eu Citizenship to get ‘thicker’: A case note on a public hearing’ (EU Law Analysis, 3 September 2025) accessed 8 April 2026 <<http://eulawanalysis.blogspot.com/2025/09/eu-citizenship-to-get-thicker-case-note.html>>. The *Safi* judgment, taken together with the *Commission v Malta* decision, raises some interesting points and questions about intra Member State solidarity in terms of EU citizenship rights, which will be discussed in more depth in the

In *Rendón Marín*, it was acknowledged that the lack of practicability of relocating to Poland from Spain, the Member State of nationality of the EU citizen child in the case, was a reason for a derivative right of residence to be granted in Spain – the right of the EU citizen to reside in the territory of the Union might not be to reside only in the Union, but in the state to which they have the most links and can be most easily supported by their caregivers.⁵⁴ This is perhaps a reason to believe that the portion of the ‘double test’ that focusses on compulsion to leave the territory of the Union might, eventually, be lowered from the strictest definition of compulsion to what would cause the least disruption to the citizen from whom the rights derive: the right will become encompassing of more rights, such as the rights to dignity and education, rather than solely a right to reside.⁵⁵

3.2.3: Concluding remarks

It is hard to interpret *McCarthy* and *Dereci* as anything other than restrictive judgments on the scope and substance of EU citizenship rights, especially in the light of *Iida* making the explicit statement that purely hypothetical infringements to freedom of movement could not be taken in consideration as reasons to overturn a contested Member State policy (unlike the findings in *Zambrano* and *Zhu and Chen*).⁵⁶ While *McCarthy* and *Dereci* were certainly more limiting in scope than *Zambrano* itself, these two cases represent the most extreme of the course corrections seen in the immediate aftermath of the *Zambrano* decision. The movement back towards more ‘enhancing’ judgments – or certainly, judgments that once more emphasise the

concluding chapter of this thesis as part of the argument that EU citizenship is entering a phase of ‘reconstitutionalisation’ after the political shock that was Brexit.

⁵⁴ CS (n 47) para 50; *Rendón Marín* (n 47) paras 78-80.

⁵⁵ *Safi* (n 35); *Hyltén-Cavallius* (n 48); *Cambien* (n 35). For the continual linkage of fundamental rights protection to EU citizenship status, see also Case C-4/23 *M.-A.A. v Directia de Evidenta a Persoanelor Cluj and Others* [2024] ECLI:EU:C:2024:845 and Case C-713/23 *Jakub Cupriak-Trojan, Mateusz Torojan, Wojewoda Mazowiecki v Prokurator Prokuratury Okregowej w Warszawie* [2025] ECLI:EU:C:2025:917; Marlene Tiede and Jasper Siegert, “A Right Not to Move: EU Citizenship and Forced Movement” (30 July 2026, *Verfassungsblog*) accessed on 1 August 2026 <<https://verfassungsblog.de/a-right-not-to-move/>>.

⁵⁶ *Iida* (n 42) paras 77, 66.

potential broad scope of fundamental rights as linked to fundamental status – was already beginning in 2016.⁵⁷

Certainly, it is telling that the relatively restrictive findings in *Iida* about how merely possessing a familial relationship to an EU citizen could not guarantee an autonomous right to reside or be taken as grounds on the face of them to establish a derivative right are not cited as reasons to *deny* other rights questioned in subsequent clarifying judgments.⁵⁸ This absence of automatic or strong denial has left the CJEU more room to interpret derivative rights more broadly in future cases, which is what will allow the CJEU to interpret that EU law supersedes domestic immigration controls in situations involving dependent EU citizens and minor EU citizens, as will be examined below.⁵⁹ These judgments can, therefore, most usefully be interpreted as cases that seek to find and define the outer edges of EU citizenship, rather than strictly (or solely) limit who can benefit from that status.

McCarthy was the first of the two judgments, with *Dereci*, to confirm that, while *Zambrano* had given rise to the thinking that the genuine enjoyment of the substance of the rights of EU citizenship could be interpreted as a positive right held by individuals, it was in practicality more of a negative right: it is for the Member States to *not* establish national policies that preclude citizens from enjoying that right. It is, however, for the national authorities of the Member States to determine whether their policies are a violation of the EU citizen's rights themselves.⁶⁰ The right of the EU citizen is enjoyed in the inability of the

⁵⁷ Hyltén-Cavallius (n 7).

⁵⁸ *Iida* (n 42) paras 66, 82.

⁵⁹ Nathan Cambien, 'Union Citizenship and Immigration: Rethinking the Classics?' (2012) 5 EJLS 10. See also Case C-459/20 *X v Staatssecretaris van Justitie en Veiligheid (Mère thaïlandaise)* [2023] ECLI:EU:C:2023:499, which held that refusing an entry permit for a TCN parent of an EU citizen child could prevent that child from exercising their EU citizenship rights even if that child had never lived in the EU, if a relationship of dependency between the two existed when the child was seeking to enter and live in the territory of the EU.

⁶⁰ Koen Lenaerts, 'The concept of EU citizenship in the case law of the European Court of Justice' (2013) 12 ERA Forum.

Member States to remove it. The CJEU can be called upon to arbitrate only when the active deprivation of the EU citizen's right is at stake.⁶¹

Such a line of case law, however, falls into the historical trend of the time, and cannot be criticised for too severe a retrenchment when the pattern along multiple different aspects of citizenship jurisprudence was that of clarification rather than expansion.⁶² After the 'rights-expanding' height of *Zambrano*, and the establishment of EU citizenship as a status with its own attendant rights and protections for all those who have the rights to claim them, the CJEU took a position of clarifying the rights of EU citizenship rather than continuing to extend them. The right to family life was already protected by the Charter, and therefore any EU citizens who fell within the scope of EU law would be protected by the Charter as well. Any step taken by the CJEU to include that right in the 'genuine enjoyment of the substance of rights' beyond those of movement and residence would, perhaps, have been considered as the CJEU overstepping its constitutional bounds.⁶³

3.3: Further clarifying of the 'genuine enjoyment' test: Relationships of dependency in adjudicating compulsion to leave the territory

The previous section of this chapter laid out the clarifying jurisprudence on the 'genuine enjoyment of the substance' of citizenship rights by analysing the ways in which the CJEU established the very narrow interpretation permissible of the *Zambrano* exception. Another layer of clarification was added to this test, essentially making it a 'double' test, in order to clarify the meaning of 'compulsion' when applying the now-narrowed *Zambrano* exception.

As the case law analysed in this section will show, 'compulsion' has come to be defined and interpreted by the Court as including a relationship of strict dependency between the EU

⁶¹ *Hinarejos* (n 7) 280.

⁶² *Hinarejos* (n 7); Sandra Mantu and Paul Minderhoud, 'Struggles over social rights: Restricting access to social assistance for EU citizens' (2023) 25 *EJSS* 3; *Hyltén-Cavallius* (n 7).

⁶³ *Nic Shuibhne* (n 18) 379.

citizen and the TCN family member whose removal is in question. This is especially the case where no cross-border element is in play and EU citizens must rely on their citizenship rights against the Member State of nationality and residence, falling back on Treaty rights, as they are out of scope of the protections within the Citizenship Directive (which already protects the TCN family members of EU citizens if they are ‘lawfully resident’).⁶⁴ An important clarifying note, however: this section will only focus on cases where an EU citizen is seeking redress against their Member State of both nationality and residence, because that jurisprudence is directly involved in the delimitation of the ‘genuine enjoyment of the substance of rights’ doctrine.⁶⁵ EU citizens who are advocating for their rights under the freedom of movement and Citizenship Directive protections, for themselves and their TCN family members, are protected by freedom of movement jurisprudence, which has already been addressed in the previous chapter. The following section, 3.4, will analyse the jurisprudence on the adjudication of rights in accordance with clarifying principles of the Citizenship Directive.

As mentioned in the discussion of compulsion, the TCN family members in those cases could not be protected by the Article 20 TFEU rights of their EU citizen family member because the relationship of dependency was not sufficiently ‘dependent’ to create the compulsion to leave the territory of the Union for the EU citizen.⁶⁶ The next step in the clarifying jurisprudence of the CJEU, therefore, was to establish the test that would determine the relationship of dependency, effectively adding a second layer to the tests that must be applied to determine whether or not a Union citizen was in risk of having their ‘genuine enjoyment of the substance’ of their rights infringed.⁶⁷ Because of the potential for the *Zambrano* doctrine to significantly widen the scope of EU law, the situations in which it would

⁶⁴ Fulvia Ristuccia, ‘Ties that bind and ties that compel: Dependency and the Ruiz Zambrano doctrine’ (2023) 60 CML Rev 1227, 1228.

⁶⁵ *ibid.*

⁶⁶ Nic Shuibhne (n 18).

⁶⁷ Ristuccia (n 64).

be an applicable exception must be interpreted narrowly, only in cases where no other avenue of EU law protections (such as under the Citizenship Directive) would be applicable, and only in situations of extreme urgency.⁶⁸ The combination of ‘extreme urgency’ and ‘compulsion’ has therefore led to a situation in which relationships of dependency are adjudicated as existing *only when the Union citizen would demonstrably not be physically able to continue living in the territory of the Union*.⁶⁹

This ‘strictest’ definition of dependency, by assimilating it to ‘inseparability’, therefore leaves out any dependence that is not critical to physical livelihood, and makes relationships of emotional or mental dependency harder to evidence.⁷⁰ Because of the strictness of this test, the CJEU has – perhaps inadvertently, and perhaps not deliberately, but still convincingly, as this section will show – established a status quo in which the TCN family members, particularly parents, of EU citizen children are afforded more protections under the Treaty than the TCN family members of EU citizen adults who have not made use of their free movement rights, and has left out individuals who should perhaps be eligible for the protections afforded to TCN family members under Article 20 TFEU but who do not fit in the legal or formal definition of ‘family’ that the CJEU’s strict interpretation of dependency allows.⁷¹

This reinforces the differentiation between adult citizens and children citizens in the standard of protections and evidence required when determining relationships of dependency. Relationships of dependency between a child citizen and their TCN caregiver can safely and reliably be assumed; relationships of dependency between an adult citizen and their TCN

⁶⁸ *ibid* 1229; Cambien (n 35).

⁶⁹ Ristuccia (n 64), emphasis mine; Cambien (n 35).

⁷⁰ Iyiola Solanke, “HC and Sanneh – ‘genuine enjoyment’ does not include social welfare” (*Electronic Immigration Network*, 20 December 2013) available at < <https://www.ein.org.uk/blog/hc-and-sanneh-genuine-enjoyment-does-not-include-social-welfare> > accessed on 13 April 2023; Ristuccia (n 64) 1230-1232; *O. and S.* (n 37) para 56; *SrS and AA* (n 35).

⁷¹ Van den Brink (n 2); Helen Stalford, ‘Concepts of family under EU law – lessons from the ECHR’ (2002) 16 *International Journal of Law, Policy and the Family* 410.

family member must be proved to the satisfaction of the Member State.⁷² This has led to the unhelpful ‘synonymisation’ of derivative rights of residence to that of Zambrano carer, leaving the exceptional circumstances and increased access of protection rights encoded in the Treaty rather than the Citizenship Directive to be mainly applicable to children rather than adults.⁷³ This double standard of protections is what has allowed limitations in not only derivative rights protections but also accessing social security benefits that would protect the EU citizen in Member States such as the UK, as will be seen in Chapter 4.⁷⁴

Perhaps because relationships of dependency are more ‘inseparable’ and more immediately and intuitively obvious in the case of EU citizen children and their TCN parents, the CJEU has offered much more leeway in the interpretation of the *Zambrano* exception in cases that involve the derived right of residence – as well as access to social security – for TCN parents of those EU citizen children.⁷⁵ Those cases, therefore, fall more into the pattern of ‘EU citizen successfully defends their rights against the Member State’ that was seen in the ‘citizenship-enhancing’ stage of the case law discussed in the previous chapters, contrary to the decisions discussed in this one.⁷⁶ Not only has the CJEU been more willing to apply the *Zambrano* exception of Article 20 TFEU protections to those children and thereby their TCN parents, the CJEU has also adopted, more formally, the importance of Charter and fundamental rights as they apply to the citizen children than they have in equivalent cases where the EU

⁷² Ristuccia (n 64); Sarah Progin-Theuerkauf, “K.A. and others – the Zambrano Story Continues” for European Law Blog, 22 May 2018, available at < <https://europeanlawblog.eu/2018/05/22/k-a-and-others-the-zambrano-story-continues/> > accessed 7 January 2022.

⁷³ Ciara Smyth, ‘A turn towards fundamental rights or just a swerve? The jurisprudence of the CJEU on family reunification for static Union citizens and third country national immigrants’ (2019) 33 JIANL 283, 293-294.

⁷⁴ Charlotte O’Brien, ‘“Hand-to-mouth” citizenship: decision time for the UK Supreme Court on the substance of Zambrano rights, EU citizenship and equal treatment’ (2016) 38 JSCWFL 228; Charlotte O’Brien, ‘Socio-economic discrimination in the EUSS’ (Challenging unfairness in the immigration system, London, February 2025).

⁷⁵ Ristuccia (n 64).

⁷⁶ Nic Shuibhne (n 18).

citizen was an adult.⁷⁷ The ‘relationship of dependency’ as it exists between an EU citizen child and their TCN parent might also entail the overturning of immigration control, when questions of rights of residence are being determined.⁷⁸

The *Chavez-Vilchez* judgment is the perfect example of children being more ‘eligible’ for *Zambrano* protections. It centres children’s rights, rather than nationality or citizenship law, in any investigation that authorities must undertake when deciding residency claims that entail deportation jeopardy. This focus on children’s rights, specifically the ‘best interests of the child’, brings a fundamental rights perspective into scope in a formal way that had *not* been considered under *Dereci*.⁷⁹ The CJEU includes the rights to family life and the best interests of the child, as laid down in Articles 7 and 24 of the Charter, in the examination of whether Article 20 TFEU is violated by a national measure.⁸⁰ In *Chavez-Vilchez* the CJEU explicitly included the right to family life and the best interests of the child together: the CJEU interpreted Article 20 TFEU protections with reference to the Charter, the right to family life and the rights of the child, which was a novelty in EU citizenship case law at the time.⁸¹ This is the result of using children’s rights perspective being applied, rather than a strictly immigration or citizenship analysis lens: a broader, more ‘permissive’ approach towards derivative rights of residence are adopted.

The complexity is developing along with case law that is beginning to prioritise the ‘best interests of the child’ in challenges to immigration violations and removals of TCN parents.⁸² While ‘best interest of the child’ remains, for the moment, merely a consideration of

⁷⁷ Hyltén-Cavallius (n 7) 432; Ristuccia (n 64); Hanneke van Eijken and Pauline Phoa, ‘The scope of Article 20 TFEU clarified in Chavez-Vilchez: Are the fundamental rights of EU citizens coming of age?’ (2018) 43 EL Rev 949.

⁷⁸ *K.A.* (n 35) paras 59, 55.

⁷⁹ Ristuccia (n 64); Nic Shuibhne (n 18); Hyltén-Cavallius (n 7); *Chavez-Vilchez* (n 51) para 71.

⁸⁰ van Eijken and Phoa (n 77) 950.

⁸¹ *ibid* 956.

⁸² Aida Torres Perez, ‘Right to family life as a bar to expulsion’ in Maribel Pascual and Aida Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge 2017) 153.

significant weight rather than a deciding factor for the Member State, the fact that the CJEU is including it as a consideration is a promising sign even if the CJEU let pass an opportunity to explicitly ground the right to family life in the Charter-protected fundamental rights of children, thereby maintaining the need for claimants to find a link to EU law to press their case.⁸³ It is this residual ambiguity that the Supreme Court of the United Kingdom would rely on when issuing the judgment in *Sanneh*, which limited the amount of social security benefits EU primary carers could request from the state if they could not demonstrate sufficient ‘negative’ conditions to rely on the judgments of *Zambrano*.⁸⁴ By confirming that only in the negative situations of potential removal from the territory of the Union – or, indeed, potential denial of the genuine substance of the rights of EU citizenship – the CJEU affirmed that the ‘catch-all’ nature of EU citizenship is only to be used in questions of extremity.⁸⁵ This is a test that is perhaps easier to meet when there are the rights of children to be considered.⁸⁶

The line of analysis that children are also the independent rights-bearers and protected by citizenship provisions and CJEU intervention was confirmed in the case of *Jobcenter Krefeld*, and acts as somewhat of a counterpoint to the more restrictive interpretations of EU citizens’ rights and their access to social assistance in host Member States as witnessed in recent years.⁸⁷ Particularly noteworthy, in this context, is the fact that the CJEU emphasised not only the rights of the former worker and the importance of their integration into the host

⁸³ Mark Klaassen, ‘Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases’ (2019) 37 NQHR 157, 165-167; *Jeunesse v Netherlands* App no 12738/10 (ECtHR, 3 October 2014) para 109; Ciara Smyth, ‘The Dublin Regulation, mutual trust and fundamental rights: No exceptionality for children?’ (2022) 28 ELJ 242, 259, 260; Kristine Kruma, ‘Family reunification: A tool to shape the concept of EU citizenship’ in Maribel Pascual and Aida Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge 2017) 133, 141.

⁸⁴ *R (Sanneh & Others) v Secretary of State for Work and Pensions* [2015] CMLR 27. See Chapter 4.

⁸⁵ O’Brien (n 2) 239; Nic Shuibhne (n 18) 367.

⁸⁶ Klaassen (n 83) 169; Ristuccia (n 64); *K.A.* (n 35) para 56.

⁸⁷ Fulvia Ristuccia, ‘The right to social assistance of children in education and their primary carers: Jobcenter Krefeld’ (2021) 58 CML Rev 877; Maria Haag ‘Former EU workers, school children, and the limits of social solidarity in the EU – Case C-181/19 Jobcenter Krefeld v JD’ (*European Law Blog*, 16 October 2020) <<https://europeanlawblog.eu/2020/10/16/former-eu-workers-school-children-and-the-limits-of-social-solidarity-in-the-eu-case-c-181-19-jobcenter-krefeld-v-jd/>> accessed 18 October 2022.

state's society, but also the rights of the child; specifically, the reinforcement of the child's right to education in the host Member State. As AG Pitruzzella argues in his Opinion, an actual, effective right to equal access to education means that if a host Member State ensures that children who are nationals of that state have 'dignified living conditions and conditions at school', the same must be made available to children of migrant workers, *both former and current*.⁸⁸ It is a reinforcement of the non-discrimination principles and equality provisions that form the bedrock of the citizenship judgments in Chapter 2, while also reinforcing the provisions of children as bearers of individual rights within the context of EU law as seen in *Chavez-Vilchez* and *Zambrano*. This confirms the set of rights established in *Baumbast*, *Teixeira*, and *Ibrahim*: the right of residence is autonomous, the right of the child to continue in education and not be discriminated against is confirmed, and the restrictions on those rights must be interpreted narrowly by the Member State, whether the adult in question is a worker or a former worker.⁸⁹

The clarifying nature of the 'double test' – dependency and compulsion – that Member States must take into consideration when making determinations of grants of residence rights to TCN family members of EU citizens who have never utilised their freedom of movement rights is one that has taken many years, and many judgments, to arrive at.⁹⁰ This line of citizenship protections might also be justifiably pointed out as the example of a 'failure' of constitutionalisation of EU citizenship, as it falls outside the neat parameters of either Citizenship Directive interpretations or a clear delineation of Article 20 rights.⁹¹

⁸⁸ Case C-181/19 *Jobcenter Krefeld – Widerspruchsstelle v JD* [2020] ECLI:EU:C:2020:794 para 74.

⁸⁹ Herwig Verschueren, 'The Right to Social Assistance for Migrating Union Citizens: A Step Forward in the Case Law of the Court of Justice This Time' (2021) 23 EJML 202, 209.

⁹⁰ Hester Kroeze and Peter Van Elsuwege, 'Revisiting *Ruiz Zambrano*: A Never-Ending Story?' (2021) 23 EJML 1; Darren Harvey, 'The Best Interests of the Child Need Not Necessarily be a Primary Consideration' (2024) 20 ECL Rev 569.

⁹¹ Harvey (n 90); Eftychia Constantinou, 'Judicial Europeanisation Through Deconstitutionalisation: The Case of the Analogous Application of the Citizenship Directive' (2024) 9 European Papers 529; Dimitry Kochenov,

The legislative authorities of the EU have passed no secondary law instruments that codify or explain the derived rights of TCNs when they are reliant upon the Article 20 TFEU rights of EU citizens, leaving a gap in the interpretive secondary law instruments that the CJEU has filled with its ‘byzantine’ case law.⁹² Because the CJEU approaches every individual preliminary reference as specifically that, an individual case, and focusses solely on the individual facts of the individual case. Sweeping ‘precedential’ or *stare decisis* judgments do not exist in this line of jurisprudence as they do in similar constitutional courts; while the CJEU does rely on previous case law, it is not bound by it and does occasionally derogate from themes and patterns that had been thought to be established in subsequent judgments.⁹³ The ‘genuine enjoyment of the substance’ of EU citizenship rights doctrine and tests of applicability has therefore been constitutionalised – embedded into the framework of EU law – by the case law, rather than by legislation, which has contributed to the confusion in applying it and the need for it to be clarified in the first place.⁹⁴

This confusion has led to gaps that vulnerable EU citizens and their family members can fall prey to, even if the CJEU then redresses the balance by confirming those rights in existence and applicability.⁹⁵ This is the case not only in the individual Member States – as will be explored in Chapter 4, when looking at the protections for derivative rights of residence of EU citizens under the Citizenship Directive, and in Chapter 5 when the ‘minimum standard’ or protections allowable under EU law was formally decoupled from the institutions of the EU and adapted into British domestic law. It is also the case at the EU level, when analysing the

‘EU Citizenship: Some Systemic Constitutional Implications’ in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *EU Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020).

⁹² Harvey (n 90); Phil Syrpis, ‘The relationship between primary and secondary law in the EU’ (2015) 52 CML Rev 461; Kochenov (n 91).

⁹³ Takis Tridimas, ‘Precedent and the Court of Justice: A Jurisprudence of Doubt?’ in Julie Dickson and Pavos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012); Steve Peers, ‘Free movement, Immigration Control and Constitutional Conflict’ (2009) 5 ECL Rev 173.

⁹⁴ Harvey (n 90); Ristuccia (n 64).

⁹⁵ See, for example, Case C-459/20 *X v Staatssecretaris van Justitie en Veiligheid* [2023] ECLI:EU:C:2023:499.

level of protections and rights that extend *beyond* residence and into what rights that residence might also entail – namely, those of access to social security benefits – upon EU citizens and their TCN family members.⁹⁶ It is not ‘rights-enhancing’ jurisprudence, as will be shown below, but is important as a counterweight in the demands of balancing multiple instruments of law, the need to safeguard freedom of movement rights, and the interests and competences of Member States.⁹⁷

3.4: Citizenship rights interpreted through the ‘limiting measures’ of secondary law

The restriction in access to social security for EU citizens and their TCN family members along the interpretive lines of the Citizenship Directive marks the next ‘phase’ in the constitutionalisation of EU citizenship: the beginning of ‘delimitation’ as the limiting powers of the CRD take on more authority even over the constitutional principles of equal treatment and nondiscrimination.⁹⁸ The CRD is given precedence when it comes to defining the rights of EU citizens after they have utilised their freedom of movement rights, and therefore it is the parameters as laid out in the CRD that govern what access EU citizens are eligible for, even as EU citizens, and even if those restrictions might ‘compete’ with Treaty rights or the constitutional principles of nondiscrimination and equal treatment.⁹⁹ The ‘fundamental status’ of EU citizenship, in the case of social security access specifically, and its concurrent right to equal treatment and non-discrimination has been largely absorbed into the economic pre-conditions set out in the CRD, creating a constitutional quagmire in which some citizens do

⁹⁶ Dion Kramer, ‘EU citizenship: a double-edged sword for European social security’ in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing 2023); Harvey (n 90).

⁹⁷ Constantinou (n 91) 555.

⁹⁸ *ibid*; Katarina Hyltén-Cavallius, *EU Citizenship at the Edges of Freedom of Movement* (Oxford Hart Publishing 2020); Elise Muir, ‘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’ in Nathan Cambien, Dimitry Kochenov, and Elise Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020).

⁹⁹ Muir (n 98); Hyltén-Cavallius (n 98).

not have to fulfil those economic preconditions, but some do, in order to access the, theoretically, same rights and in which the difference in treatment is based upon which instrument of EU law their rights are being defended under.¹⁰⁰ This is partly a result of the ‘double standard’ established in the above section in the difference in treatment of EU citizen children and EU citizen adults: EU citizen children are oftentimes in a more dire situation of their rights being effectively, immediately, and more permanently stripped should the residence right of their TCN family member not be recognised, requiring the implementation and protection of the more ‘generous’ source of EU citizenship rights, i.e. Article 20 TFEU.¹⁰¹

This ‘lower’ standard as applied to EU citizen children also applies in cases where the residence right of the TCN parent is not in question, but rather the scope of social security accessibility that is guaranteed to the TCN parent as a result of their role as caregiver to an EU citizen child.¹⁰² Access to welfare benefits is of relevance to this dissertation because it is indicative of the limitation of the scope of the status of EU citizen, and the extent to which the status of EU citizen ‘trumps’ the Member State authority to limit access to migration or benefits schemes in the name of protecting the public purse of the Member State.¹⁰³ Access to social security is not a constitutional right attached to EU citizenship itself, but is important for the constitutional concept of that status: it aligns with how ‘far’ EU citizenship goes to protect its bearers. The limitation on social security access, restricting the constitutional rights of EU citizens to *solely* residence rather than residence and a certain of quality of life, has constitutional implications on EU citizenship even if it is not a constitutional rights *per se*. Limitations on social security, along the lines of nationality, and permitted under the CRD,

¹⁰⁰ Hyltén-Cavallius (n 7); Kochenov (n 91).

¹⁰¹ Hyltén-Cavallius (n 7); van Eijken and Phoa (n 77); Ristuccia (n 64); Nic Shuibhne (n 18); Muir (n 98).

¹⁰² Hyltén-Cavallius (n 48); Daniela Fisichella, ‘European Union Citizenship and ‘Tourism of Welfare’: Challenging European Social Rights in Time of Enduring Crisis’ (2018) 3 Il Diritto dell’Unione Europea 467; Muir (n 98).

¹⁰³ Remembering, of course, that the key factor in *Zambrano* was on whether or not it was correct for Mr Zambrano to be denied a work permit; similarly, the decision in *Chavez-Vilchez* was motivated by the denial of cash payments under the Dutch authorities’ welfare schemes to the parents in the case, and remembering the finding in Case C-85/96 *María Martínez Sala v Fresitaat Bayern* [1998] ECLI:EU:C:1997:335.

undermines the constitutional right to equal treatment and nondiscrimination which is a key component of EU law and enshrined in the Treaties. It is an allowance of restrictive secondary law instruments over the constitutional principles protected in EU citizenship and its resultant Treaty rights.

The first ‘narrowing’ of the interpretation of equality and nondiscrimination as they would apply to EU citizens who had utilised their freedom of movement rights was the interpretive line of case law introduced by the CJEU that focussed on the importance of *lawful residence under the Citizenship Directive and only the Citizenship Directive*, rather than other instruments of EU law, as a necessary pre-condition for any further rights as endowed by EU law, including that of equal treatment with nationals of the host Member State.¹⁰⁴ This is an important clarification to bear in mind when considering the ‘constitutionalisation’ of EU citizenship rights into this very narrow definition, as the ‘lawful residence’ under the CRD is itself a requirement of meeting many economic pre-conditions (either of being in work or, economically self-sufficient and possessing sufficient sickness insurance).¹⁰⁵ The scope of EU rights, should they be enforceable under the CRD, are therefore to be interpreted within the very narrow confines of the CRD itself, allowing Member States a much greater margin in legislating and restricting access to their social security systems than was previously the case.¹⁰⁶ Prioritising the CRD as a ‘source’ of EU citizenship rights *restricts* access to those constitutional citizenship rights, thereby also potentially undermining the constitutional value of those rights.

¹⁰⁴ Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358 para 80, emphasis mine.

¹⁰⁵ Council Directive 2004/38/EC 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC OJ L158/30, Article 7(1).

¹⁰⁶ Niamh Nic Shuibhne, ‘What I tell you three times is true: lawful residence and equal treatment after Dano’ (2016) 23 MJ 908.

The right of EU citizens to equal treatment in social security access is, therefore, *only applicable when the EU citizen is residing lawfully on the territory of the host Member State according to the Citizenship Directive*, and not on the basis of the constitutional weight of the citizenship in general.¹⁰⁷ This line of case law, by failing to explicitly affirm the residency rights of economically inactive EU citizens in the member-state of their choice, the CJEU left the door open to citizenship rights remaining firmly linked to active economic participation and allowing only those of independent means to move and reside freely throughout the Union after their economic participation concludes.¹⁰⁸ Because lawful residence was linked primarily to the CRD after its implementation, this excluded anybody who had – at any point – relied on social assistance from being considered ‘lawfully resident’.¹⁰⁹ More relevantly for this thesis, TCN family members of EU citizens were explicitly considered to *not* be protected by the CRD if their residence right in the Member State was deriving from another source of EU citizenship rights.¹¹⁰ Other sources of EU citizenship rights that could be used to claim access to social assistance schemes, such as those of derived rights to reside because of a child in education, would be broader and more permissive than those found strictly in the Citizenship Directive – *but only residence completed under the Citizenship Directive can be considered as lawful residence*.¹¹¹

This strict application of lawful residence and economic participation serving as a necessary pre-condition for access to social assistance rights is perhaps not surprising. This jurisprudence was developing in years in which the constitutional priorities of the Member States were to limit the access of migrants to social benefits schemes – or at least to appear to,

¹⁰⁷ *ibid*, emphasis mine.

¹⁰⁸ Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* [2013] ECLI:EU:C:2013:565.

¹⁰⁹ Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alminanovic and Others* [2015] ECLI:EU:C:2015:597 para 58; *Dano* (n 104) paras 85-91, 78.

¹¹⁰ Case C-529/11 *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department* [2013] ECLI:EU:C:2013:290 para 48; Joined Cases C-424/10 and C-425/10 *Tomasz Ziolkowski, Barbara Szeja, Maria-Magdalena Szeja, Marion Szeja v Land Berlin* [2011] ECLI:EU:C:2011:866.

¹¹¹ *Alimanovic* (n 109) Opinion of AG Wathelet paras 117-122; *Alarape* (n 110); *Ziolkowski and Szeja* (n 110) para 51.

in response to the academic and political debates on overly generous EU migration policies and its subsequent ‘welfare tourism’.¹¹² It was more impactful, both long term and on future judgments, that in *Alimanovic* the CJEU only considered the lawful residence of Ms Alimanovic and her children to be established under the Citizenship Directive, rather than looking at her rights under other instruments of EU law or considering her rights to social assistance in respect to her young children’s rights to remain in education and be supported by their primary caregiver while they did so.¹¹³

This ambiguity centres around the importance and primacy of the Citizenship Directive in determining what is considered lawful residence of EU citizens in host Member States and, if necessary, their TCN family members. It was established in earlier case law that in situations of contested residence, only residence accomplished that met the requirements laid out in the Citizenship Directive could be considered by national authorities when determining the length of residence required to acquire a right of permanent residence as well as what could constitute lawful residence.¹¹⁴

Alarape confirms that residence as a primary carer of another individual with a right to reside does not satisfy the requirements of the Citizenship Directive and therefore cannot be counted as years of lawful residence towards the acquisition of permanent residence.¹¹⁵ This is the case even if the residence was accomplished lawfully, but not under the conditions as laid

¹¹² Adrienne Yong, ‘Driving a wedge between friends?: The Court of Justice of the EU and its citizens in the case of welfare benefits’ (2016) 6 EHRLR 664; Maxime Tecqmenne, ‘Migrant jobseekers, right of residence and access to welfare benefits: one step forward, two steps backward?’ (2021) 46 EL Rev 765, 771; Blauburger and Schmidt (n 2); Susanne K. Schmidt, Michael Blauburger and Dorte Sindbjerg Martinsen, ‘Free movement and equal treatment in an unequal union’ (2018) 25 JEPP 1391.

¹¹³ Nic Shuibhne (n 106); Tecqmenne (n 112); Hyltén-Cavallius (n 7). Perhaps this was not raised as the right to reside was not the right in question in this case; by this point in time the link between residence and subsistence payments in the absence of employment was not firmly established.

¹¹⁴ Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Group* [2008] ECLI:EU:C:2008:630; *Ziolkowski and Szeja* (n 109) paras 45-47.

¹¹⁵ *Alarape* (n 110) para 48.

out in the Citizenship Directive.¹¹⁶ This is, in a way, a step backwards: where in earlier case law previous lawful residence was inapplicable in determining whether or not a TCN spouse should be granted a derived right of residence, the TCN parents of minor or dependent children cannot now count that period of residence under a derived right as a means of acquiring a permanent right of residence that would not depend upon those children. It increases their precarity, and leaves them with an increased number of conditions to meet. In limiting the grounds on which both TCNs and Union citizens resident in another Member State could acquire permanent residence, the CJEU allowing Member States to strengthen their immigration and welfare regulations in a way that would allow them to increase which of their non-nationals were to be denied the rights that came with permanent residence.¹¹⁷

According to the CJEU, the implementation of the Citizenship Directive on right to residence and length of support allocated for jobseekers versus economically active workers is consideration enough of individual circumstances, as it sets a clear principle for people to follow. What is most striking is the removal, in *Alimanovic*, of the precedent set in *Brey* that it was for the national authorities to examine the individual circumstances of the claimant requesting access to social assistance, thereby undermining the constitutional principle of ‘proportionality’.¹¹⁸ EU citizens and their TCN family members could be restricted from accessing social security on the grounds of nationality, undermining the principles of equal treatment and nondiscrimination, and could be restricted on that access without recourse to individual assessment, allowing for broad swathes of discrimination rather than individually-assessed situations.

¹¹⁶ *Ziolkowski and Szeja* (n 110) para 51.

¹¹⁷ Adam Łazowski ‘Children of the lesser law: comment on Ziolkowski and Szeja’ (2013) 38 EL Rev 404, 417; Katja Swider, ‘Legitimizing precarity of EU citizenship: Tjebbes’ (2020) 57 CML Rev 1163.

¹¹⁸ *Alimanovic* (n 109) paras 59-61; *Brey* (n 108) paras 77-80.

Partly because of the lack of consideration granted to other residence rights that might have been at play in *Alimanovic*, and the subsequent decision in *Commission v UK*, the line of case law that focusses so narrowly on lawful residence as completed under the Citizenship Directive whilst fulfilling its economic preconditions, was the first that raised the question of whether or not the CJEU started backtracking on its commitment to expanding EU citizenship.¹¹⁹ This line of scholarly analysis is, this thesis has argued, overly simplistic and does not take into consideration the many competing constitutional pressures that the CJEU had to navigate in the 2010s.¹²⁰ The CJEU did not, after all, say in the ‘citizenship-reducing’ judgments that the Member States were obligated to limit access to social security benefits and social assistance in line with the strictest interpretation of the Citizenship Directive; they merely ruled that the Member States were not precluded from doing so.¹²¹ This might, reasonably, be construed as splitting hairs – but it is perhaps unfair to accuse the CJEU of undoing its own previous work on citizenship-advancing case law when it might simply have been responding to the political, economic and social pressures of the early 2010s, or seeking to clarify an ambiguity that they themselves considered to be existing in prior case law.¹²² And, of more salient importance perhaps, the case law in this time period was not universally ‘negative’ in the sense of rights-restricting; there were some positive case judgments that expanded the rights of EU citizens against their Member States of residence and nationality, even if those cases were fewer and farther between than in the previous phase of citizenship constitutionalisation, and were mostly limited to the expanding rights of children.¹²³

¹¹⁹ Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland* [2016] ECLI:EU:C:2016:436. This decision held that the United Kingdom was justified – i.e., not acting in contravention of its obligations under the equal treatment and non-discrimination principles – in only allowing EU citizens who were ‘lawfully and habitually resident’ in the territory of the United Kingdom access to child tax credits and other benefits. This will be discussed in more detail in Chapter 4.

¹²⁰ Constantinou (n 91).

¹²¹ Tecqmenne (n 112) 772.

¹²² Blauburger et al (n 4).

¹²³ See, for example, Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECLI:EU:C:2008:449 (prior unlawful residence could not be construed as a motivation to deny a

It would be unfair, therefore, to criticise this line of case law as purely ‘rights-restricting’. It is more appropriate to term this period of the jurisprudence as existing in the phase of ‘citizenship-clarifying’ constitutionalisation of EU citizenship. Some elements of delimitation certainly exist, as evidenced by the trend at the CJEU in prioritising the limiting and restricting effects of secondary law instruments, rather than the vaguer and more permissive elements of the rights as they are simply stated in the Treaties.¹²⁴ The line of case law adopted in this stage was merely to confirm that the ‘conditionality’ imposed upon citizenship rights were, also, within the acceptable bounds of both EU law and the constitutional documents adopted to give it effect.¹²⁵ The constitutional priority has shifted away from the affirmation of citizens’ rights and towards the balancing effect of how the Member States might lawfully implement the conditions that were accepted as politically salient and prioritised through the adoption of the Citizenship Directive.¹²⁶ This period of constitutionalisation through clarification, and some elements of delimitation, ‘sheds light on the ability of the CJEU to reframe the interplay between primary and secondary law as well as between the judicial and political guidance’.¹²⁷

3.5: Concluding remarks

The *Zambrano* judgment, when first handed down, gave rise to a great deal of outcry amongst the most Eurosceptic nations – including the United Kingdom and Denmark, in the case of

family reunification right in the present day in the Member State of nationality); *Chavez-Vilchez* (n 51); Case-C836/18 *Subdelegación del Gobierno en Ciudad Real v RH* [2020] ECLI:EU:C2020:119 (‘lack of sufficient resources’ could not be considered an impairment to the right of a TCN spouse to join their Union citizen spouse in their Member State of nationality); Case C-247/20 *VI v Commissioners for Her Majesty’s Revenue and Customs* [2022] ECLI:EU:C:2022:177 (being covered by the national health system of the host Member State was considered sufficient ‘sickness insurance’ and to ask for a supplemental standard of protection would violate the EU citizen’s constitutional right to equal treatment and non-discrimination); Nic Shuibhne (n 18).

¹²⁴ Diego Ginés Martín, ‘Citizens or migrants? Precarious residence in the context of EU citizenship’ (2021) 69 *Revista de Derecho Comunitario Europeo* 653; Hyltén-Cavallius (n 98).

¹²⁵ Kathrin Hamenstädt, ‘The impact of the duration of lawful residence on the rights of European citizens and their third-country family members’ (2017) 24 *MJ* 63; Hyltén-Cavallius (n 98).

¹²⁶ Constantinou (n 91); Muir (n 98); Hyltén-Cavallius (n 98).

¹²⁷ Muir (n 98); Hyltén-Cavallius (n 98).

immigration and derivative rights of EU citizenship – that the European Union was now going to consider itself justified to meddle in situations that should remain wholly internal.¹²⁸ While these fears did ultimately prove to be unfounded, it set the precedent that questions that had previously been considered questions for only national authorities would now potentially be within scope of European judgment, even when citizens had not crossed a border.¹²⁹ The backlash from the *Zambrano* judgment was one of the complex political factors that ultimately culminated in the Brexit referendum in 2016.¹³⁰

The increased role of the CJEU in determining questions of citizenship rights, overruling significant immigration and benefits controls as they existed in the Member States, also had direct impacts upon the domestic settings the cases were originally found in: both Ireland and Belgium changed their nationality laws in the wake of the *Zhu and Chen* and *Zambrano* judgments, closing off access to Irish and Belgian nationality on purely *jus solis* grounds, further restricting the avenues through which individuals could acquire Member State nationality and therefore EU citizenship, and limiting the number of family members who could then claim derivative rights through those citizens. Perhaps it is no wonder, then, that after *Zambrano* the CJEU retreated towards an interpretation of the secondary and primary pieces of legislation that could be argued to reflect the political priorities of the European legislature more accurately with regards to integration, immigration, residence and citizenship and leaving the ‘citizenship-enhancing’ role to the legislatures and the Council.¹³¹ More

¹²⁸ Jesse Moritz and Daniel William Carter, ‘Life after the ‘Dano-Trilogy’: Legal Certainty, Choices and Limitations in EU Citizenship Case Law’ in Nathan Cambien, Dmitri Kochenov and Elise Muir (eds), *EU Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020); Harold D. Clarke, Matthew Goodwin and Paul Whiteley, *Brexit: Why Britain really voted to leave the European Union* (CUP 2017); Matthew Goodwin and Caitlin Milazzo, ‘Taking back control? Investigating the role of immigration in the 2016 vote for Brexit’ (2017) 19 *The British Journal of Politics and International Relations* 450; Blauberger et al (n 4); Muir (n 98).

¹²⁹ Moritz and Carter (n 128).

¹³⁰ O’Brien (n 28) 232.

¹³¹ Delia Ferri and Giuseppe Martinico, ‘Revisiting the Ruiz Zambrano Doctrine and Exploring the Potential for its Extensive Application’ (2021) 27 *EPL* 690, 690; Moritz and Carter (n 128); Ginés Martin (n 124); Nathan Cambien, ‘The impact of Union citizenship on member-states’ immigration laws: Some potentially perverse side effects resulting from recent ECJ case-law’ (SSRN, 2012); Ellen Nissen, ‘A Children’s Rights Perspective

importantly, as a method of ‘delimitation’, was the CJEU allowing for the economic pre-conditions of the Citizenship Directive to determine the ‘access points’ of social rights through social assistance, and to allow the ‘political and constitutional pressures’ of migration control to establish itself through the control and restriction of social security assistance to EU migrants with only limited interventions.¹³²

The period of the jurisprudence that this chapter has analysed, therefore, can most accurately be described as the era of ‘citizenship-clarifying’ jurisprudence post-*Zambrano*, especially with the introduction of the Citizenship Directive and its stated purpose of harmonizing the disparate instruments of citizenship rights and the derivative rights of family members.¹³³ The CJEU was not abandoning its commitment to the fundamental status of EU citizenship, or backing away permanently from a more robust defence of its constitutional promise and protections, but rather clarifying the full extent of the scope of the protections afforded to EU citizens and their TCN family members. The CJEU took the opportunity, in this period of constitutionalisation through clarification, of specifying that in ordinary cases of EU citizenship rights – away from the marginal cases of Chapters 1-2, for example – the secondary law instruments, particularly that of the Citizenship Directive, took priority over the more ‘unconditional’ nature of the rights under the Treaty.¹³⁴ In cases that met a criteria of ‘exceptional’ circumstances, however, such as when an EU citizen would be effectively deprived of their ‘genuine enjoyment of the substance’ of their citizenship rights – such as being compelled to leave the territory of the Union – then the ‘unconditionality’ of the Treaty could be found to apply, as the situation was of graver circumstances and so could entail a higher standard of protections.¹³⁵ This standard of protection, however, could only apply in

to Ruiz Zambrano and Chavez-Vilchez: An Examination in Light of Theory, Practice and Child Development Research’ (2021) 23 EJML 68, 74.

¹³² Mantu and Minderhoud (n 62).

¹³³ Nic Shuibhne (n 8); Syrpis (n 92) 483.

¹³⁴ Muir (n 98); McCarthy (n 20); Dereci (n 20); Brey (n 67); Dano (n 104); Alimanovic (n 109).

¹³⁵ Nic Shuibhne (n 18); Chavez-Vilchez (n 51); K.A. (n 35); O. and S. (n 37); Rendon Marín (n 47); CS (n 47).

situations of strict compulsion, and when residence in the territory of the Union as a whole would be threatened.¹³⁶ The CJEU was clarifying the scope of EU citizenship rights rather than expanding them.¹³⁷

Zambrano did not, therefore, give rise to a new onslaught of cases where the ‘wholly internal’ rule could be completely set aside if only a tenuous link to EU law could be found. This is the, potentially political, light in which the cases examined in this section can also potentially be analysed: the CJEU taking a step back from the fears raised that it would set itself up to be the arbiter of contested facts within individual Member States’ approaches to regulating their own immigration policies.¹³⁸ This chapter has not argued that the CJEU’s motivations were political – it is impossible to adequately interpret the motivations of the CJEU in any instance. Rather, this chapter accepts the judgments on the face of them: they were issued in order to clarify the scope of citizenship jurisprudence, and offered reminders to the Member States of the importance of individual proportionality assessments in cases of contested applicability of EU rights along the constitutional principles and access to rights guaranteed by EU citizenship and freedom of movement.¹³⁹

In Chapter 4, therefore, the narrative of this thesis continues focusing on the ‘delimitation’ stage of constitutionalisation, by examining the example that is offered by the

¹³⁶ *Dereci* (n 20); *Alokpa* (n 37); *Ymerga* (n 37); *Iida* (n 42). This can also be seen in the fundamental rights protection of EU citizenship at play in cases of extradition of EU citizens to third countries (not discussed in depth in this thesis as outside the scope of the lens of analysis being derivative rights of residence). An EU citizen who has made use of their freedom of movement rights – irrespective of why the movement was undertaken, even if that reason was to deliberately place themselves under the protection of EU law – cannot be extradited to a third country, even if that would fall within the domestic laws of the Member State, if such an extradition would endanger their Charter-protected fundamental rights against being subject to the death penalty, torture, or degrading or inhumane treatment (Case C-182/15 *Aleksei Petruhhin v Latvijas Republikas Generalprokuratūra* [2016] ECLI:EU:C:2016:630; Steve Peers, “Extradition to non-EU countries: the limits imposed by EU citizenship” (7 September 2016, EU Law Analysis) accessed 12 June 2026 <<http://eulawanalysis.blogspot.com/2016/09/extradition-to-non-eu-countries-limits.html>>; Alla Pozdnakova ‘Aleksei Petruhhin: Extradition of EU Citizens to Third States’ (2017) 2 *European Papers* 209.

¹³⁷ *Muir* (n 98); *Hyltén-Cavallius* (n 7); *Hyltén-Cavallius* (n 98).

¹³⁸ *Tryfonidou* (n 7) 516.

¹³⁹ *Brey* (n 108); *Alarape* (n 111); *Jobcenter Krefeld* (n 88); Case C-93/18 *Ermira Bajratari v Secretary of State for the Home Department* [2019] ECLI:EU:C:2019:809; *Chavez-Vilchez* (n 51).

case study of the United Kingdom as both a Member State and a former Member State. Immigration policies, specifically within the transposition of the Citizenship Directive, are broadly left to the discretion of the individual Member States; the common policies across the EU on migration and family reunification have, for the most part, remained as commitments to ideas rather than shared policies that are uniformly enforced across the territory of the Union.¹⁴⁰ Questions of family reunification for TCN family members of EU citizens fall, therefore, squarely within the conflict inherent between freedom of movement rights for EU citizens and the desires of Member States to exert their own immigration control. The implementation of Schengen in 1985 and 1990, the introduction and transposition of the Citizenship Directive, and the implementation of EU citizenship and EU citizenship rights under the Treaties did not, by any means, create a framework of EU law on immigration and integration that replaced the framework of individual Member States. This legal complexity is particularly relevant when looking at questions of right to family life and family reunification, where it is unclear whether an EU citizen is subject wholly to national law or whether or not there is an applicability of EU law. TCN family members are still subject to immigration control, and to the residency and integration requirements, of individual Member States, even if their rights of entry are to be facilitated and prioritised by the immigration authorities of the Member States.¹⁴¹

EU law, therefore, has been called upon to intervene in questions of contested facts and legal sources for the right of TCN family members to derive their right of residence from EU citizens, when the link to freedom of movement is not explicitly or clearly visible.¹⁴² Simply being an EU citizen is not, according to the post-*Zambrano* line of case law, sufficient to bring

¹⁴⁰ Martin A. Schain, 'The state strikes back: immigration policy in the European Union' (2009) 20 EJIL 93.

¹⁴¹ Case 157/79 *Regina v Stanislaus Pieck* [1980] ECLI:EU:C:1980:179; Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State* [2002] ECLI:EU:C:2002:461; Case C-83/11 *Secretary of State for the Home Department v Muhammad Sazzadur Rahman and Others* [2012] ECLI:EU:C:2012:519.

¹⁴² Jo Shaw and Nina Miller, 'When legal worlds collide: an exploration of what happens when EU free movement law meets UK immigration law' (2013) 38 EL Rev 137, 142-143.

in EU law when the boundaries of national immigration control and sovereignty are considered too restrictive.¹⁴³ The United Kingdom will offer a pertinent example of the different stages of Member State may travel on the pathway to ‘deconstitutionalising’ EU citizenship, up to and including full withdrawal from the Union. Chapter 4 will therefore consider the British transposition of the Citizenship Directive, and the safeguarding mechanism introduced during that transposition to successfully limit the social assistance access of EU citizens residing in the United Kingdom, ‘divorcing’ them from the constitutional protections of EU citizenship rights before Brexit continues the deconstitutionalisation process in Chapter 5.¹⁴⁴

¹⁴³ Schain (n 140); van Elsuwege and Kochenov (n 17).

¹⁴⁴ Muir (n 98); Stephanie Reynolds, ‘(De)constructing the Road to Brexit: Paving the Way to Further Limitations on Free Movement and Equal Treatment?’ in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Bloomsbury Publishing 2020).

Chapter 4: Reassertion of Member State competence and further delimitation of EU citizenship rights

4.1: Introduction

The constitutionalisation of EU citizenship through the jurisprudence of the CJEU was analysed in the previous chapters, and so the analysis here will turn to the level of protection of derivative rights of EU citizenship afforded to those EU citizens and their TCN family members in the United Kingdom within the boundaries established by the CJEU jurisprudence. The enforcement of the EU citizenship rights for EU citizens and their TCN family members was bound by the strictest definition of CJEU jurisprudence, but also submitted to the immigration controls and limiting mechanisms of secondary law instruments.¹

The United Kingdom functions effectively as a case study when analysing the constitutionalisation of EU citizenship, as the UK has historically operated on the ‘edges’ of the European Union project and the EU citizenship rights most at question within the UK were questions of ‘citizenship on the periphery’: they never joined the Eurozone; the responses in the United Kingdom to the ‘citizenship-enhancing’ jurisprudence of the CJEU and the deepening political and social integration of the European bodies were negative; the British government always refused to join or condone any joint border or asylum policy proposed in the Union; and the straightforward applications of EU citizenship rights were limited to those who fulfilled easily evidencable economic and in-work pre-conditions.²

¹ Jan Zgliniski, ‘The new judicial federalism: the evolving relationship between EU and Member State Courts’ (2023) 2 *European Law Open* 345.

² Brendon Donnelly, ‘On the edge: Britain and the European Union’ (2012) 11 *European View* 31; Matthew Evans, ‘Abusing or Misusing the Right of Free Movement? The UK’s Policy towards EU Nationals Sleeping Rough’ in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Publishing 2020); Alice Welsh, *The Market Citizenship Illusion: Free Movement Rights for Atypical Workers* (Bloomsbury Publishing 2025); Susanne K. Schmidt, ‘No match made in heaven: Parliamentary sovereignty, EU over-constitutionalisation and Brexit’ (2020) 27 *JEPP* 779; Charlotte O’Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Oxford Hart Publishing 2017); Iyola Solanke, ‘Who speaks for the Zambrano Families? Multi-

But while the United Kingdom was a Member State, it was still under the obligation of implementing and enforcing the citizenship protections of EU citizens and their TCN family members residing in its territory; the fact that the United Kingdom was able to minimise the level of protections offered to a CJEU-sanctioned ‘absolute minimum’ before finally breaking off as a Member State demonstrates the deconstitutionalisation phase of EU citizenship, when the relative strength of the status was decreasing both at the level of the CJEU and within the Member States. This led to a decreased standard of protections offered under the Immigration Regulations that served as the transposition of the CRD. The fact of Brexit offers an even more starkly useful case study, as a means of analysing the ongoing protections of EU citizenship for those EU citizens skirting the edge of the constitutional framework of the EU, and on the ‘other side’ of that framework as well.³

The overarching argument of this chapter is that the United Kingdom, while following the established jurisprudence of the CJEU – and the minimum level of protection possible under the family reunification and family rights regulations and the Citizenship Directive – of derivative rights protections, sought to restrict the ‘additional’ benefits of the derivative right of residence by prioritising immigration control and austerity and thereby treating secondary law instruments rather than primary law instruments as the ‘best source of truth’ for EU citizenship rights.⁴

This will serve as the illustrative example of the ‘delimiting’ phase of constitutionalisation (as sketched out in Chapter 3), where the powers of secondary law

level Abandonment in the UK and the EU’ in Dustin M, Ferreira N and Millins S (eds), *Gender and Queer Perspectives on Brexit* (Palgrave Macmillan 2019).

³ There is also a practical reason for selecting the United Kingdom: though the UK was by no means the only Eurosceptic nation of the EU, during its time as a Member State and now post-withdrawal, the policies and court judgments are easily accessible and can be read in their original language. There is no risk of complicated or mistranslations potentially skewing the possible analysis.

⁴ Phil Syrpis, ‘The relationship between primary and secondary law in the EU’ (2015) 52 CML Rev 641; Niamh Nic Shuibhne, ‘The Third Age of EU Citizenship’ in Phil Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012); Welsh (n 2); Evans (n 2).

instruments – rather than the Treaties – were considered by the authorities of the Member States and the CJEU as a more ‘authoritative’ source of EU citizenship rights.⁵ This can be observed in the strict restriction offered on the *Zambrano* right: as the residence right for *Zambrano* carers was brought into domestic regulation by the 2012 amendments to the 2006 Immigration Regulations, allowed for a TCN to reside in the United Kingdom as the primary carer of a British citizen child, but the *Zambrano* right was simply a very strict right of residence, with no further attendant rights.⁶ TCN carers were explicitly, as per those regulations, excluded from a series of basic means-tested benefits including jobseekers’ allowance, employment and support allowance, income support, pension credit, housing benefit, council tax benefit, child benefit, and child tax credit.⁷ These regulations and exclusions apply to *Zambrano* carers regardless of their employment status, and UK courts in this time period regularly confirmed that the right of *Zambrano* carers was solely to reside, without any of the additional benefits that EU workers and citizens would benefit from, creating a scenario for EU citizen children and their TCN parents of ‘tolerated alienhood’ rather than promoting the full integration and participatory EU citizenship promoted by the CJEU during the ‘constitutionalisation’ phase analysed in Chapters 1-3.⁸

The purpose of this chapter is to examine the ways in which the United Kingdom limited the enforcement level of EU citizenship rights protections for both vulnerable EU citizens and their TCN family members by prioritising the ‘restrictive’ elements of secondary

⁵ Syrpis (n 4).

⁶ Solanke (n 2); Iyiola Solanke “On the frontline: residency rights and non-EU parents of British citizens” (*Discover Society*, June 6 2017) < <https://archive.discover society.org/2017/06/06/on-the-frontline-residency-rights-and-non-eu-parents-of-british-citizens/> > accessed on 23 April 2024.

⁷ Social Security Regulations 2012 (SI 2012/2587), Allocation of Housing and Homelessness Regulations 2012 (SI 2012/2588) and Child Benefit and Child Tax Credit Regulations 2012 (SI 2012/2612).

⁸ *R. (on the application of Yekini) v Southwark LBC* [2014] EWHC 2096 (Admin); *Pryce and London Borough of Southwark and Secretary of State for the Home Department* [2012] EWCA Civ 1572; *R (Sanneh & Others) v Secretary of State for Work and Pensions* [2015] CMLR 27; *M.Y & Ors v The Minister for Justice & Ors* [2015] IEHC 7; *F v London Borough of Barking and Dagenham* [2015] EWHC 2838 (Admin); *Ayinde and Thinjom* [2015] UKUT 560 (IAC). See also O’Brien (n 2).

law instruments, such as the CRD, and how that delimitation of EU citizenship rights protections allowed for the subsuming of EU citizenship rights to immigration controls and social security austerity measures. The United Kingdom offers an example of EU citizenship on the periphery: both the geographical and political buy-in periphery of the EU as a project; and the delimitation of EU citizenship rights because of the emphasis on restrictive measures of secondary law rather than the broader interpretation allowed to vulnerable EU citizens that can be found in the Treaties and the Charter. This chapter offers two primary pieces of evidence to this delimitation: the restrictions on protections of social citizenship to *Zambrano* carers; and the attempts to limit the rights of EU citizens to a strict compliance with the CRD for both social security access and freedom from immigration controls.

The United Kingdom was certainly not the only Member State of the EU whose reaction to the increasing liberality of the freedom of movement and attendant family life rights protections was that of potential restriction at the policy level: similar trends were observed in Austria, Germany, Denmark, and the Netherlands, coinciding with the time of accession of former Soviet-bloc countries to the Union and increased austerity in the domestic governments that led to cuts in welfare rights across all sectors, not just for EU citizens.⁹ The reaction was, partly, motivated by the same concerns that have always been triggered by all immigration debates, including intra-EU ones: the protection of national sovereignty and border control against unasked-for immigration.¹⁰ This traditionally sole preserve of national sovereignty, within the system of the EU, was subsumed under an umbrella of ‘enforced’ open internal migration, a dichotomy that was always going to square uneasily with the authorities and systems of Member States that were, as are most if not all immigration and citizenship

⁹ Anja Lansbergen, ‘Metock, implementation for the Citizens’ Rights Directive and lessons for EU citizenship’ (2009) 31 J Soc Wel & Fam L 285; Merve Biten, Theresa Kuhn and Wouter van der Brug, ‘How does fiscal austerity affect trust in the European Union? Analyzing the role of responsibility attribution’ (2022) 30 JEPP 1033.

¹⁰ Catherine Dauvergne, ‘Sovereignty, Migration and the Rule of Law in Global Times’ (2004) 67 MLR 588.

acquisition regimes, set up on exclusionary border and immigration policies.¹¹ This uneasiness was reinforced by EU law which stipulated that access to social security benefits, educational opportunities, and work for those ‘internal’ migrants was to be granted on non-discrimination principles that based their strength on the law that non-nationals of EU origin were to be treated equivalently, within the host Member State, as nationals of that Member State – once again, removing a key factor of immigration control from the authority of the Member State and assigning it to areas of EU competence.¹²

This reaction of increased wariness towards freedom of movement rights, and the access to social security and educational benefits that it grants, was by no means specific to the United Kingdom: it was shared by other restrictive immigration nations, such as Denmark, and the Member States with *jus solis* provisions of citizenship (Ireland and Belgium) explicitly changed their nationality policies following the *Zhu and Chen* and *Zambrano* decisions in order to limit the amount of TCNs who could potentially gain access to EU citizenship and thereby freedom of movement provisions.¹³ These shared anxieties have coalesced around the assumption that EU migrants would be given unfairly generous access to the social security systems of countries that were all feeling the effects of the 2008 financial crisis.¹⁴

Because of the similarity in both political reactions and legislative policies across the Member States during the time of the CJEU’s increasing liberality of citizenship protections and provisions, the choice of the United Kingdom as a solitary case study may on first instance appear limiting. It is not, after all, the only Member State to have submitted preliminary

¹¹ Dauvergne (n 10); Alina Tryfonidou, ‘The impact of EU law on nationality laws and migration control in the EU’s member states’ (2011) 25 JIANL 358.

¹² Tryfonidou (n 11) 369.

¹³ Tryfonidou (n 11); Lansbergen (n 9); Susanne K. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of the Case Law* (OUP 2018).

¹⁴ Anna Kyriazi and Francesco Visconti, ‘Free movement and Welfare in the European Union: The Social Consequences of the Right to Exit’ (2023) 0 International Migration Review 1.

references on questions of derivative rights of residence for the TCN family members of EU citizens, or on limiting access to social security benefits for economically inactive EU citizens and their family members before the introduction of the CRD and under CRD transposition obligations. More relevantly, the British authorities made a distinct immigration choice to assimilate access to the derivative rights of the benefits of EU citizenship – freedom of movement, nondiscrimination in access to education and social security – into the condition of being lawfully resident, much like under traditional immigration controls, rather than conditional on simply a free movement right that had been exercised. This choice also explicitly excluded access to social security rights for non-economically active EU citizens and their family members.¹⁵

By examining first how the United Kingdom adapted EU rights of citizenship and residence into their domestic law when they were obligated to implement EU law and following that analysis with an examination of how the United Kingdom is pursuing that protection in a system that is no longer compelled to implement EU law, but still must protect the rights that originate within it, this second part of the thesis will be able to offer an overview of how the delimitation of EU citizenship offers both fewer protections for EU citizens (because of the prioritisation of the limiting aspects of secondary law), but also fewer access routes for individuals to access legal remedies or redress of any rights violations – because of both the departure from the central constitutional framework of the EU, and the fewer references to the CJEU by British courts when making determinations of EU citizenship rights within the controlling framework of the CRD. This delimitation – the prioritisation of restrictions as permitted by secondary law instruments, and the ‘allowance’ towards Member States

¹⁵ The Immigration (European Economic Area) Regulations 2016; Lansbergen (n 9); Sandra Mantu, ‘EU Citizenship and EU Territory: Unsettling the National, Embedding the Supranational’ in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Publishing 2020).

restricting the social parameters of EU citizenship – was confirmed by the decision of *Commission v UK*.¹⁶

This chapter will analyse the delimitation phase of EU citizenship constitutionalisation, specifically within the UK during its time as a Member State, by focusing on the limitation of the protections of the social aspect of EU citizenship, specifically concentrated around *Zambrano* carers and the introduction of the ‘safeguarding mechanism’ to limit the access of EU citizenship to the remedies of non-discrimination in social security access. The limitation of social protections for EU citizens and their TCN family members is indicative of a weakening of constitutional protections for those citizens *because* it allows for those rights to be limited, against the equal treatment and proportionality tenants of EU constitutional law.¹⁷

The constitutional value of EU citizenship, and its residual level of protections as offered to those who do not most clearly or most straightforwardly qualify for it, can be evidenced in the extent to which EU citizenship offers a passport to in-group collective solidarity.¹⁸ Because of the shrinking of access routes to that solidarity and social protections for EU citizens and TCN family members, even in the ‘extreme’ case of vulnerable EU citizens such as children and their TCN primary carer, combined with the re-prioritisation of immigration control for those vulnerable EU citizens and their TCN family members, the UK offers an example of ‘delimitation’ of EU citizenship precisely because the EU citizenship right

¹⁶ Charlotte O’Brien, ‘The ECJ sacrifices EU Citizenship in vain: *Commission v UK*’ (2017) 54 CML Rev 209; Stephanie Reynolds, ‘(De)constructing the Road to Brexit: Paving the Way to Further Limitations on Free Movement and Equal Treatment?’ in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Bloomsbury Publishing 2020).

¹⁷ O’Brien (n 2) 272; Welsh (n 2).

¹⁸ O’Brien (n 2) 9; Francesca Strumia and Mary-Elizabeth Hughes, ‘A momentary blip or a step forward in revisionist free movement? Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland*’ (2016) 23 EPL 723.

is considered within the framework of domestic law as secondary to Member State priorities on immigration control and austerity measures.¹⁹

The chapter will conclude with an analysis and examination of *UK v Commission*, as that case was the culmination of the United Kingdom's policy approach to restricting access to the constitutional rights of EU citizens to the social protections for themselves and their TCN family members.²⁰ The *Commission v UK* decision highlights the dichotomy in approach between the free movement of workers and the free movement of EU citizens in the United Kingdom and the EU as a whole.²¹ It also raises questions about the continuation and renewals of the constitutionalisation path that the Court will take once the political pressures of the United Kingdom's withdrawal from the European Union have lessened, and the concern that the Citizenship Directive might become an instrument of secondary legislation held above all other regulations in its possibilities of allowing Member States to institute further discriminatory tests on eligibility for access to social security and citizenship protections.²²

4.2: Delimitation through immigration controls

As touched upon in previous chapters, the approach of the United Kingdom towards the 'free movement of persons' provisions and protections for EU citizens was always more 'at arm's length' than openly enthusiastic, especially in the case of rights of residence for TCN family members of EU citizens that were seen as 'exploiting' loopholes in EU law to circumvent

¹⁹ O'Brien (n 2) 202; Helena Wray, *Article 8 ECHR, Family Reunification and the UK's Supreme Court: Family Matters?* (Bloomsbury Publishing 2023).

²⁰ Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland* ECLI:EU:C:2016:436.

²¹ Strumia and Hughes (n 18).

²² Strumia and Hughes (n 18); Jaan Paju, 'On the lack of legal reasoning in case C-308/14, European Commission v United Kingdom' (2019) 48 ILJ 117; Mel Cousins, 'The baseless fabric of this vision': EU citizenship, the right to reside and EU law' (2016) 1 JSSL 89; Maria Haag, 'The muddle about the Union citizen's equal access to social security benefits: Familienkasse Niedersachsen-Bremen (C-411/20)' (2023) 48 EL Rev 206.

domestic immigration controls.²³ Perhaps this attitude is a natural response to the ‘top-down’ imposition that was EU citizenship: that the emphasis on the constitutional nature of EU citizenship by the CJEU over-expanded both the constitutional promise and protection of EU citizenship, while pushing the obligations of those protections and the ‘inconveniences’ of such protections onto Member States who had had limited say in determining the exact scope of those protections themselves.²⁴

This political attitude has, unfortunately, impacted on not only the long-term relationship of the United Kingdom with the European Union (see Chapter 5 of this thesis for more) but fundamentally with the interpretation of EU citizenship rights, and their level of protection as well, that is offered in the United Kingdom both while it was a Member State, and afterwards.²⁵ This can be seen in the different methods of delimitation of EU citizenship rights within the United Kingdom, when the courts and legislative bodies of the UK tried – and oftentimes succeeded, as will be explored in this section – to impose more limited protections domestically while claiming to meet the ‘minimum standard’ of protection offered under secondary law instruments, such as the CRD.²⁶ The implementation of EU freedom of

²³ Harold Clarke, Matthew Goodwin and Paul Whitely, *Brexit: Why Britain really voted to leave the European Union* (CUP 2017); Matthew Goodwin and Caitlin Milazzo, ‘Taking back control? Investigating the role of immigration in the 2016 vote for Brexit’ (2017) 19 *The British Journal of Politics and International Relations* 450; Felix Karstens, ‘How public discourse affects attitudes towards Freedom of Movement and Schengen’ (2019) 21 *European Union Politics* 43; Sofia Vasilopoulou and Liisa Talving, ‘Opportunity or threat? Public attitudes towards EU freedom of movement’ (2018) 26 *JEPP* 805; Steve Peers, ‘Free movement, Immigration Control and Constitutional Conflict’ (2009) 5 *ECL Rev* 173; David Martin, ‘Comments on *Förster* (Case C-158/07), *Metock* (Case C-127/08) and *Huber* (Case C-524/06)’ (2009) 95 *EJML* 108; Elaine Fahey, ‘Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in *Metock*’ (2009) 36 *Legal Issues of Economic Integration* 83.

²⁴ Catherine Barnard and Emilija Leinarte, ‘The Creation of European Citizenship: Constitutional Miracle or Myopia?’ (2022) 24 *CYELS* 24; Eleanor Spaventa, ‘Seeing the wood for the trees? On the scope of Union citizenship and its constitutional effect’ (2008) 45 *CML Rev* 13. See also Chapter 1 of this thesis for a discussion on the normative value of EU citizenship.

²⁵ Jo Shaw and Nina Miller, ‘When legal worlds collide: an exploration of what happens when EU free movement law meets UK immigration law’ (2013) 38 *EL Rev* 137.

²⁶ Shaw and Miller (n 25); Nicola Rogers, ‘Supremacy and proportionality – the missing element in the UK’s implementation of free movement law’ (2007) 21 *JIANL* 181; Martin (n 23); Steve Peers, ‘*Metock* in the Council: a UK attack on the rule of law and EU fundamental freedoms’ *ILPA European Update*, December 2008 (page 16).

movement rights in the United Kingdom was, therefore, subsumed to the immigration enforcement framework and, in cases of judicial challenge, to the immigration tribunals.²⁷ The regulatory framework of the United Kingdom can be split into roughly two thematic areas: the framework that existed prior to the implementation and transposition of the Citizenship Directive, when freedom of movement as linked to the right to work was the primary consideration; and the period between 2006-2016, when the 2006 Immigration Regulations transposing the Citizenship Directive were in place and the emphasis was shifted to lawful residence of EU citizens and their family members.²⁸

The United Kingdom has never been a part of the Schengen Agreement, meaning that the ‘internal’ border between EU Member States was never fully opened. The British immigration authorities retained and continue to retain immigration control over their own entry points, meaning that the right of entry and the right of residence were litigated and verified differently by the relevant authorities.²⁹ Because of the retained right of British authorities to maintain control over their own borders, the British and French governments established bilateral agreements allowing border checks for the United Kingdom to be conducted on French territory.³⁰ This was a response to the perceived necessity by the British government to maintain control over its own border policies for security reasons, as the open internal borders of the EU might eventually pose a security risk to the United Kingdom should those border checks no longer be conducted.³¹ Thus, the regulatory framework of the United Kingdom prior to the introduction of the Citizenship Directive was one of primarily

²⁷ Shaw and Miller (n 25); Rogers (n 26).

²⁸ European Union (Withdrawal) Act 2018.

²⁹ Robin White, ‘Conflicting competences: free movement rules and immigration laws’ (2004) 29 EL Rev 385; Anthony Valcke, ‘Five years of the Citizens Directive in the UK – Part 1’ (2011) 25 JIANL 217.

³⁰ Bernard Ryan, ‘The European Dimension to British Border Control’ (2004) 18 JIANL 6.

³¹ Dr Cathryn Costello and Emily Hancox, ‘The UK, EU Citizenship and Free Movement of Persons: Policy Primer’ (*Migration Observatory*, 1 June 2014) <https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-UK_EU_Citizenship_Free_Movement.pdf> accessed on 13 May 2024.

immigration control at the British border, where rights of entry were either proved or disproved, before a later right of residence could be established or verified. The original right of entry was a difficult right to assert in the first place, as the right of entry for citizens of the EU, even before the Citizenship Directive and with the non-accession of Britain to the Schengen Agreement, was part of the UK's obligations to EU law under the Treaties of Maastricht and Lisbon.³² EU citizens had a right of entry to the UK, even if that entry is still subject to immigration control; the right of residence is the one where the United Kingdom imposes more of its national law, as will be seen with the transposition of the Citizenship Directive.

4.2.1: The 'limiting powers' of the CRD transposed into domestic immigration law

The primary piece of national law to bear in mind for freedom of movement provisions is that of the 2006 Immigration Regulations.³³ These were adopted on 30 March 2006 and brought into force on 4 April 2006 specifically for the purposes of transposing the Citizenship Directive into British national law, although as will be examined below, the national regulations imposed more required proofs to be compliant with the Regulations than were technically required in the text of the Directive to be compliant with the Directive. In other words: the Immigration Regulations imposed stricter parameters to assess lawful residence and evidence such residence than was required by the Directive, or that was imposed in other Member States.³⁴

According to the Immigration Regulations, entry into the United Kingdom was permitted to all EU nationals and their TCN family members who could successfully prove their familial relationship to the EU national. They were, nominally, subject to immigration

³² Costello and Hancox (n 31); Robin White, 'Free movement, equal treatment and citizenship of the Union' (2005) 54 ICLQ 885.

³³ Immigration Regulations 2006, SI 2006/1003.

³⁴ Helen Toner, 'New Regulations implementing Directive 2004/38' (2006) 20 JIANL 158; Valcke (n 29) 231; Rogers (n 26); Directorate General for Internal Policies, Citizens' Rights and Constitutional Affairs, 'Comparative study on the application of Directive 2004/38/EC 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 (study)' March 2009, page 170; Charlotte O'Brien, 'Acte cryptique? Zambrano, welfare rights and underclass citizenship in the tale of the missing preliminary reference' (2019) 56 CML Rev 1697.

control, but the immigration control was not considered sufficiently onerous to be perceived as a barrier to the freedom of movement of EU citizens.³⁵ There were still provisions included in the regulations to refuse entry to either EU citizens or their TCN family members, but the immigration officer making the decision to refuse such an entry must have been operating under the assumption that such a decision was lawful and justified, and challenges to entry were not to be made as a matter of course.³⁶ The regulations focused primarily, therefore, on *lawful residence* for EU citizens and the rights that were inherent to that lawful residence, as well as the circumstances in which the EU citizens could be removed from the United Kingdom should their residence become either ‘unlawful’.³⁷ Those rights of removal came into play if the right of residence should never have been granted in the first place, or if the EU citizen ceases to be a ‘qualified person’ at any point after the three-month grace period stipulated in the Citizenship Directive.³⁸

Once an EU citizen was lawfully or permanently resident in the United Kingdom, they became subject to national legislation unless their claim or appeal touched upon EU law. Appeals to removal orders for EU citizens, for example, were heard by the immigration tribunals; and any disputes between an EU worker and their British employer were treated in the domestic employment tribunals.³⁹ Because of the status of the Immigration Regulations in national law, any challenge to a decision made under those regulations was considered a case of purely national competence unless there was a reason for the relevant court to have made a preliminary reference to the CJEU (this was of particular relevance when the courts were

³⁵ White (n 29) 888.

³⁶ Immigration Regulations 2006 (n 33), regs 22 and 23.

³⁷ Toner (n 34); Valcke (n 29). See Chapter 3 for the constitutionalisation of ‘lawful residence’ as the basis for EU citizenship rights.

³⁸ Toner (n 34).

³⁹ Shaw and Miller (n 25); Costello and Hancox (n 31).

determining the exact nature of the protections of Zambrano carers without reference to the CJEU, as established in the previous section).⁴⁰

The implementation of the Citizenship Directive in the UK was interesting on many levels, not least of which the fact that the Directive seemed to allow the Member States greater leeway on restrictive immigration policies than they had been allowed under the liberal line of expanding citizenship rights that the CJEU had been taking in preceding judgments.⁴¹ The Citizenship Directive does continue to impose an obligation on the Member States to limit border controls and checks on EU citizens, and to restrict their scope of action on issuing and refusing entry and residence permits to the family members of EU citizens who are utilising their freedom of movement rights to move and to reside in the United Kingdom.⁴²

However, the Citizenship Directive does also offer a margin of action to the Member States on restricting *who* will have a right to *lawful residence* upon the territory of the host Member State.⁴³ In the case of the United Kingdom, this transposition focused on restricting access to that lawful resident status to the qualified persons of workers, jobseekers, self-sufficient persons, self-employed persons, and students and their family members.⁴⁴ The lack of transposition of Article 25 of the Citizenship Directive is what enabled EU citizens, both before and after the vote of the referendum, to come under the umbrella of the ‘hostile environment’ that deliberately targets unwanted migrants in the UK in an attempt to force them

⁴⁰ Anthony Valcke, ‘Five years of the Citizens Directive in the UK – Part 2’ (2011) 25 JIANL 331.

⁴¹ Alina Tryfonidou, ‘Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach?’ (2009) 15 ELJ 634, 652; Case C-83/11 *Secretary of State for the Home Department v Muhammad Sazzadur Rahman and Others* [2012] ECLI:EU:C:2012:519 paras 19-22; Chapters 2-3 of this thesis.

⁴² Shaw and Miller (n 25) 150-151.

⁴³ Council Directive 2004/38/EC 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC OJ L158/30 paragraphs 10, 20, 21.

⁴⁴ Immigration Regulations 2016 (n 15) s6, paragraph 1.

into voluntarily choosing to leave the country.⁴⁵ This kind of limiting of access to rights in domestic law that was created to transpose EU law creates a complex situation wherein EU nationals and their family members have a right to reside in the UK that is linked to their economic ability to support themselves, but if that economic ability is lost their right to lawful residence is also lost.⁴⁶

Because of this potential loss of lawful residency, the period of time that EU citizens and their family members then might have to wait before acquiring the right of permanent residence is then increased beyond five years, while British authorities have explicitly held that a period of residence under a derived right could not count as lawful residence for the purpose of acquiring either permanent residence or citizenship.⁴⁷ This is the trap that EU citizens residing in the UK find themselves falling into today: when they are no longer economically self-sufficient, for whatever reason, they lose their lawful residency and therefore become ineligible for the welfare and social security benefits that they would be entitled to as lawful residents.⁴⁸ The detailed guidance in the Appendix EU to the 2016 Immigration Regulations is worth quoting at length here:

The Home Secretary has carefully considered the Court of Appeal judgment and has decided that she no longer wishes that definition in Appendix EU to reflect the scope of the 2016 Regulations (which have now been revoked) but wishes it to reflect the scope of those who, by the end of the transition period, had an EU law right to reside in the UK as a Zambrano primary carer, in line with the originally stated policy intention. She therefore intends to maintain the requirement in sub-paragraph (b) of the definition that the applicant did not, by the end of the transition period and during the

⁴⁵ Article 25 of the Citizenship Directive requires that EU nationals living and working in Member States other than that of their nationality receive documentation enabling them to prove their lawful residence in the host state; Anthony Valcke, 'EU Citizens' Rights in Practice: Exploring the Implementation Gap in Free Movement Law' (2019) 21 EJML 289.

⁴⁶ Valcke (n 45).

⁴⁷ Valcke (n 29).

⁴⁸ *MY & Ors* (n 8); Case C-529/11 *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department* [2013] ECLI:EU:C:2013:290; joined Cases C-424/10 and C-425/10 *Tomasz Ziolkowski, Barbara Szeja, Maria-Magdalena Seja, Marion Szeja v Land Berlin* [2011] ECLI:EU:C:2011:866.

relevant period relied upon, have leave to enter or remain in the UK (unless this was under the EUSS).⁴⁹

The need to prove lawful residence, under the Immigration Regulations, is what proved the ‘sticking point’ between the more liberal approach to EU citizenship rights at the CJEU and the UK’s attempt to narrow and restrict the access to those rights.⁵⁰ This is partly because of the dichotomy that exists in traditional British immigration controls, which offers protections to those with leave to remain on a greater level than those with leave solely to enter; EU citizenship rights granted EU citizens and their TCN family members ‘unlimited’ (if they met the economic preconditions laid out in the CRD and therefore the 2006 Immigration Regulations, of course) leave to *enter* but not necessarily leave to *remain*.⁵¹ It is the leave to remain that brought with it further entitlement to social security access, but requiring the social security access could – potentially – jeopardize the lawful residence as well.⁵² The ‘limiting’ power of the CRD, and the further limitations that the United Kingdom policy decision-makers then made of it to further restrict the rights of EU citizens to their access points of those rights, was evident here: an EU citizen could only have access to those rights if they never needed them.⁵³ This is an example of the beginning of a constitutionalised EU citizenship right, before Brexit finalised the process: a right that exists in theory, but that cannot be pursued at the risk of forfeiting the right completely, cannot be said to have firm constitutional grounding.

This ‘hostile’ immigration context as applied to matters of constitutional citizenship rights squared rather uncomfortably with the freedom of movement provisions that are enshrined in the Directive, especially as the right to move and reside freely is the cornerstone of the freedom of movement and EU citizenship rights. This right inevitably conflicts with the

⁴⁹ The Immigration (European Economic Area) Regulations 2016 SI 2016/1052, Appendix EU, detailed guidance.

⁵⁰ Rogers (n 26).

⁵¹ Shaw and Miller (n 25). Emphasis mine.

⁵² O’Brien (n 34); CRD transposition report (n 34) page 169.

⁵³ O’Brien (n 34); O’Brien (n 2).

‘lawful right of residence’ tests that have been carried out on EU nationals post-2014 when restricting access to social security, relying heavily on the scope awarded to the Member States in Articles 10, 20 and 21 of the Citizenship Directive to ‘protect’ the public finances of the Member State from the undue burden that might be caused by the EU national and their family members (please see Chapter 3 for a discussion on the ‘constitutionalisation’ of this conditionality as allowed by the Court).

The Immigration Regulations, therefore, transposed a permanent right of residence that was *negated* by being reliant upon two statuses protected by EU citizenship law. The ‘qualified persons’ who benefited from the exemptions to immigration controls in the Immigration Regulations excluded any individual who relied on state support, potentially violating the individual assessment and proportionality requirements laid out in previous lines of CJEU case law.⁵⁴ Similarly, any residence that was completed under a derived right to reside could not be considered lawful for the purposes of either accessing social security benefits, or be considered lawful for the purposes of eventual acquisition of permanent residence, potentially leaving those individuals in an extremely vulnerable and inconstant immigration status.⁵⁵ This meant that there was a potential trap of disproportionality written into the regulations themselves: it is an imposition of migration control on a population of immigrants and their family members that should, theoretically, be free from immigration control in their entirety.⁵⁶ Lawful residence, according to the Immigration Regulations 2016 and the case law decisions made

⁵⁴ Immigration Regulations 2006 (n 33) Section 15 paragraph 2; Part 1 Regulation 6, paragraph 1; Case C-140/12 *Pensionversicherungsanstalt v Peter Brey* [2013] ECLI:EU:C:2013:565; Case C-456/02 *Michel Trojani v Centre public d’aide sociale de Bruxelles (CPAS)* [2004] ECLI:EU:C:2004:488; joined cases C-22/08 and C-23/08 *Athanasios Vatsouras & Josef Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 90* [2009] ECLI:EU:C:2009:344; Herwig Verschueren, ‘Preventing benefit tourism in the EU: a narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?’ (2015) 52 CML Rev 363.

⁵⁵ Adam Łazowski, ‘Children of the lesser law: comment on Ziolkowski and Szeja’ (2013) 38 EL Rev 404; Maxime Tecqmenne, ‘Migrant jobseekers, right of residence and access to welfare benefits: one step forward, two steps backward?’ (2021) 46 EL Rev 765; Iyiola Solanke, ‘The Impact of Brexit on Black Women, Children and Citizenship’ (2020) 58 JCMS 147; *Alarape* (n 48). See Chapter 5 for a discussion on the inevitable consequences of this in the context of deconstitutionalisation through Brexit.

⁵⁶ Rogers (n 26); Shaw and Miller (n 25).

against those regulations, was a residence right that presupposes that the person claiming it did not, at the time they entered the United Kingdom, need state support, and would never be in a position of needing state support at all. That residence right could be undermined by requiring access to social security benefits despite the explicit instruction otherwise in the Citizenship Directive and CJEU case law.⁵⁷

4.2.2: The limitations on freedom of movement and family reunification rights for EU citizens

Another example of delimitation of EU citizenship rights in the United Kingdom can be seen by analysing the *Akrich* case. The rights of freedom of movement for EU citizens and their family members regularly come up against the migration systems of the Member States and cause inevitable friction.⁵⁸ This is where the dichotomy between right of entry and right of residence comes into focus. This circle was squared – albeit temporarily – by the CJEU with its decision in *Akrich*, when it introduced the concept of prior lawful residence as a prerequisite for a right of re-entry and continuing residence.⁵⁹ Because of the emphasis on lawful residence as the basis for any continuing or permanent residence in the territory of the United Kingdom, it is worth revisiting *Akrich* in detail within the context of the emphasis in British legislation and the British judiciary on lawful residence as the precondition for the genuine enjoyment of the substance of EU citizenship rights when residing on the territory of the United Kingdom.⁶⁰

⁵⁷ Citizenship Directive (n 43) Article 14, paragraphs 2, 3, 4(b); report on the implementation of the CRD (n 34); Case C-247/20 *VI v Commissioners for Her Majesty's Revenue and Customs* [2022] ECLI:EU:C:2022:177 paras 54-55. This is where the difference between ‘right to enter’ and ‘right to remain’ in British domestic law is once again helpful.

⁵⁸ Shaw and Miller (n 25); Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State* [2002] ECLI:EU:C:2002:461; Case C-157/03 *Commission of the European Communities v Kingdom of Spain* [2005] ECLI:EU:C:2005:225; White (n 29); Tryfonidou (n 11).

⁵⁹ Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECLI:EU:C:2003:491; Cathryn Costello, ‘Metock: Free movement and ‘normal family life’ in the Union’ (2009) 46 CML Rev 587; Rogers (n 26) – specifically her phrasing of *Akrich* as a ‘Pyrrhic victory’, a phraseology that I find particularly apt for the British approach towards the judgment in *Akrich*.

⁶⁰ Rogers (n 26); *Okafor & others v Secretary of State for the Home Department* [2011] EWCA Civ 499.

Because of the permission to limit derivative rights of residence for TCN family members of EU citizens *who both met lawful immigration preconditions*, the exemptions usually granted EU citizens and their family members to move freely without meeting immigration requirements were – temporarily under *Akrich* – removed. This is an example of delimitation of EU citizenship: the reintroduction of immigration controls to limit the possibility of family reunification was, later, construed by the CJEU as a disproportionate and unlawful potential infringement of the freedom of movement rights of EU citizens and needed to be ‘course-corrected’.⁶¹ The application of immigration controls to specifically TCN family members of EU citizens is a delimitation of EU citizenship rights because it prioritises the lawful applications of domestic immigration control rather than the freedom of movement provisions under Articles 20-21 TFEU.

The manner that the United Kingdom responded to the *Akrich* precedent – by wholly embracing it – is indicative of the priorities in bringing EU freedom of movement rights completely under the ambit of immigration control, even if such a substitution of purely domestic jurisdiction was a violation of EU law, precedent, and the constitutional protections of EU citizenship rights.⁶² The government of the UK, in the European Council, pushed for the *Akrich* precedent – that all family reunification rights for EU citizens and their TCN family members must be conditional upon the TCN family member and EU citizen both being always lawfully resident while utilising their freedom of movement rights – to be codified into the Citizenship Directive itself, thereby limiting the possibilities of protections that the Citizenship Directive could offer even after the *Metock* case overturned *Akrich*.⁶³ Immigration controls would, therefore, apply to EU citizens even in the exercise of their freedom of movement rights, and any exemptions to those immigration controls that might apply to EU citizens and their

⁶¹ Wray (n 19); Rogers (n 26); O’Brien (n 2); Shaw and Miller (n 25).

⁶² *Okafor* (n 60); Rogers (n 26).

⁶³ Peers (n 26); Martin (n 23); Rogers (n 26); Shaw and Miller (n 25); White (n 29).

family members would be severely limited. This can be considered an early example of delimitation of EU citizenship within the United Kingdom as a Member State, as the rights of EU citizens – as guaranteed by the constitutional status and order of EU citizenship – were being limited by one of the mechanisms tasked with enforcing those rights. It is worth, therefore, briefly outlining the *Akrich* decision to understand why it was considered so important to the legislative priority of limiting constitutional rights of EU citizens within the British constitutional order itself.⁶⁴

Hacene Akrich was an individual of Moroccan nationality who had entered the United Kingdom lawfully on a tourist visa and unlawfully overstayed, before being deported after being convicted of attempted theft and attempting to use a stolen identity. He subsequently illegally re-entered, married a woman of British nationality while residing unlawfully in the United Kingdom for the second time, and was removed to Ireland where his wife was residing temporarily. The couple then requested leave to return to the United Kingdom under the rights of return of EU citizens guaranteed by the line of CJEU case law exemplified by *Singh*.⁶⁵ The immigration authorities of the United Kingdom refused Mr Akrich's leave to enter and remain on the grounds that he was still under a removal order and that the EU rights of his spouse were invalidated by the fact that she had only utilised her freedom of movement rights to circumvent British immigration law.⁶⁶ The CJEU held that, while it was unlawful for British immigration authorities to take into consideration their suspicions of the motives for the EU national utilising her freedom of movement rights, they were justified in denying Mr Akrich his right

⁶⁴ Eleanor Spaventa, 'Case C-109/01, Secretary of State for the Home Department v H. Akrich, judgment of the Full Court of 23 September 2003' (2005) 42 CML Rev 225.

⁶⁵ Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department* [1992] ECLI:EU:C:1992:296; see also Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v RRG Eind* [2007] ECLI:EU:C:2007:771 and Case C-1/05 *Yunying Jia v Migrationsverket* [2007] ECLI:EU:C:2007:1.

⁶⁶ Ben Olivier and Jan Herman Reestman, 'European citizens' third-country family members and Community law' (2007) 3 ECL Rev 46; Spaventa (n 64).

of re-entry and residence into the United Kingdom because he had not been *lawfully resident* in the United Kingdom prior to his desire to re-enter.⁶⁷ The right of residence of a TCN spouse could not be guaranteed as existing under EU law if the spouse did not already possess a residence right under *domestic* law.⁶⁸ The lawful residence of Mr Akrich in Ireland could not sufficiently be considered a remedy to the prior unlawful residence in the United Kingdom.⁶⁹

This judgment, despite its inconsistencies with previous jurisprudence (namely, the *MRAX* case, which held that deliberately utilising EU citizenship rights to circumvent national domestic immigration policies that were more restrictive than EU citizenship rights permitted could not be considered a valid reason for the denial of a residence right for a TCN family member of a returning EU citizen) was used by British authorities to limit the freedom of movement of EU citizens and their families in the subsequent transposition of the Citizenship Directive into domestic immigration regulation.⁷⁰ The freedom of movement of EU citizens and their family members were, therefore, subjected to immigration controls and border authority checks, and any claims or disputes that rose from questions of freedom of movement rights were heard and adjudicated in immigration courts and tribunals. This limited the possibilities for references to the CJEU, thereby restricting the rights of individual EU citizens to request the redress from the CJEU when their constitutional rights as EU citizens were being unlawfully constrained.⁷¹ Lawful residence becoming the primary measurement for accessing further rights linked to social rights for EU citizens and their TCN family members meant that a new regulatory framework for adjudicating what lawful residence was, and how it was obtained, had to be created.

⁶⁷ *Akrich* (n 59) para 61; emphasis mine.

⁶⁸ *ibid* paras 53-55.

⁶⁹ *Spaventa* (n 64).

⁷⁰ *MRAX* (n 58) paras 60, 80; *Spaventa* (n 64).

⁷¹ *Shaw and Miller* (n 25); *Rogers* (n 26).

This focus on lawful residence, therefore, led to a closer inspection of the motivations for any applications for derived rights of residence permits for TCN family members for EU citizens, as it was considered by Member State authorities that freedom of movement not genuinely entered into would negate any subsequent freedom of movement right.⁷² This could have become problematic in the context of social security access as well, as during the transposition of the CRD British authorities utilised the necessity of access to state support as evidence that the EU citizen making the claim for state support was becoming an undue burden on the support system of the Member State.⁷³ This would have rendered them illegally resident, potentially compromising their ability to continue both residing in the United Kingdom, the rights of residence of their family members, and their future ability to re-enter legally. This was particularly the case with the focus on lawful residence as the defining characteristic for the enjoyment of the substance of EU rights once the residence had been acquired.⁷⁴ This will be of even greater relevance in determining the full scope of access to rights encompassed *within* that residence right, such as social security benefits, for EU citizens whose TCN parents' residence rights were to be strictly defined and limited to *purely* a residence under the Immigration Regulations (i.e., no subsequent right to social security access).⁷⁵

The emphasis on lawful and *solely* lawful residence, however, was considered by the CJEU – in the cases that made it to a preliminary reference – to go too far in the direction of disproportionality.⁷⁶ The attempts to bring the freedom of movement protections of EU citizens

⁷² Yves Pascouau, “Strong attack against the freedom of movement of EU citizens: Turning back the clock” (*European Policy Centre*, April 30th 2013) <<https://www.epc.eu/en/Publications/Strong-attack-against-the-free~1c7140>> accessed 10 October 2024.

⁷³ CRD transposition report (n 34), page 160.

⁷⁴ *Alarape* (n 47).

⁷⁵ Rogers (n 26); Charlotte O'Brien, “‘Hand-to-mouth’ citizenship: decision time for the UK Supreme Court on the substance of Zambrano rights, EU citizenship and equal treatment” (2016) 38 JSCWFL 228; Iyiola Solanke, “HC and Sanneh – ‘genuine enjoyment’ does not include social welfare” (*Electronic Immigration Network*, 20 December 2013) available at <<https://www.ein.org.uk/blog/hc-and-sanneh-genuine-enjoyment-does-not-include-social-welfare>> accessed on 13 April 2023.

⁷⁶ Rogers (n 26); Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECLI:EU:C:2008:449; Tryfonidou (n 41).

fully into immigration control, in attempts to embed the *Akrich* precedent into both domestic and EU law, seemed to imply that the assumption within the UK system was that all free movement claims for EU citizens to reunite their family members, or derive a right to reside for a TCN family member, was a fraudulent attempt to circumvent domestic immigration controls.⁷⁷ In any case, the brief opportunity of restricting freedom of movement within the migration controls of lawful residence was overturned explicitly by the CJEU in *Metock*, when the requirement for prior lawful residence as a prerequisite for an ongoing right of residence in the context of family rights was explicitly overturned as unlawful and *contrary to the objectives of the Citizenship Directive*.⁷⁸

While the path towards delimitation was well and truly sketched out – at least from the point of view of the domestic authorities of the Member State that was the United Kingdom, as a legitimate political and constitutional priority, as evidenced by their attempts to institutionalise the limiting precedent of *Akrich* rather than the broader rights allowed under *Metock* and the CRD – the delimitation that could have been allowed here was only begun, rather than completed.⁷⁹ EU citizenship rights, at this stage, still ‘trumped’ immigration controls, even if the Member State feels they have a strong case to identify – and thereby negate – a potentially fraudulent use of those rights. The CJEU used this development to further ‘entrench’ the constitutional nature of EU citizenship rights, deepening the divide between the constitutional orders of the UK and the EU: a constitutional citizenship right cannot be used or enforced fraudulently as the fact that it exists is justification enough for its enforcement.⁸⁰

⁷⁷ Rogers (n 26); Shaw and Miller (n 25).

⁷⁸ *Metock* (n 76); Costello (n 59); Lansbergen (n 9). See Chapter 2 of this thesis for a more in-depth discussion of the importance of *Metock* to EU citizenship constitutionalisation. Emphasis mine.

⁷⁹ Spaventa (n 64); Peers (n 23).

⁸⁰ Spaventa (n 64); Lansbergen (n 9).

The emphasis on immigration control and lawful residence for TCN family members, even within the context of freedom of movement rights, was the beginning of the ‘delimitation’ of EU citizenship rights within the United Kingdom – the prioritisation of the rights of the Member State to limit access to the territory of the Member State, potentially against the ‘rights’ of EU citizens. The delimitation process continued with the strict limitations on the further access to rights that Zambrano carers could benefit from, because this limitation of rights was not only targeting TCN family members with EU rights of residence, but was also creating a situation where own-state nationals were being denied the benefits of equal treatment and proportionality as guaranteed under EU constitutional frameworks.⁸¹ The next section will, therefore, provide an analysis of how the domestic interpretation by British courts of a strict application of the Zambrano right to reside contributed to the delimitation of EU citizenship rights.

4.3: Restrictions on *Zambrano* in the UK as the indicator and precursor of restriction on EU citizenship rights in general

Why does the restriction on particularly *Zambrano* rights to reside matter, in the context of EU citizenship delimitation in the United Kingdom? The restrictions of those rights were occurring at the same time as, and were deeply emblematic of, a greater retrenchment on the rights to social security access for EU citizens, both economically active and inactive, in general.⁸² It is not so much the limiting of the access to the rights in general that is the example of the delimitation of EU citizenship, but rather that the rights were successfully limited along lines that, in previous eras of citizenship jurisprudence, would have been considered violations of the EU citizen’s constitutional rights to nondiscrimination, equal treatment, and proportionality

⁸¹ O’Brien (n 34); Solanke (n 6).

⁸² O’Brien (n 34); Elise Muir, ‘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’ in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020).

in their access to benefits and residence in the host Member State. Perhaps it is unsurprising that in an era of greater austerity and limitations on social security rights for everybody, the rights of the EU citizen – and particularly the TCN primary carer of an EU citizen – were easy to ‘deprioritise’ as part of a constitutional battleground between a ‘peripheral’ Member State and a CJEU that was already allowing greater prominence in limiting secondary law instruments.⁸³ That social security benefits was the EU citizenship right that was ‘sacrificed’ in this delimitation of *the rights of access to further rights for EU citizens themselves* is coincidental, rather than the primary focus of analysis.⁸⁴

The *Zambrano* case, when heard by the CJEU, set the precedent of derivative rights protection that all subsequent judgments have either based themselves on or attempted to retrench.⁸⁵ It established the precedent of genuine enjoyment of the substance of EU citizenship rights as well as raising questions about what, precisely, genuine enjoyment and substance of EU citizenship rights specifically entailed; as well as creating a complicated approach towards purely internal situations of the EU and when Treaty rights can be called in to palliate the lack of any past freedom of movement.⁸⁶ *Zambrano* was a contributor to the thinking that the rules of EU citizenship should be extended to ensure that EU children’s rights were protected even in situations that seemed wholly internal, and that the constitutional nature of EU citizenship rights could provide scope of protections and individual redress for both individual EU citizens, and their vulnerable TCN family members.⁸⁷

⁸³ Jo Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalisation’ (2020) EUI Working Paper RSCAS 2020/33; Bernard and Leinarte (n 24). See Chapter 3 of this thesis for a discussion on the importance of social security access to the constitutionalisation of EU citizenshipship.

⁸⁴ O’Brien (n 34).

⁸⁵ Kay Hailbronner and Daniel Thym, ‘Case C-34/09, Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, not yet reported’ (2011) 48 CML Rev 1253, 1264.

⁸⁶ Hester Kroeze and Peter Van Elsuwege, ‘Revisiting Ruiz Zambrano: A Never-Ending Story?’ (2021) 23 EJML 1, 3.

⁸⁷ O’Brien (n 34).

This analytical trend was part and parcel of what led to the political and legislative ‘backlash’, specifically in the United Kingdom, of introducing legislation that deliberately narrowed the access of rights that EU citizens might enjoy on the basis of their EU citizenship status itself within the UK, further narrowing who might access not only access the protections of EU citizenship, but who might be able to be in a position to benefit from them by moving in the first place.⁸⁸ This had a further, perhaps unintentional, impact: the extremely restrictive interpretation placed upon the *Zambrano* precedent by the domestic authorities of the United Kingdom that further narrowed the definition of individuals who could be protected it to TCNs who are primary carers of dependent, EU-citizen *children* while excluding family members that fall outside of that narrow definition.⁸⁹

The synonymisation of ‘*Zambrano* carer’ with ‘TCN parent with sole primary caring responsibility for a child citizen’ was adapted into the Immigration Regulations 2016 in the UK, and therefore enshrined into domestic law that needed no further reference (according to the British courts; see above section) to the CJEU for potential expansion of those protections.⁹⁰ This has had an immediate, and noticeable, impact on how the guidelines for EUSS applications for bearers of derivative rights have been written, creating gaps and potential exclusions for vulnerable people to fall into (see Chapter 5 of this thesis). This association between derivative rights of residence and vulnerable children, while protecting the children’s rights perspective of derivative rights of residence protection, also leaves out other groups of vulnerable individuals whose right of residence is no less valid: vulnerable adults who rely on citizen family members, such as siblings or children, for their care and the dignity of their retirement, even if the courts would not consider that compulsion to leave the territory; or a

⁸⁸ Charlotte O’Brien, ‘The pillory, the precipice, and the slippery slope: the profound effects of the UK’s legal reform programme targeting EU migrants’ (2015) 37 JSWFL 37 111.

⁸⁹ Anja Wiesbrock, ‘Union Citizenship and the Redefinition of the ‘Internal Situations’ Rule: The Implications of *Zambrano*’ (2011) 12 GLJ 2077.

⁹⁰ The Immigration Regulations 2016 (n 15), SI 2016/1052 para 7.

spouse who, while not relying on their citizen partner for care and comfort, has a residence right that is now unclear.⁹¹

That is why the restrictions on further access to further rights for *Zambrano* carers in the United Kingdom matters: they are part of a general pattern of ‘legal expressions of a desire to curb EU migration’ and ‘open up the possibility of unilateral, back-door treaty tinkering, at odds with the aims and spirit of EU integration’.⁹² It is the very specific downgrading of the constitutional priority of EU citizenship, limiting the rights that it entails and expands into TCN family members, to prioritise instead the ‘exclusionary’ aspect of Member State sovereignty and runs the risk of undermining other rights of EU citizenship.⁹³

4.3.1: Minimum standard of protections established for *Zambrano* carers: residence and residence only

Zambrano was a unique decision in the EU context for many reasons, but one of the most impactful ones was that it did not clarify either what was meant by that substance or the extent of the personal scope of its protections.⁹⁴ Much reliance was therefore placed on the subsequent judgments, as seen in Chapters 2 and 3, especially the limiting ones that followed the *Zambrano* judgment.⁹⁵ The limiting judgments that followed *Zambrano* also had the effect, at both the EU level and in the United Kingdom, of reinforcing the exceptional nature of the *Zambrano* judgment and reinforcing the idea that such an ‘override’ of standard immigration control

⁹¹ *Patel v Secretary of State for the Home Department* [2019] UKSC 59 para 20.

⁹² *ibid* 136.

⁹³ *ibid*; Solanke (n 55); also Chapter 1 of this thesis for the ‘social power’ of EU citizenship status.

⁹⁴ Niamh Nic Shuibhne, ‘Seven Questions for Seven Paragraphs’ (2011) 36 *EL Rev* 161.

⁹⁵ As has previously been established, however, that ‘theoretical’ opening of rights never came to pass – Member States were still allowed the authority and the scope to pass national legislation limiting access to nationality for children born on their territory, as was the case in Ireland after the *Zhu and Chen* case, and the *Zambrano* amendments in the UK explicitly excluding *Zambrano* carers from non-contributory social security benefits were never even referred to the CJEU for clarification.

practices could only apply in situations of *extreme urgency*, namely those that include an EU citizen child and their TCN primary carer (usually a mother).⁹⁶

This deliberate restriction of not only the number of individuals who can claim protections under the constitutional nature of EU citizenship, but also the level of and type of protection they can claim, is an important distinction and phase of the ‘delimitation’ phase of EU citizenship within the United Kingdom. It is indicative of a decision to deprioritise the potential expansiveness and ‘generous’ nature of EU citizenship, by restricting the access to the social rights that form an integral part of its ‘aspirational’ purpose to a set of individuals who fulfill economic and administrative preconditions.⁹⁷ Limiting the EU law rights of TCN family members of even *British* (as well as EU citizen) children, and subjecting them to the restrictions of a purely domestic social security, immigration, and residence testing mechanism, is an indication of the ‘delimitation’ of EU citizenship rights that limits individual redress for the vulnerable.⁹⁸

Rights deriving from EU citizenship rights, specifically the *Zambrano* right, were increasingly subject to the ‘limiting’ aspects of secondary law instruments in the United Kingdom – even in cases of citizen children, which was not the case in other Member States.⁹⁹ This serves as an example of delimitation because the source of *Zambrano* rights was shifted away from the broader reading permissible under the *Zambrano* judgment itself to much stricter interpretations offered in both legislative amendments to the Immigration Regulations 2006

⁹⁶ *R (on the application of HC) (Appellant) v Secretary of State for Work and Pensions and others (Respondents)* [2017] UKSC 73 *on appeal from* [2015] EWCA Civ 49 para 41 (emphasis mine); Solanke (n 75).

⁹⁷ Sandra Mantu, ‘EU citizenship and the rule of law in times of Brexit: Generosity by reciprocity’ (EU Global Leadership in the Rule of Law, February 2019, Zagreb); O’Brien (n 88); O’Brien (n 2). See also Ruairi O’Neill, ‘A Stitch in Time? Mutual Trust as the EU’s Fix-All in Case C-183/23 *Commission v Malta*’ (2025) 10 European Papers 463 and Case C-181/23 *European Commission v Malta* [2025] ECLI:EU:C:2025:283.

⁹⁸ Solanke (n 55).

⁹⁹ Schmidt (n 13) 181-196; Roel Fernhout and Ries Wever, ‘Thematic Report: Follow-Up of the Case law of the Court of Justice of the European Union’, published October 2011, accessed 14 September 2025.

and domestic court judgments that upheld those amendments.¹⁰⁰ This ‘delimitation’ of the *Zambrano* right away from the EU jurisprudence and towards a purely domestic standard also meant that any CJEU jurisprudence that could potentially expand that right, such as *Chavez-Vilchez*, was deliberately excluded from jurisprudential or legislative consideration in the United Kingdom.¹⁰¹

This delimitation meant that any parent – and in almost all the cases, it was specifically a parent whose claim was being disputed – who could claim a *Zambrano* right to reside would be strictly limited in both how they could prove that *Zambrano* right to reside, and what that right to reside carried with it.¹⁰² Namely, the *Zambrano* right to reside could *only* apply when no other route to lawful residence could be proven to be applicable; and the *Zambrano* right to reside, in the United Kingdom at least, was a right only to reside in the territory of the EU, and not a right to reside qualified by any right to standard of living or quality of life.¹⁰³ Any *Zambrano* carer was therefore excluded from non-contributory welfare benefits.

This legislative and judicial response was not predictable. The reaction to the *Zambrano* decision in the UK was not particularly vociferous, unlike the media response in Germany and the Netherlands: it did not draw much attention, being the subject of only three articles in eighteen papers in the months immediately following the decision.¹⁰⁴ The reactions from other Member States, namely Germany and Ireland, were comparatively less muted: some of the responses in the media in those countries raised the spectre of mass immigration from third countries, and a preemptive accusation of refugees using their EU citizen children to

¹⁰⁰ The Social Security (Habitual Residence) (Amendment) Regulations 2012; the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012; and the Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012.

¹⁰¹ Wray (n 19); O’Brien (n 34); Solanke (n 6).

¹⁰² Solanke (n 55).

¹⁰³ Solanke (n 55); *Harrison v Secretary of State for the Home Department* [2012] EWCA Civ 1736 para 67.

¹⁰⁴ Schmidt (n 13).

circumvent the denial of their asylum claims and to draw social security benefits indiscriminately from the public purse.¹⁰⁵ The reactions of governments, policy-makers and courts of the Member States perhaps reflected that fear. The Member States in question adopted legislation that restricted the potentially broad remit of the *Zambrano* claimants to both an incrementally small percentage of public spending, and to very few individuals as well.¹⁰⁶ Not all Member States were immediately restrictive, however: some Member States which adopted the *Zambrano* exception made by the CJEU into their own policies in ways that would permit greater access to rights for EU citizens and their TCN family members under the status of EU citizenship than was seen in the United Kingdom.¹⁰⁷ The Belgian courts found that non-EU citizen carers of EU citizen children could claim minimum subsistence payments.¹⁰⁸ In the Netherlands, on the other hand, the difficulty of the *Zambrano* claim lay in proving a *Zambrano* status; once the *Zambrano* status was acquired, however, the access to welfare benefits went with it.¹⁰⁹

The UK government, with its establishment of restrictive statutory instruments, took a very different approach to the establishment of *Zambrano* rights than other Member States: it took a clear, and immediate, stance to restrict the rights of *Zambrano* carers with minimal submissions of the clarifying judgments to the CJEU through a preliminary reference.¹¹⁰ The limitations on what further rights *Zambrano* carers might have access to beyond the right of

¹⁰⁵ Iyiola Solanke, 'Using the citizen to bring the refugee in: Gerardo Ruiz Zambrano v Office National de l'Emploi' (2012) 75 MLR 101.

¹⁰⁶ Schmidt (n 13).

¹⁰⁷ O'Brien (n 34).

¹⁰⁸ X v. Office National d'Allocations Familiales pour Travailleurs Salariés; Cour du travail de Bruxelles; number: RG n 2010/AB/333, 22 December 2011.

¹⁰⁹ ECLI:NL:HR:2014:277 Hoge Raad, Number 13/00409, 14 February 2014; O'Brien (n 34) 1721-1723.

¹¹⁰ The lack of the preliminary reference in the post-*Zambrano* cases is explored very thoroughly in the article cited at (n 34). The argument therein is that the divergent approaches across the Member States and throughout the different levels of UK courts is evidence in and of itself that the *Zambrano* case law emerging from the CJEU was not sufficiently clear to be interpreted by the Member States without further reference to the CJEU. This will be of relevance later in the chapter when discussing the continuing restrictions of access to social security and welfare benefits of those benefitting from EU rights to reside in the UK as the case law builds to the Brexit vote.

residence in the United Kingdom were occurring at the same time as similar clarifying CJEU judgments on the scope of rights for derivative rights bearers more broadly (as discussed in Chapter 3).¹¹¹ This, perhaps, gave the policy-makers in the United Kingdom the necessary ‘cover’ to apply these restrictions as broadly in compliance with EU law.¹¹²

The reality of the post-*Zambrano* state of play in the United Kingdom, therefore, is one where *Zambrano* carers are explicitly excluded from access to non-contributory social security benefits, regardless of their employment or jobseeker status, that EU nationals and UK citizens *are* otherwise entitled to. The *Zambrano* right to reside is, furthermore, considered a ‘catch-all’ status that can be claimed only when *other* routes of accessing lawful residence have been closed or found inapplicable, making it more likely that those in the position of being *Zambrano* claimants were forced into existing on the much-restricted access to social benefits that come with the status of *Zambrano* carer.¹¹³ The right of residence came with only the statutory minimum protection of the 1989 Children Act.¹¹⁴ It was accepted by the UK courts and legislative bodies that British citizen children had an EU right to reside in the territory of the United Kingdom with their TCN primary carer, as well as their right to reside under both national and international law, but the right was strictly constrained to *solely* a residence right and to the bare minimum subsistence required to maintain that right of residence.¹¹⁵

The *Zambrano* right to reside carries with it no right to quality of life or standard of living, or even of protection from absolute poverty for the British child – the bare minimum

¹¹¹ Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECLI:EU:C:2011:277; Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECLI:EU:C:2011:734; Case C-86/12 *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l’Emploi et de l’Immigration* [2013] ECLI:EU:C:2013:645.

¹¹² O’Brien (n 34); Rogers (n 26).

¹¹³ Pryce (n 8) para 21; Charlotte O’Brien, ‘Civis capitalist sum: Class as the new guiding principle of EU free movement rights’ (2016) 53 CML Rev 937.

¹¹⁴ J.H.L. 2018 21(1) 2; Section 17 Children Act 1989, stipulating that local authorities have a duty to ‘safeguard and promote the welfare of children within their area who are in need’.

¹¹⁵ O’Brien (n 88); Solanke (n 75).

required for subsistence is the *full* scope of the *Zambrano* right.¹¹⁶ Anything beyond that bare minimum subsistence was not required by EU law, and since the regulations were not applying EU law in the first instance there could be no grounding in EU law either to appeal to the protections of family life and dignity that exist in the Charter and the Convention.¹¹⁷ Because the protections of EU citizenship apply only to the child, the *Zambrano* parent cannot have a claim to the equal treatment provisions of EU citizenship that the *child* might claim.¹¹⁸ The *Sanneh* decision confirmed that the UK attitude towards derivative rights of residence originating in EU law as that of allowing only the minimum standard of protections for EU citizenship and its attendant rights and protections, and can be seen as evidence of a ‘delimitation’ of EU citizenship protections because of the quite significant retrenchment of the ‘umbrella’ of protections that an EU citizen can extend to their family members.¹¹⁹

In the *HC* appeal to the initial *Sanneh* judgment, the judges confirmed that the principle of the *Zambrano* protections were, in and of themselves, *restrictive rather than expansive*: it was a case of exceptional circumstances that were not repeated in the present case, and the only right that could be considered binding based on the *Zambrano* principle was that of protection from expulsion from the territory of the European Union, and *only protection from absolute and immediate expulsion*.¹²⁰ The right extended to financial support from the state only to the extent that the right to not be removed from the territory could be practical rather than theoretical; but the only protection that EU law offers by virtue of the relevant CJEU decisions themselves is that of protection from expulsion and the bare minimum support required to be

¹¹⁶ *Sanneh* (n 8) paras 90-91. Emphasis mine.

¹¹⁷ *ibid* para 43.

¹¹⁸ In taking this stance, the Court failed to take into consideration the fact that the denial of access to benefits to the *Zambrano* parent will, inevitably, impact the child and the child’s right to equal treatment anyway.

¹¹⁹ Contrast this interpretation of the ‘best interests of the child’ to the later case of *Chavez-Vilchez*, for example, as a means of highlighting the difference in protections that were offered by different Member States. The lack of ‘universality’ in protections for the extension powers of a citizen child can also be taken as evidence of citizenship deconstitutionalisation, because of the lack of standardized protection that can be offered throughout the EU.

¹²⁰ *HC* (n 96) para 28. Emphasis mine.

able to *continue* residing.¹²¹ Most importantly, the residence right could only be considered to exist if it was ‘retroactively’ applied: a TCN could use the derivative right to continue residing in the territory of the United Kingdom, but this right did not extend to creating a new residence right if one were not already in place.¹²² The *Zambrano* amendments to the 2006 Immigration Regulations were, therefore, more than suitable to provide for the protection from expulsion of EU citizens from the territory.¹²³ The *Zambrano* carer has a right to reside but not to thrive, on the same level as any other TCN who has made the immigration decision to move to the United Kingdom. The only concession to which they are entitled, which gives them an advantage over other migrants in a similar position, is that they bear responsibilities for British citizen children who do have greater rights from the British state by virtue of their own nationality.¹²⁴

The *Sanneh* and subsequent *HC* decisions were being challenged and heard in a UK context that, similar to ones in other Member States, was becoming ever more hostile to EU migration.¹²⁵ This trend allowed for the creation of the label ‘parasitic rights’ to attach to the rights of family members of EU citizens to benefit from the freedom of movement provisions, especially when taken in conjunction with the emphasis placed by the courts and the policymakers on protecting access to social security and welfare benefits from ‘benefits tourists’.¹²⁶ This protection of the public purse has previously been found to be a legitimate aim for the Member State to pursue, should the restrictions that it places upon access to social security rights fall in line with proportionality as required by the constitutional parameters of

¹²¹ *ibid* paras 25-26. Emphasis mine.

¹²² *ibid*.

¹²³ *ibid* para 29.

¹²⁴ Lady Hale, while agreeing with the judgment dismissing the appeal, spends paragraphs 39-47 discussing why the policymakers should have perhaps considered guaranteeing the rights of the British citizen children as more important than denying the rights of third-country nationals residing in the territory of the United Kingdom.

¹²⁵ *HC* (n 96) para 41; Matthew Evans, ‘EU Migrants, abuse and access to welfare’ (2015) 29 *JIANL* 273.

¹²⁶ Evans (n 125); Andreas Musolff, ‘The Scenario of (Im-)Migrants as Scroungers and/or Parasites in British Media Discourses’ in *Representing Poverty and Precarity in a Postcolonial World* (Brill 2020); David Cameron’s EU speech of 28 November 2014, accessed on 24 May 2024 on the BBC website <https://www.bbc.com/news/uk-politics-30250299>.

EU citizenship protections.¹²⁷ They address the political and social mistrust of EU free movement rights and those immigrants perceived as exploiting the loopholes in the system by utilising claims of EU residence rights to circumvent the domestic immigration system and the synonymisation in British policymaking and judicial decision-making of ‘*Zambrano* right’ to that of a parent deriving a right of residence from a dependent child for primary care only, to the exclusion of other types of familial relationships and other types of dependency.¹²⁸

The fact that the Court of Appeal relied on the limiting judgments of *Brey*, *Dano*, *Alimanovic* and *Dereci* was pointed to as an indication of the lack of necessity for a preliminary reference – according to the judges, those cases awarded Member States the right to restrict the access of non-nationals to the welfare benefits systems of the Member States to defend access to the public purse. Those cases, however, explicitly found that it was for the local authority in question to determine that the exclusion from benefits access was proportionate to justify the overruling of the non-discrimination principles. The Court of Appeal judgment found that the exclusion of *Zambrano* carers was proportionate because they remain eligible for backstop protections under s.17 of the Children Act protecting them from homelessness and absolute destitution and because the government’s aim of preventing ‘welfare benefits tourism’ was an acceptable one.

However, the exclusion of *Zambrano* carers from social security benefits is *not* preventative: they are already lawfully resident on the territory of the United Kingdom, and there is no compelling evidence that restricting such access has any significant impact on immigration numbers or benefits claims made by migrants.¹²⁹ Such a restriction serves only to

¹²⁷ *Brey* (n 54).

¹²⁸ O’Brien (n 2) and O’Brien (n 34); Evans (n 125); Stalford (n 71); Solanke (n 6); Jane Fortin, ‘Are Children’s Best Interests Really Best? *ZH (Tanzania) (FC) v Secretary of State for the Home Department*’ (2011) 74 MLR 947; Jason Pobjoy, ‘The best interests of the child principle as an independent source of international protection’ (2015) 64 ICLQ 327.

¹²⁹ *Sanneh* (n 8) para 98; O’Brien (n 34).

introduce an additional complexity into a familial situation that is already complicated. The exclusion of Zambrano carers from access to the social security benefits that are available to other British and European parents strips the children of those Zambrano carers from the protections of equal treatment that they are guaranteed under EU law, regardless of whether one agrees with the CJEU about no individual having a right to a certain standard of quality of life.¹³⁰ Allowing Zambrano carers to access those social security benefits would enable their British citizen children to live in something more than acute poverty and indicates that the Court of Appeal considers the *Zambrano* right to be purely a residence right stripped of the substance of genuine enjoyment of the rights of EU citizenship as established by the CJEU.¹³¹

The fact that the British courts enshrined a precedent of absolute compulsion, and the bare minimum subsistence required to avoid that compulsion, has unfortunately led to a definition of ‘primary carer’ that privileges parent-child relationships in the scope of *Zambrano* protections and leaves out other relationships of dependency, or certainly makes them harder to evidence.¹³² It would be harder for an adult to claim a relationship of dependency on another adult, certainly a relationship of dependency that excluded all other potential carers and would therefore entail the ‘practical compulsion to leave the territory’ that was set as the standard by

¹³⁰ An analogy to child support is useful here – child support payments are considered as the right of the child in question, rather than the parent receiving the support payments. It could therefore be argued that non-contributory social security benefits, such as child tax credits or a child allowance, which are restricted for Zambrano carers, are a violation of the child’s rights to that monetary support from the state rather than another parent. By refusing to treat UK (and therefore EU citizen) children whose TCN primary carer is considered lawfully resident in the UK based on an EU citizenship right as equivalent to UK citizen children whose parents are lawfully resident due to domestic legislation in the determination of welfare benefits entitlements, the rights of those children of Zambrano carers to equal treatment with own-state nationals is being undermined. See also O’Brien (n 2); O’Brien (n 34); O’Brien (n 75) and Solanke (n 2). This line of ‘equal treatment’ reasoning has not been followed consistently by the CJEU (*Alimanovic*, *Dano*, *Dereci*), however, despite recent AG Opinions that suggest a potential future trend for the re-anchoring of fundamental rights protections attached to citizenship status for EU children as well as free movement rights (for example, the Opinion of AG de la Tour in Case C-397/23 *FL v Jobcenter Arbeitplus Bielefeld* [2025] ECLI:EU:C:2025:96). See also Julia Villotti ‘Perspective Matters! The Right of Minor EU Citizens and their Parents to Non-discrimination in the Host Member State’ (2026) 28 EJML 235; Catherine Jacqueson ‘A resisting enclave of social rights – protecting the children of former workers: C-181/19 *Jobcenter Krefeld-Widerspruchsstelle v JD*’ (2021) 28 MJ 731.

¹³¹ O’Brien (n 34) 22-25.

¹³² Iyiola Solanke, ‘Another type of ‘Other’ in EU Law? AB (2) MVC v Home Office and Rahman v Secretary of State for the Home Office’ (2013) 76 MLR 383.

the Supreme Court in *HC* (following the line of judgment of the CJEU in *McCarthy* that only compulsion to leave the territory could create a satisfactory legal basis for a derived residence right), and can also be found in cases heard by British courts where the citizen who triggers the derivative right is an adult with other adults claiming dependency.¹³³

There is one exception to this pattern, but even in that case the circumstances were so extreme as to fall into the ‘exceptional’ nature insisted upon in *Zambrano*-implementing decisions: the non-British child being removed from the UK would entail such a significant drop in the quality of life of the British mother, and would for all practical purposes force her to leave the UK, that to not consider such a case an example of compulsion would be a failure of objectivity by the local authorities and the Home Office.¹³⁴ For the most part, however, and sometimes even in cases involving children, the ‘compulsion’ principle will only protect *Zambrano* parents, to the exclusion of adults who might have a claim of reliance on the *Zambrano* principles of protection.¹³⁵ This synonymisation of ‘*Zambrano* right’ with ‘TCN parent of an EU (or British) citizen child’ was both part of the decisions in *Sanneh* and *HC* as well as a lasting legacy of those decisions and would prove problematic in a post-Brexit UK where residency rights were being denied to TCN adults with caring responsibilities towards British adults rather than children.

4.3.2: The interpretation of EU citizenship rights and the best interest of the child

This ‘law of intended consequences’, in significantly narrowing the scope of both individual applicability and standard of protections for those who can claim a derived right of residence,

¹³³ *R. (on the application of Stewart) v Secretary of State for the Home Department* [2015] EWHC 806 (Admin); *Harrison* (n 103); *FZ (China) v Secretary of State for the Home Department* [2015] EWCA Civ 550; *Hines v Lambeth LBC* [2014] EWCA Civ 660; *Ayinde and Thinjom* (n 8); *R (on the application of Agyarko) and R (on the application of Ikuga) v Secretary of State for the Home Department* [2017] UKSC 11 on appeal from [2015] EWCA Civ 440.

¹³⁴ *MS v Secretary of State for the Home Department* [2016] Upper Tribunal (Immigration and Asylum Chamber) IA/38332/2014 para 55.

¹³⁵ *Hines* (n 133) para 24; *F. v Dagenham* (n 8) paras 17-18.

had a further knock-on effect that ‘decoupled’ the fundamental rights protection of EU citizenship from the status of EU citizen in the United Kingdom. Whereas in EU law the ‘best interests of the child’ is intended as another built-in layer of protection for vulnerable individuals who can claim individual protection under EU law (see Chapter 2), this protection is not applied in the United Kingdom because of the disapplication in the British courts of the *Chavez-Vilchez* line of case law when making determinations on *Zambrano* rights of residence and access to social security claims.¹³⁶

Chavez-Vilchez was greeted relatively positively by the academic literature as an example of the CJEU prioritising the rights of children in judgments on immigration and access to social security benefits.¹³⁷ However, the British courts’ approach to the precedent of the *Chavez-Vilchez* judgment – that of the best interest of the child being ‘paramount’ in derivative rights claims, rather than merely the inability to continue residing on the territory should the carer be removed – was that it did not fundamentally alter the ‘bare minimum’ principle of protections inherent in *Zambrano*.¹³⁸ Furthermore, the ‘best interests of the child’ provision could not negate or nullify the authority of judgments issued on the *Zambrano* principle and before the *Chavez-Vilchez* judgment that limited autonomous rights of TCN family members, and upheld that any matters concerning access to state support while residing – even if that residence was accomplished under EU law provisions – could only be a matter of national

¹³⁶ Asad Ali Khan ‘Has Chavez-Vilchez altered the approach to derivative claims for residence in the UK?’ (*United Kingdom Immigration Law Blog*, May 19 2019) <<https://asadakhan.wordpress.com/2019/05/19/has-chavez-vilchez-altered-the-approach-to-derivative-claims-for-residence-in-the-uk/>> accessed on 12 May 2024; Solanke (n 54); Delia Ferri and Giuseppe Martinico, ‘Revisiting the Ruiz Zambrano Doctrine and Exploring the Potential for its Extensive Application’ (2021) 27 EPL 690.

¹³⁷ See, for example: Hanneke van Eijken and Pauline Phoa, ‘The scope of Article 20 TFEU clarified in Chavez-Vilchez: Are the fundamental rights of EU citizens coming of age?’ (2018) 43 EL Rev 949; Fulvia Staiano, ‘Derivative rights of residence for parents of Union citizen children under Article 20 TFEU: Chavez-Vilchez’ (2018) 55 CML Rev 225; Ellen Nissen, ‘A Children’s Rights Perspective to Ruiz Zambrano and Chavez-Vilchez: An Examination in Light of Theory, Practice, and Child Development Research’ (2021) 23 EJML 68.

¹³⁸ Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* [2017] ECLI:EU:C:2017:354 paras 71-72; *Hines* (n 133) para 25; *HC* (n 96) paras 9-15.

law.¹³⁹ If anything, the British courts utilised the *Chavez-Vilchez* principle as an argument for doubling down on their argumentation that *Zambrano* confers a right to reside for primary carers *only* if the strictest level of ‘compulsion’ when assessing relationships of care and dependency can be proved.¹⁴⁰

The emphasis on compulsion to leave the territory of the Union manages to negate the expansion of the *Zambrano* right to adults in relationships of dependency, as well as minimising the potential impact of ‘best interests of the child’ protections as articulated by the CJEU in *Chavez-Vilchez*.¹⁴¹ *Chavez-Vilchez*, according to the British courts when applying the standard as seen in *Robinson*, *Sanneh*, and *Shah*, was merely a confirmation that *Zambrano* tests must be applied in questions of removals of TCN who are primary carers of British citizens and that the test must be one of practicality rather than legal theory – but only that.¹⁴² If the test is applied and the level of compulsion not met, then the *Zambrano* principle was correctly applied, and the claim found wanting. The test of compulsion remains unaltered by *Chavez-Vilchez*; furthermore, the British courts did not consider that *Chavez-Vilchez* introduced a shift in the law when adjudicating compulsion.¹⁴³ It merely introduced a new set of factors for national authorities to consider when making removal decisions against TCN carers of EU citizens, factors which confirm rather than decline the appropriate focus on ‘compulsion’ rather than ‘choice’.¹⁴⁴ This means that the United Kingdom was pursuing and limiting itself in oversight from the CJEU, as evidenced by the further restriction of the ‘minimum standard of protections’ that the *Zambrano* test was intended to establish, by implementing stricter tests

¹³⁹ Ali Khan (n 136); Case C-87/12 *Kreshnik Ymeraga, Kasim Ymeraga, Afijete Ymeraga-Tafarshiku, Kushtrim Ymeraga, Labintot Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration* [2013] ECLI:EU:C:2013:291 paras 41-43; *Sanneh* (n 8) para 70.

¹⁴⁰ *Patel* (n 91) para 22; *Harrison* (n 103) para 67. Emphasis mine.

¹⁴¹ Fulvia Staiano, ‘Derivative rights of residence for parents of Union citizen children under Article 20 TFEU: *Chavez-Vilchez*’ (2018) 55 CML Rev 225, 233.

¹⁴² *Patel* (n 91) paras 26-27.

¹⁴³ *ibid.*

¹⁴⁴ *ibid* para 25.

than the CJEU had established and could continue with that ‘narrowing’ in more cases of access to rights of EU citizenship, such as social security access.¹⁴⁵

Therefore, the focus on restriction of access to social security is important both as the focus of the case law and the focus of the analysis of derivative rights protection: it goes to the heart of questions of compulsion to leave the territory, rather than simply a choice to leave the territory. Voices that are critical of government policy may choose to point to the restriction of access to social security benefits as a cynical ploy by the executive to actively disincentivise immigration, and certainly when that immigration is perceived as ‘benefits tourism’ as has sometimes been the case with EU citizens.¹⁴⁶ When the courts apply tests and standards of compulsion to leave, the life that the TCN and their citizen dependent is living in the United Kingdom is inevitably linked to that notion of compulsion, as articulated in the *Shah and Patel* appeals.¹⁴⁷ This is where the ‘best interests’ of the child provisions of *Chavez-Vilchez* could have come into play, but did not.¹⁴⁸ The Home Office guidance following the decision in *Chavez-Vilchez* was merely to consider the fact that another member of the family or parent could take over the care of the child should the TCN parent be removed. Whether or not the other possible carer is in a financial, physical, or practical position to do so, is not considered relevant for questions of compulsion.¹⁴⁹

The British courts choose to rely on the principles of *Dereci* and *O. and B.*, in that a *desire* to keep a family unit together is not sufficient reason to be considered compulsion to

¹⁴⁵ Michael Blauberger and Susanne K. Schmidt, ‘Welfare migration? Free movement of EU citizens and access to social benefits’ (2014) 1 Research & Politics 1; O’Brien (n 88).

¹⁴⁶ O’Brien (n 88); Iyiola Solanke, ‘HC and Sanneh – ‘genuine enjoyment’ does not include social welfare’ (*Electronic Immigration Network*, 20 December 2013) available at < <https://www.ein.org.uk/blog/hc-and-sanneh-genuine-enjoyment-does-not-include-social-welfare> > accessed on 13 April 2023; Evans (n 125).

¹⁴⁷ *Patel* (n 91).

¹⁴⁸ *Hines* (n 133) paras 25, 50; Solanke (n 55).

¹⁴⁹ Tom Royston and Charlotte O’Brien, ‘You can check out anytime you like, but you can never leave’ (2018) 25 JSWFL D20; *Hines* (n 133).

leave the territory.¹⁵⁰ This seems to be a response to the perception that spouses with no other right to reside are using *Zambrano* protections as a ‘back door’ route to residence as the primary carers of children when the citizen spouses are engaged in full-time employment. By not taking into consideration the best interests of the child provisions of *Chavez-Vilchez*, however – by only acknowledging it as confirmation of the necessity to apply a *Zambrano* test, and not as a shift in the case law towards a higher standard of protection for citizen children – the courts have potentially created a test of compulsion, as evidenced by *Sanneh* and *HC*, that introduces cases where the children, and families, involved in the cases would have to be living in extremely desperate situations before the protections of the *Zambrano* principle could be engaged.¹⁵¹ By disregarding the ‘best interests of the child’ scope of *Chavez-Vilchez*, the British courts did not choose to offer a stricter standard of protection for the children and the families at the heart of these cases and instead chose to reaffirm the very strict standard the British system is applying towards questions of compulsion.¹⁵²

This emphasis on strict compulsion seemed to confirm the priority of the British system to limiting the access to the immigration and social security benefits system for migrants considered ‘unworthy’, at the cost of protecting the citizenship rights of vulnerable individuals who do have a claim to the protection of the state.¹⁵³ Those citizenship rights were, perhaps, even easier to ‘sacrifice’ if they were EU citizenship rights guaranteed under a constitutional framework that the United Kingdom, even at this stage of the delimitation process, was distancing itself from.¹⁵⁴

¹⁵⁰ *Harrison* (n 103); *Patel, Shah and Bourouisa v SSHD* [2017] EWCA 2028 para 78.

¹⁵¹ O’Brien (n 75).

¹⁵² Ali Khan (n 136); O’Brien (n 34); Wray (n 19); OPEN Summary of EMN Ad-Hoc Query No. 2018.1326 Impact of 2017 Chavez-Vilchez ruling, 31 May 2019, accessed 23 January 2025.

¹⁵³ O’Brien (n 75).

¹⁵⁴ O’Brien (n 2).

4.3.3: *Zambrano* rights and EU citizenship protections as a constitutional last resort

The combination of the different strands of the *Zambrano* argument, as interpreted by the British courts, led to a situation in the United Kingdom that this chapter has argued is the quintessential example of the ‘exceptional circumstances’ at the heart of the original *Zambrano* claim at the CJEU, while also offering a very narrow interpretation of the level of protections awarded by EU citizenship rights. The cases examined in this section confirmed and expanded on the line of case law adopted at the level of the CJEU, namely that: the *Zambrano* right to reside is solely a residence right, and can only be applied when the EU (British) citizen from whom the right derives would be compelled to leave the territory of the United Kingdom should the TCN leave. Because of that very strict reliance on compulsion when applying *Zambrano* protections, the standard for claimants who can reliably and realistically claim *Zambrano* protections have been, practically, limited to parents who have no other right to reside, and parents whose living and financial situations are precarious enough to exclude other residence rights.¹⁵⁵ That definition of compulsion, attached solely to continued residence in the territory and the bare minimum of financial support to ensure that continued residence, but with no subsequent rights to quality of life or state support, does create a situation where only non-EU parents of British children can claim *Zambrano* protections, condemning them to a precarious immigration status and those children to a life of precarious financial stability that would not be the case for British citizen children of parents not subject to immigration control.¹⁵⁶

Because of the stripping of the test to practical compulsion, the level of *Zambrano* protections afforded to TCN parents with that *Zambrano* right has, therefore, come to stand as

¹⁵⁵ *R. (on the application of Zewdu) v Secretary of State for the Home Department* [2015] EWHC 2148 (Admin); Iyiola Solanke, “On the frontline: residency rights and non-EU parents of British citizens” (*Discover Society*, June 6 2017) < <https://archive.discover society.org/2017/06/06/on-the-frontline-residency-rights-and-non-eu-parents-of-british-citizens/> > accessed on 23 April 2024.

¹⁵⁶ Solanke (n 146). I also use the term ‘subject to immigration control’ slightly loosely here; by virtue of their status as *Zambrano* carers, the TCN parents of British citizen children are, in fact, exempt from immigration control because they do possess a lawful residence right as *Zambrano* carers.

a right of ‘last resort’ with very minimal further attendant rights and protections.¹⁵⁷ The protection of ‘last resort’ can also be read in conjunction with, and considered an example of, a protection of ‘absolute minimum stipulated’: the genuine enjoyment of the substance of citizenship rights is linked only to residence on the territory of citizenship, and it is only threats to that residence that can be considered worthy of intervention in restrictive immigration and social welfare decisions.¹⁵⁸ This is somewhat of a vicious circle, as it stipulates that either, or any combination of, the financial, housing, and familial situations of TCN individuals with a *Zambrano* right to reside would have to get extremely dire before any kind of protection from the state would or could come into play.¹⁵⁹ And even if it does get difficult, the recourse to state support is limited to only what is provided for in s.17 of the Children Act and the bare minimum of homelessness assistance to ensure that children are not rendered homeless; not to any standard of living or quality of life that would entail other rights potentially guaranteed by EU citizenship status, such as access to social security or state support for job-seeking parents.¹⁶⁰

This contributes to a potential disregard of practical considerations in the legal standard in a way that has not been addressed by the courts (as Lady Hale points out in the *HC* appeal): if an individual has to leave the territory of the United Kingdom because they are residing in such extreme destitution that they cannot realistically or practically continue residing there, and they bring their child with them because they believe their child will be best cared for by themselves even in another country, does that not in and of itself constitute compulsion to leave

¹⁵⁷ Iyiola Solanke, ‘Race, gender and discrimination – learning from *Zambrano*’ in Michael Adler (ed), *A Research Agenda for Social Welfare Law, Policy and Practice* (2022) 236. This clear distinction between a ‘*Zambrano* right to reside’ and ‘other lawful rights to reside’, and the clear decision by the Home Office to assign non-EU citizens with that *Zambrano* right to the purely *Zambrano* right rather than the more generous settled status one, will be particularly relevant in Chapter 5 and the source of some of the case law analysed there.

¹⁵⁸ *Zewdu* (n 155) para 22; *Hines* (n 133) para 6; *Harrison* (n 103) para 67; *Ayinde and Thinjom* (n 8); *Sanneh* (n 8).

¹⁵⁹ *O’Brien* (n 88); *Sanneh* (n 8); *Yekini* (n 8); *Pryce* (n 8).

¹⁶⁰ *F. and Dagenham* (n 8).

the territory?¹⁶¹ The British courts have held that such a case would not meet the level required to prove compulsion because of the backstop provisions against homelessness and in s.17 of the Children's Act, and even in cases involving children compulsion can only be proved if there is no other family member or parent physically able to take over care of the child. Whether or not the other potential carer would provide adequate or even suitable care is not considered as a factor when determining the level of compulsion.¹⁶² The best interests of the child are not considered a paramount factor when determining the level of access to benefits or support for a TCN parent.¹⁶³ The fact that most of these cases revolved around access to social security benefits, access to housing, and state-sponsored income support is indicative of the prioritising of linking the right to reside to a sole residence right with no further support, even in the case of the 'best interest' of the child in question. And the emphasis on 'compulsion', and the backstop provisions of s.17 of the Children's Act as the minimum standard of income support required that removes the risk of compulsion, completely leaves out access to protections and rights for TCN adults whose residence rights derive from a relationship of dependency with another adult.

This application of and emphasis on strictly and solely residency rights of Zambrano carers in the United Kingdom follows and takes to the extreme the 'exceptional circumstances' pattern that the post-*Zambrano* case law similarly followed in the EU. The subject material of the case law followed a similar pattern as well. There was no need to establish, in the British case law, the judicial equivalent of the primacy and priority of British citizenship; the idea of the rights of a British national to reside in the territory of the United Kingdom with his family was never subject to the complications and litigations of free movement rights in the territory of the European Union. Once the right to residency was established by the CJEU and confirmed

¹⁶¹ *HC* (n 96) paras 39-41.

¹⁶² *Hines* (n 133); *Sanneh* (n 8) para 102; *Harrison* (n 103); *HC* (n 96); *Solanke* (n 55).

¹⁶³ *Solanke* (n 55); *O'Brien* (n 88).

by the British courts, the pattern followed with the ‘clarifying’ judgments of the CJEU and the restrictive ones in the British jurisdiction: the derived right to reside is established for the primary carers of British citizens should it be proven that the citizen is completely dependent upon the TCN to the extent that the removal of the TCN would lead to the removal of the citizen (although it is for the claimant to prove such dependency, which is a departure from the EU case law that requires the burden of proof to reside with the national authorities of the Member State).¹⁶⁴ Similarly to the European case law, this has led to situations where it is far easier to evidence relationships of dependency between TCN parents and their citizen children, leading to a line of case law that over-emphasises the rights of parents as carers and only considers relationships of dependency in situations of extreme physical urgency.¹⁶⁵

The emphasis on compulsion, and therefore on a strict analysis of a relationship of dependency, is what permits the *Zambrano* protection to exist as a ‘last resort’ application of rights and what makes it far easier to exclude adults relying on other adults from that protection. It is easier for a court to assume that a minor child dependent on a single parent would be compelled to be removed from the country if the parent was also removed; such an assumption is not to be made, as the British courts have found, when another parent or family member can possibly take on the care of the child. In questions of relationships of dependency between adults (the two most common cases are those involving spouses and elderly dependents), the courts have held that only overwhelming evidence to the fact that the citizen would be removed

¹⁶⁴ *Yekini* (n 8).

¹⁶⁵ *Ayinde and Thinjom* (n 8); *Agyarko and Ikuja* (n 133); *MS* (n 134). The academic literature follows this trend as well: Iyiola Solanke and Charlotte O’Brien both pay due attention to the risk of discrimination for children who grow up in these precarious financial situations with parents who do not have the support required to work and provide care, and are excluded from the social security benefits required to adequately support children when unable to work; but very little attention has been paid to the adult TCNs who rely on other adults for their rights of residence. See Chiara Berneri, ‘Family Reunification between Static EU Citizens and Third Country Nationals’ (2018) 20 EJML 289; Elena Zambelli, Michaela Benson, and Nando Sigona, ‘Brexit Rebordering, Sticky Relationships and the Production of Mixed-Status Families’ (2024) 58 Sociology 605; Gareth Davies, ‘The Right to Stay at Home: a basis for expanding European family rights’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2015); Nissen (n 137).

must be considered as sufficient to bring in the *Zambrano* protection for the carer.¹⁶⁶ It is perhaps logical to assume that, in relationships between adults, choice will play far more of a role than that of compulsion: if a non-citizen spouse is removed from the territory, the citizen spouse is not compelled to leave the territory with them, but rather chooses to follow them. This line of reasoning does not, however, seem to take into consideration that choices are oftentimes forced by circumstances, and the choice to follow a spouse who is the sole breadwinner for a family is not, for all practical intents and purposes, much of a choice at all.¹⁶⁷

4.3.4: Concluding remarks

The *Zambrano* right, as interpreted in the United Kingdom therefore, is a right of last resort to reside when no other lawful residence is applicable, not a right to family life or quality of life upon the territory of the United Kingdom.¹⁶⁸ It is the stripping of the social rights of EU citizenship back to the bare minimum. This limits the potential of social justice offered within EU citizenship, as well as deliberately removing the protection of equal treatment and proportionality from the constitutional frameworks that shores up the access points of EU citizens and their TCN family members for both those citizenship rights and the access routes to legal remedies.¹⁶⁹ It also potentially undercuts the constitutional value of EU citizenship as a constitutional guarantor of free movement rights (for example, Articles 18 and 21 TFEU): by erecting new and potentially impossible to overcome evidentiary burdens to access the social security system of the host Member State, the equal treatment and non-discrimination requirements that form part of the constitutional principles of EU citizenship are minimised.¹⁷⁰ The jurisprudence of the CJEU that has advocated for, and allowed, genuine links to the

¹⁶⁶ *MS* (n 134); *Agyarko and Ikuja* (n 133); *Ayinde and Thinjom* (n 8); *Patel, Bourouisa and Shah* (n 150).

¹⁶⁷ O'Brien (n 75); Solanke (n 146); Nissen (n 137); Davies (n 165).

¹⁶⁸ *Harrison* (n 103); *HC* (n 96); *Patel, Bourouisa and Shah* (n 150) paras 75-76.

¹⁶⁹ O'Brien (n 2).

¹⁷⁰ Welsh (n 2); Oxana Golynger, *Ubiquitous Citizens of Europe: The Paradigm of Partial Migration* (Intersentia 2006); Philipp Lutz, 'Allowing mobility and preventing migration? The combination of entry and stay in immigration policies' (2023) 47 *West European Politics* 840.

economic marketplace of the host Member State to be proven before social security access rights could be guaranteed.¹⁷¹

However, as established in Chapters 1-3, the nature of EU citizenship has shifted away from a purely marketplace consideration towards a constitutional status that embeds within it social considerations, and the limitations offered by the United Kingdom on the social rights that might be encompassed within EU citizenship impacts negatively on the ongoing constitutionalisation of that status by reinforcing the marketplace considerations and limiting those who exist on the periphery of the evidenceable in-work conditions to the bare minimum standard of protections of any potential social rights.¹⁷² The social integration elements of EU citizenship that are linked to an individual ‘transnational status’ protected by the constitutional principles of equal treatment and non-discrimination and proportionality, are downgraded to a ‘lesser’ right.¹⁷³ Access to the social protection system of the host Member State *should* be included as a self-constitutive element of EU citizenship, as EU citizenship shifts towards a more constitutionally social citizenship than one primarily engaged in work; however that constitutional protection is limited when the right to social security is linked purely to a work status and not one that can exist within an individual status solely.¹⁷⁴

The long-term impact of this ‘delimitation’ within the UK, in allowing the primary source of rights for EU citizens and their TCN family members to exist within a limiting secondary instrument seeking to primarily delineate and fix the outer limits of who can benefit

¹⁷¹ See, for example, *Vatsouras* (n 54) and *Trojani* (n 54).

¹⁷² Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECLI:EU:C:2001458; Stefano Giubboni, ‘European Citizenship and Social Rights in Times of Crisis’ Working Paper-LPF n.2/2013.

¹⁷³ Giubboni (n 172); Floris de Witte, ‘EU Law, Politics, and the Social Question’ (2013) 14 GLJ 581; Loïc Azoulay, ‘La citoyenneté européenne, un statut d’intégration sociale’ in Gérard Cohen-Jonathan (ed), *Chemins d’Europe: Mélanges en l’honneur de Jean-Paul Jacqué* (Dalloz 2010); Golyner (n 170).

¹⁷⁴ Giubboni (n 172); de Witte (n 173); O’Brien (n 2); Eleni de Becker, ‘Social Security in the Fundamental Rights Case Law of the CJEU’ in G Vonk and F Pennings (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing 2022).

from citizenship rights, is a less constitutionalised – i.e., less grounded in the primary law framework of the EU, and therefore less linked to potential fundamental or human rights jurisdictional claims – right to social security more broadly.¹⁷⁵ By introducing limitations on that social security access first to Zambrano carers, individuals who were ‘doubly’ on the periphery of the constitutional protections of EU citizenship, the stage was set for further deconstitutionalisation of EU citizenship by imposing limitations on social security access for all EU citizens, not just the economically inactive, against the principles of nondiscrimination and equal treatment.¹⁷⁶ This will be discussed in the next section.

4.4: Stripping of social security access for economically inactive EU citizens as a ‘political sacrifice’

The constitutional pressures between the European actors (the CJEU, the Commission) and the implementing Member States can be most easily identified and analysed through the lens of the ‘safeguarding mechanism’ introduced in the United Kingdom to further restrict access of EU migrants to social security benefits, and the subsequent litigation at both the CJEU and within the domestic courts of the United Kingdom. The safeguarding mechanism would have introduced two potential lawful derogations from safeguarding freedom of movement rights for EU citizens and their TCN family members: the ability to introduce a ‘check’ in the form of immigration controls on the inflow of EU migration, to insist upon a ‘genuine link’ between the EU migrant and the workforce of the UK to claim benefits, and to insist upon ‘prior lawful residence’ in another Member State of the EU before a TCN family member would be granted a residence right in the UK.¹⁷⁷ This section will focus mainly on the safeguarding mechanism’s ability to limit access to social security benefits, as immigration controls on TCN family members and EU citizens were addressed in section 4.2 of this chapter.

¹⁷⁵ De Becker (n 174); O’Brien (n 2).

¹⁷⁶ O’Brien (n 88).

¹⁷⁷ Rossella Pulvirenti, ‘A New Settlement for the United Kingdom in the European Union: A New Challenge to EU Citizens’ Social Benefits and Freedom of Movement?’ (2016) 1 European Papers 727.

The discussions and debates surrounding this ‘safeguarding mechanism’ encapsulates the constitutional ‘breaking point’ always implicit within EU citizenship: the aspirational nature of EU citizenship and its broad swathe of protective rights, including social rights, pushing up against the austerity policies adopted in the Member States.¹⁷⁸ Social security access, along with immigration controls, are the practical and real-world examples of the friction inherent in EU citizenship. The aspirational nature of EU citizenship (see Chapter 1 of this thesis) is always going to be constrained by the fact that the implementing authorities of it are the Member States themselves.¹⁷⁹

The rights of EU citizens and their TCN family members to residence on the basis of their EU citizenship rights in the host Member State is no longer up for debate (see Chapters 2-3 of this thesis); rather, it is the access to further rights that ‘reinforce’ that residence that have become the new flash point in debates around EU citizenship.¹⁸⁰ Social security access is now the example of Member State restrictions to rights of EU citizens in the host Member States, and the ‘signalling’ mechanism that the Member States have used to indicate their desire to utilise the ‘limiting measures’ of the Citizenship Directive to protect their sovereignty against the ‘over-reach’ of EU citizenship rights.¹⁸¹

This is in part because of the importance of the role of social security access as an illustration of the conflict inherent in the dichotomy between the residence and integration of EU citizens into the host Member State and the ‘limiting’ measures Member States wish to put in place in order to ‘protect’ their own citizenship link to their social security systems.¹⁸² These

¹⁷⁸ Barnard and Leinarte (n 24); Susanne K. Schmidt, ‘Extending Citizenship Rights and Losing It All: Brexit and the Perils of ‘Over-Constitutionalisation’’ in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Bloomsbury Publishing 2017).

¹⁷⁹ Schmidt (n 178); Reynolds (n 16); Daniel Thym, ‘The Evolution of Citizens’ Rights in Light of the European Union’s Constitutional Development’ in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Bloomsbury Publishing 2017).

¹⁸⁰ Schmidt (n 178).

¹⁸¹ O’Brien (n 88).

¹⁸² Thym (n 179) 116-117.

benefits are politicised even when they are offered to own-state nationals; the politicisation of them in the face of concerns about ‘uncontrollable’ EU migration was almost inevitable.¹⁸³ This is why access to social security benefits, and the ‘lawful’ restriction of them for EU citizens as considered under both the ‘limiting’ mechanism that is the CRD and the subsequent litigation at both the CJEU and the domestic courts, serves as a useful indicator of the beginning of the deconstitutionalisation of EU citizenship in the United Kingdom even before the completion of that process through Brexit.¹⁸⁴ The legislation and the judiciary of the United Kingdom was able to successfully limit access to social security benefits for mobile EU citizens to a test that specifically overturned the constitutional protections of nondiscrimination and equal treatment in social security access for those EU citizens, and for those restrictions to be upheld as proportional.¹⁸⁵

4.4.1: Nondiscrimination and equal treatment of EU citizens: not for access to social security

The ‘safeguarding mechanism’, introduced and accepted in the EU Council in February 2016, was a re-negotiation of the requirements to offer in-work and non-contributory benefits to recently arriving EU citizens.¹⁸⁶ It was considered an ‘exceptional’ settlement, in order to try and prevent the United Kingdom leaving the EU; however it is still worth discussing here because of the example it gives as a forerunner of ‘deconstitutionalisation’ of EU citizenship.¹⁸⁷ This permission to limit access to those rights, in the interest of limiting any ‘undue burden’ on the social security system of the United Kingdom, would have run contrary to the equal

¹⁸³ Evans (n 125); Jesse Moritz and Daniel William Carter, ‘Life after the ‘Dano-Trilogy’: Legal Certainty, Choices and Limitations in EU Citizenship Case Law’ in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *EU Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020).

¹⁸⁴ Thym (n 179).

¹⁸⁵ O’Brien (n 2).

¹⁸⁶ Decision of the Heads of State of Government meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, Annex 1 to the Conclusions of the European Council Meeting (18/19 February 2016), Brussels, 19 February 2016, EUCO 1/16.

¹⁸⁷ Pulvirenti (n 177); Isabel Shutes, ‘Work-related Conditionality and the Access to Social Benefits of National Citizens, EU and Non-EU Citizens’ (2016) 45 JSP 691; Reynolds (n 16).

treatment and nondiscrimination protections that had previously been established the rights-expanding jurisprudence explored in Chapters 1-2, and would also build upon the more ‘restrictive’ line of case law established on social security benefits while seemingly contradicting some concurrent CJEU case law as well.¹⁸⁸

The restrictions introduced in the safeguarding mechanism would have enabled the national authorities of the United Kingdom to use the ‘overriding reasons of public interest’ to unilaterally deny the rights of EU citizens to access the social security benefits that they would be entitled to as EU citizens utilising their freedom of movement rights, by linking a ‘habitual residence’ test to the already-extent test of ‘a genuine link’ to the marketplace of the host Member State.¹⁸⁹ Under the safeguarding mechanism, a local authority would have been able to ‘suspend’ the access of EU citizens to in-work benefits for the first four years of their employment upon arrival in the host Member State, with access increasing gradually as ‘real and genuine links’ to the host Member State also increased.¹⁹⁰ This level of restriction would be in violation of three of the key constitutional principles, and relevant Treaty rights, of EU citizenship: it would have unilaterally discriminated against EU citizens on the basis of their nationality, it would have suspended the right of EU citizens to be treated equally with own-state nationals, and it would have been considered a non-proportional response because of the removal of any individual assessment in the decision to suspend access to those in-work benefits.¹⁹¹

¹⁸⁸ Reynolds (n 16); *Vatsouras* (n 54) para 45 which held that jobseekers’ allowance and other assistance mechanisms offered to economically inactive EU citizens seeking to establish a genuine link to the economic marketplace of the host Member State could not be considered social assistance.

¹⁸⁹ Pulvirenti (n 177).

¹⁹⁰ Council Decision (n 186) pg 23.

¹⁹¹ Reynolds (n 16).

This level of restriction on access to social security benefits was, even in 2016, nothing new.¹⁹² It was following an already established line of case law that had already begun to shift the rights of EU citizens to access their social security rights away from equal treatment rights based on residence to nondiscrimination and equal treatment rights that were acquired by ‘proving’ a social integration into the host Member State more closely aligned with traditional immigration jurisprudence than freedom of movement jurisprudence.¹⁹³ The addition in the safeguarding mechanism – the, perhaps, pernicious – addition is that the limitations offered in the safeguarding mechanism are a limitation to freedom of movement of workers that is not covered by the ‘overriding reasons of public interest’ exceptions as provided for in *De Cuyper*, or a Treaty-based exception; and the targets of the limiting nature of the safeguard mechanism were directed very deliberately at *workers*.¹⁹⁴

Workers had previously been found to be, by their nature, ‘exempt’ from any kind of testing of either habitual residence or genuine link to the society of the host Member State.¹⁹⁵ The line of case law that had previously restricted access to social security benefits for EU citizens had been addressed towards economically inactive EU citizens.¹⁹⁶ Freedom of

¹⁹² Reynolds (n 16); Pulvirenti (n 177); Rebecca Zahn, ‘“Common Sense” or a Threat to EU Integration? The Court, Economically Inactive EU Citizens and Social Benefits’ (2015) 44 ILJ 573. See also *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1 on appeal from WLR 481 (specifically para 69 of the judgment).

¹⁹³ Thym (n 179); Case C-406/04 *Gérald De Cuyper v Office national de l’emploi* [2006] ECLI:EU:C:2006:491; Case C-213/05 *Wendy Geven v Land Nordrhein-Westfalen* [2007] ECLI:EU:C:2007:438; Case C-212/05 *Gertraud Hartmann v Freistaat Bayern* [2007] ECLI:EU:C:2007:437; Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECLI:EU:C:2004:172; Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Group* [2008] ECLI:EU:C:2008:630; Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358; Case C-67/14 *Jobcenter Berlin Neukoln v Nazifa Alimanovic and Others* [2015] ECLI:EU:C:2015:597.

¹⁹⁴ Pulvirenti (n 189); Reynolds (n 16) 87.

¹⁹⁵ Case C-59/85 *State of the Netherlands v Ann Florence Reed* [1986] ECLI:EU:C:1986:157; Case C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* [2010] ECLI:EU:C:2010:181; Case C-224/98 *Marie-Nathalie D’Hoop v Office national de l’emploi* [2002] ECLI:EU:C:2002:103; Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECLI:EU:C:1982:105; Case C-139/85 *R.H. Kempf v Staatssecretaris van Justitie* [1986] ECLI:EU:C:1986:223; Case C-542/09 *European Commission v Kingdom of the Netherlands* [2012] ECLI:EU:C:2012:346.

¹⁹⁶ Ferdinand Wollenschläger, ‘Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the Post-Dano Era’ in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Bloomsbury Publishing 2017); Zahn (n 192).

movement for workers, until this introduction, had been broadly considered to fall within ‘acceptable’ levels of EU citizenship rights, even within the more sceptical Member States. For the access point to rights for ‘good’ EU citizens to be even more narrowly construed by the authorities of the Member State was a signal shift towards a restriction in rights for EU citizens as a citizenship status itself rather than just limiting and defining *which* of those EU citizens who could access the broader supranational citizenship rights.¹⁹⁷

The introduction of this safeguarding mechanism was also another example of the United Kingdom introducing an immigration control into one of the constitutional rights of EU citizenship, that should have been guaranteed by Treaty – or the Citizenship Directive. One of the suggestions of the Decision was to re-introduce the *Akrich* precedent of limiting any rights of entry and residence for TCN family members of EU citizens to the requirement of lawful residence in another EU Member State, deliberately disregarding the case law that had already been set in *Metock*; however, the introduction of the ‘habitual residence’ as linked to the ‘genuine link to the society of the host Member State’ test within the ambit of access to in-work benefits was crucial for the establishment of the precedent that would enable the United Kingdom to later further restrict social security access for economically inactive EU citizens as well (see next section).¹⁹⁸ The rights of access to social security were no longer to be linked to the status of EU citizen, let alone EU worker; any access to non-discrimination or equal treatment had been set aside and successfully interpreted as a necessary ‘sacrifice’ in order to protect the robustness of the social security system of the host Member State.¹⁹⁹ Non-discrimination and equal treatment were no longer the cornerstones of EU citizenship rights under freedom of movement law, rather it was immigration control that could require a

¹⁹⁷ Thym (n 179); Schmidt (n 178); Reynolds (n 16).

¹⁹⁸ Reynolds (n 16); Pulvirenti (n 189).

¹⁹⁹ Charlotte O’Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Oxford Hart Publishing 2017); O’Brien (n 88).

‘genuine link’, based upon lawful residence, that governed the access point of EU citizens and their family members to social security access in their Member State of residence.²⁰⁰

The safeguarding mechanism, and the Decision that it formed a part of, never became a part of broader EU law (and even if it had, it is questionable whether or not it would have been upheld by the CJEU).²⁰¹ It also introduced the ‘constitutionally unthinkable’ provision of discrimination against the EU worker rather than the more ‘acceptable’ discrimination against economically inactive EU citizens, or the ‘indirectly discriminatory’ restrictions to social security benefits that was already allowable under the Citizenship Directive and the restrictive line of CJEU jurisprudence post-*Zambrano*.²⁰² The real danger of ‘delimitation’ within the safeguarding mechanism, however, is the stage it set and the path it paved to allow – and for the CJEU to ratify in *Commission v UK*, discussed in the next section – the authorities of the United Kingdom to strip away social security access along discriminatory grounds for economically inactive citizens more fully. Because there had been allowances made, even in the ‘constitutionally unthinkable’ realm of Union workers, to palliate the political and constitutional headwinds of anti-EU sentiment in the United Kingdom, the ‘lesser evil’ of stripping social security rights away from economically inactive EU citizens – considered a ‘less good’ EU migrant more generally – was, perhaps, a ‘delimitation’ that was permitted to proceed as the ‘lesser of multiple evils’.²⁰³

4.4.2: Lawful and habitual residence as pre-requisites for accessing EU citizenship rights

The political and social discourse surrounding the extent of derivative rights of residence for the family members of EU citizens came to a head in the 2016 judgment of *Commission v UK*,

²⁰⁰ *Patmalniece (FC) v Secretary of State for Work and Pensions* [2011] UKSC 11.

²⁰¹ Pulvirenti (n 189).

²⁰² Reynolds (n 16).

²⁰³ Thym (n 179); Schmidt (n 178); Barnard and Leinarte (n 24); O’Brien (n 2); Reynolds (n 16) 86-87.

a decision handed down only a week prior to the referendum vote elected to leave the European Union, and in the same thematic and political vein as the approval of the safeguarding mechanism in February 2016.²⁰⁴ The academic response to this CJEU decision was one of overwhelming negativity, as a sign that the CJEU had abandoned its role to promoting and protecting EU citizenship rights and had instead allowed Member States' instincts to restrict access to social security benefits for EU migrants under the umbrella of protecting the state of their finances, to the detriment of the constitutional protections enshrined in the concept of EU citizenship itself.²⁰⁵

The CJEU in this case held that the United Kingdom had not violated the principle of nondiscrimination on the basis of nationality by restricting special non-contributory benefits, such as child tax credit and income support for unemployed EU migrants, by requiring the EU citizen and their family members to prove their lawful residence on the territory of the United Kingdom.²⁰⁶ An important factor of the CJEU decision, however, was that of shifting the burden of proving the proportionality of the restrictive measures away from the state and onto the individual.²⁰⁷ This is of particular importance because it was the first clear break of the CJEU, even from its previous line of restrictive case law on access to social security benefits for mobile and non-mobile citizens, from placing the burden of proving proportionality on the national authorities rather than the individuals making benefits claims under EU rights to

²⁰⁴ Charlotte O'Brien, "Don't think of the children! CJEU approves automatic exclusions from family benefits in Case C-308/14 *Commission v UK*" (16 June 2016, *EU Law Analysis*) <<https://eulawanalysis.blogspot.com/2016/06/dont-think-of-children-cjeu-approves.html>> accessed on 12 May 2024.

²⁰⁵ O'Brien (n 2); Strumia and Hughes (n 18); Paju (n 22); Jaan Paju, 'Case C-181/19, *Jobcenter Krefeld*: The End of Union Citizenship as Previously Understood?' (2019) 14 *Review of European Administrative Law* 47; Sandra Mantu and Paul Minderhoud, 'EU citizenship and social solidarity' (2017) 24 *MJ*; Herwig Verschueren, 'Recent case before the Court of Justice of the European Union' (2017) 19 *EJSS* 1; Anne Pieter van der Mei, 'Overview of recent cases before the Court of Justice of the European Union (April-September 2017)' (2017) 19 *EJSS* 353.

²⁰⁶ *UK v Commission* (n 20); O'Brien (n 75). See also *Secretary of State for Work and Pensions v Gubeladze* [2018] UKSC 0008 and Case C-162/09 *Secretary of State for Work and Pensions v Taous Lassal* [2010] ECLI:EU:C:2010:592.

²⁰⁷ *UK v Commission* (n 20) paras 81-85; Strumia and Hughes (n 18).

reside. It is now for the individual, or the Commission and the CJEU, to prove that disproportionality exists, rather than for the United Kingdom and its national authorities to prove that their restrictive measures are proportionate.²⁰⁸ Because of quite a few factors – the clear break with previous case law, the domestic context of increased politicisation of EU migrants’ rights to social security benefits, and the coincidental timing of this judgment being handed down so close to the day of the Brexit referendum vote – there has been a trend in the literature to amalgamate the decision of the CJEU on its restrictions of social security benefits for EU migrants with a political decision by the CJEU to placate the British government in order not to lose the United Kingdom as a Member State of the EU.²⁰⁹ This was, regardless, quickly rendered moot by the decision made in the referendum vote.

This decision confirmed the ‘lawfulness’ of subjecting EU citizenship rights to a lawful residence – assimilated, in this case, to a habitual residence test – and the financial burden tests that come within that lawful residence requirement.²¹⁰ This decision also formalised the link between being ‘lawfully resident’ and being ‘self-sufficient’. An EU citizen, under the Citizenship Directive, who is both not working and not sufficiently well-provided for can forfeit their right to lawful residence should they develop a requirement to rely on the social security benefits of the host Member State that is deemed to be an ‘undue burden’.²¹¹ This decision is also the clearest example of lawful residence being linked not only to ‘habitual’ residence – and the subsequent indirect indiscriminate, as an own-state national would find

²⁰⁸ *Dano* (n 193); *Alimanovic* (n 193); *Brey* (n 54); Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto, Joel Pena Cuevas, Joel Luis Pena Cruz* [2016] ECLI:EU:C:2016:114; O’Brien (n 2) 231-232.

²⁰⁹ O’Brien (n 75); specifically the paragraph that analyses the decisions of HMRC and the 2014 Budget that restrictions of benefits to EU nationals would be increased and implemented by further checks on the basis of EU status. O’Brien (n 2) makes this argument quite plainly; Strumia and Hughes (n 18) reiterate it in section 2.4 of their very useful and concise paper, where they acknowledge that this wider political context is not limited to the United Kingdom but is rather shared across the EU in light of political backlash to perceived loss of sovereignty over financial and immigration controls.

²¹⁰ *Patmalniece* (n 200); *UK v Commission* (n 20) para 44; *ibid* Opinion of AG Cruz Villalón para 72.

²¹¹ *Mirga* (n 196); *Gubeladze* (n 206); *Lassal* (n 206); Strumia and Hughes (n 18).

it easier to evidence habitual residence than a non-national – but also to the real requirement of economic self-sufficiency.²¹² EU citizenship rights were again – already? – being limited into a category set by the immigration control of ‘lawful residence’, a residence set with economic pre-conditions that did not apply to the own-state nationals of the Member State and thereby undermined the constitutional provisions of EU citizenship as well as the aspirational nature of it.²¹³

The *Commission v UK* decision allowed for the drawing of a much sharper distinction, and therefore more freedom to both directly and indirectly discriminate, between the own-state nationals of the Member State and the moving EU citizen, thereby further undermining the constitutional principles of protections to equal treatment and non-discrimination: an EU citizen runs the risk of being subjected to a higher level of ‘financial burden’ testing, as well as introducing the need to prove a genuine link to the host Member State, before being eligible for social security benefits, even when they are working or contributing to the system itself.²¹⁴ That test of ‘genuine residence’ is harder for an EU citizen, even residing in the host Member State, to evidence than that of a national seeking social security benefits, even when that national is residing abroad.²¹⁵ This is the furthest the CJEU has gone yet in allowing Member States to adhere so strictly to the principles of promoting their own citizenship-enhancing social schemes, even at the expense of the constitutional nature and protections of EU citizenship – and the judgment here was handed down prior to the final deconstitutionalisation event of Brexit.²¹⁶

²¹² Strumia and Hughes (n 18); O’Brien (n 204); Case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions* [2011] ECLI:EU:C:2011:500 para 100; *UK v Commission* (n 20) para 32.

²¹³ *Mirga* (n 196); Nic Shuibhne (n 4); O’Brien (n 2); Wollenschläger (n 196).

²¹⁴ Strumia and Hughes (n 18); Daniel Thym, ‘The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens’ (2015) 52 CML Rev 17.

²¹⁵ *Stewart* (n 212); O’Brien (n 2).

²¹⁶ Thym (n 179).

The *Commission v UK* decision represented what this chapter has argued is the definitive break between the restrictive limitations of protections of EU citizenship applying strictly to those utilising their freedom of movement rights to take up employment and their immediate family members (with the exceptions of children, as seen in *Zambrano* and *Zhu and Chen*); to a more expansionist protection of EU citizenship rights that, while still maintaining an emphasis on workers and their family members, also takes into account the rights of EU citizens to reside rather than solely move and to enjoy the benefits of a right to family life during and after that residency.²¹⁷ In the United Kingdom, the case presented itself as an interesting case study on how rights that originated in EU case law have been translated into purely domestic law. Part of this argument is based on the fact of what, specifically, the *Commission v UK* decision was determining: access to social security benefits that had, for the most part, already been established to not be accessible to *Zambrano* carers in the UK.

Furthermore, the access to social security benefits at risk in this case was not the access to social assistance, but rather to noncontributory social benefits that were only guaranteed under the Citizenship Directive, and even then in terms that allowed the Member State to restrict access to them in the first place.²¹⁸ The restriction already existed in the limiting secondary measure as well as the line of case law relied upon by the government of the United Kingdom; the *Commission v UK* decision merely confirmed that restriction of social security benefits along lines that would have been considered as immigration control (lawful and

²¹⁷ Lorena Rincón-Eizaga, 'Human rights in the European Union: Conflict between the Luxembourg and Strasbourg courts regarding interpretation of Article 8 of the European Convention of Human Rights' (2008) 11 Int. Law. Rev 119.

²¹⁸ *Gubeladze* (n 206); Verschueren (n 205) 74.

habitual residence) even in the face of freedom of movement and EU citizenship protections could be considered lawful and justified.²¹⁹

4.5: Concluding remarks

The United Kingdom, as argued in this chapter, serves as an example of ‘delimitation’ of EU citizenship and derivative rights of residence, even while it was a Member State of the European Union. The United Kingdom has always been a Eurosceptic nation, with an arms-length relationship with the continent and the Union as a whole (never joining either Schengen or the Eurozone, maintaining separate rights of entry and residence for EU citizens and their family members).²²⁰ The responses in the political and social attitudes towards freedom of movement from the rest of Europe was always mixed at best, especially once the Eastern European nations had joined the EU.²²¹ While the United Kingdom was obligated to implement domestic policies that aligned with the CJEU jurisprudence on expansive EU citizenship rights, the regulations made domestically to transpose those rights skewed to the minimum standard of protection and subsumed EU citizenship protections to the restrictive limitations of immigration control for both entry and residence.²²²

The process of delimitation began with the transposition of the Citizenship Directive into the 2016 Immigration Regulations, when the strictest tests possible on residence were imposed on EU citizens making use of their freedom of movement rights. By placing the ‘primary’ source of EU citizenship rights that must be enforced within the secondary

²¹⁹ Paju (n 22); Thym (n 214); Niamh Nic Shuibhne, ‘Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship’ (2015) 52 CML Rev 889; Zahn (n 192); Wollenschläger (n 196); Verschueren (n 205); Tecqmenne (n 55).

²²⁰ James Dennison, ‘Why did the UK leave in the EU? The state of the science of explaining Brexit’ in John Erik Fossum and Christopher Lord (eds), *Handbook of the European Union and Brexit* (Edward Elgar Publishing 2023); Sara Hobolt, ‘The Brexit Vote: A divided nation, a divided continent’ (2016) 23 JEPP 1259; Stephen George ‘Britain: Anatomy of a Eurosceptic state’ (2000) 22 J Europ Integration 15.

²²¹ Strumia and Hughes (n 18); Editorial Comments, ‘The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare’ (2014) 51 CML Rev 729.

²²² Rogers (n 26); Shaw and Miller (n 25).

instruments of law, such as the CRD, the ‘fundamental’ rights that are attached to the individual EU citizenship status are enforceable in only patchwork ways and subject to complex jurisdictional questions between EU institutions and domestic courts.²²³ This was visible in the limiting of access to social security as it occurred in the United Kingdom: access to social security benefits was regulated within the ambit of immigration control, making it easier to challenge residence rights of EU citizens by immigration authorities, and eventually exposing EU citizens to the hostile environment post-withdrawal. Not only were residence rights limited to very strict tests, but attempts were made to limit even entry of TCN spouses of EU citizens (the *Akrich* precedent) before the CJEU overturned *Akrich* with *Metock* and the United Kingdom was obliged to continue facilitating the entry of TCN spouses of EU citizens.²²⁴

The limitation of derivative rights of residence for TCN family members to strict residence, with no further attendant rights, and a strict test of compulsion to leave the territory rather than a more generous test of ‘best interests’ in cases involving children is also an example of the deconstitutionalisation of EU citizenship rights: it evidences a narrowing of the ‘genuine enjoyment of the substance of citizenship rights’ to *only* residence, under the limiting measures of secondary law, rather than anything broader that might be guaranteed under the Treaties, the Charter or fundamental rights or general principles of EU law. The CJEU, perhaps responding to a political ill-wind on ‘benefits tourism’ and EU migration encroaching on national sovereignty of immigration control, allowed the United Kingdom to set the minimum protections possible for derived rights bearers as the benchmark, rather than the minimum standard.²²⁵ EU citizenship protections, within the United Kingdom, were downgraded from a

²²³ Syrpis (n 4); Elise Muir, ‘The fundamental rights implications of EU legislation: Some constitutional challenges’ (2014) 51 CML Rev 219.

²²⁴ Peers (n 26).

²²⁵ Urska Šardl and Silje Hermansen, ‘The European Court of Justice, an Able and Unwilling Lawmaker: Evidence from 920 Free Movement and Persons Judgments’ in Mark Dawson, Elise Muir and Bruno de Witte (eds) *Judicial Politics in the EU*, (Edward Elgar Publishing 2023); O’Brien (n 2); Steve Peers, “Benefit Tourism by EU citizens: the CJEU just says No” (EU Law Analysis, 11 November 2014) available at <

‘fundamental’ status with attendant rights to a backstop, catch-all, failsafe provision, as a means of meeting a low bar of protection, rather than something with its own set of rights and provisions to be protected and pursued. This delimitation of rights was ‘permitted’ by the *Commission v UK* decision, when the CJEU gave its blessing for the ‘safeguarding’ mechanism that would make it far easier to automatically disapply social security protections to EU citizens who required state support while not in employment.²²⁶

In the United Kingdom, the case presented itself as an interesting case study on how rights that originated in EU case law have been translated into purely domestic law. Part of this argument is based on the fact of what, specifically, the *Commission v UK* decision was determining: access to social security benefits that had, for the most part, already been established to not be accessible to *Zambrano* carers in the UK; furthermore, the access to social security benefits at risk in this case was not the access to social assistance, but rather to noncontributory social benefits that were only guaranteed under the Citizenship Directive, and even then in terms that allowed the Member State to restrict access to them in the first place.²²⁷ The restriction already existed in the limiting secondary measure as well as the line of case law relied upon by the government of the United Kingdom.²²⁸ The *Commission v UK* decision merely confirmed that restriction of social security benefits along lines that would have been considered as immigration control (lawful and habitual residence) even in the face of freedom of movement and EU citizenship protections could be considered lawful and justified.²²⁹

<https://eulawanalysis.blogspot.com/2014/11/benefit-tourism-by-eu-citizens-cjeu.html>> accessed on 15 March 2025.

²²⁶ Šardl and Hermansen (n 225).

²²⁷ Verschueren (n 205) 74.

²²⁸ Strumia and Hughes (n 18).

²²⁹ Paju (n 22); Thym (n 214); Nic Shuibhne (n 219); Zahn (n 192); Wollenschläger (n 196).

It seems unnecessarily critical, however, to accuse the CJEU of abdicating its responsibilities towards EU citizenship when it is not clear that that is their role.²³⁰ The CJEU has previously taken broad stances on citizenship and the fundamental rights thereof, namely in *Grzelczyk* and *Zambrano*, in the rights-enhancing phase of citizenship jurisprudence. The expansive nature of those cases has perhaps been overinterpreted as ‘broad’ with the benefit of hindsight and further clarificatory jurisprudence, as well as in the light of increasing restrictions on the rights of EU citizens – both mobile and immobile, and economically active and inactive – in the Member States.²³¹

But to call the *Commission v UK* decision of 2016 a failure of the CJEU to protect citizenship rights takes the understandable disappointment of those invested in a broader, more participatory EU citizenship even in the United Kingdom, a step too far.²³² The CJEU, after all, never issued a judgment that claimed EU citizenship rights were to trump the rights of Member States to restrict access to their social security and immigration systems: it only stipulated that no laws could be put in place that would, practically and effectively, deny a EU citizen their right to enjoy the fundamental rights guaranteed by that status. That stance was clarified and narrowed in scope by later judgments, and the *Commission v UK* decision is merely the latest and last case in that narrowing lens.²³³ This is especially true when considering the fact that

²³⁰ This is especially relevant when considering the fact that it is unclear, and certainly not unanimously accepted, that the CJEU should be taking an active policy-making role in progressing the rights awarded to and protected by European citizenship. The Court, currently, functions as a constitutional adjudicator that clarifies questions of EU law and offers guidance in specific cases that can also function as a generic enough advice to applied in analogous situations; while the nature of the cases that make it to the Court will, inevitably, have some impact on policy-making, that is not the purpose of the Court and to try and force it into a role of judicial activism does it, perhaps, a disservice. See Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP 2013) – specifically Chapter 2, pgs. 31-62. Davies (n 165) 278; see also Chapter 3 of this thesis.

²³¹ Verschueren (n 205); ‘The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare’ (n 221); Nic Shuibhne (n 230).

²³² Hanneke van Eijken and Sybe de Vries, ‘Deepening and widening of the protection of fundamental rights of European citizens vis-à-vis non-state, private actors’ in Rosemarie Buikema, Antoine Buyse, Antonius C.G.M. Robben (eds), *Cultures, Citizenship and Human Rights* (Routledge 2019); Tobias Lock *The European Court of Justice and International Courts* (OUP 2015).

²³³ Case C-181/19 *Jobcenter Krefeld – Widerspruchsstelle v JD* [2020] ECLI:EU:C:2020:794; Case C-89/17 *Secretary of State for the Home Department v Rozanne Banger* [2018] ECLI:EU:C:2018:570; Case C-673/16

the CJEU only confirmed a restriction that already existed within the ambit of a Member State's rights.²³⁴ Where the CJEU did, however, prioritise the right of a Member State to exclude EU citizens rather than the individual's right to citizenship guarantees was the shift of burden of proof towards the individual and away from the state and its national authorities. There is some truth to the interpretation that that particular shift of burden of proof does indicate an attempt by the CJEU to placate the British government in light of the extremely toxic political context that surrounded the British referendum.²³⁵

With the United Kingdom having departed the Union, and making their own political and judicial decisions on derivative rights that derive themselves from EU rights but are grounded in purely domestic contexts, the CJEU will be bound by different contexts and debates than those that circulated in the UK about EU citizenship in the few years leading up to June 2016.²³⁶ Chapter 5 will now look at the territorial as well as legal deconstitutionalisation of EU citizenship in the United Kingdom, when the United Kingdom treats EU citizens purely under domestic regulations and 'translates' EU law into domestic law.

Relu Adrian Coman and Others v Inspectoratul General pentru and Ministerul Afacerilor Interne [2018] ECLI:EU:C:2018:385; Case C-93/18 *Ermira Bajratari v Secretary of State for the Home Department* [2019] ECLI:EU:C:2019:809; Case C-836/18 *Subdelegacion del Gobierno en Ciudad Real v RH* [2020] ECLI:EU:C:2020:119; Case C-459/20 *X v Staatssecretaris van Justitie en Veiligheid* [2023] ECLI:EU:C:2023:499; *VI* (n 57); Case C-550/16 *A v Staatssecretaris van Veiligheid en Justitie* [2018] ECLI:EU:C:2018:248; Case C-91/20 *LW v Germany* [2022] EU:C:2021:898; Case C-624/20 *EK v Staatsecretaris van Justitie en Veiligheid* [2022] ECLI:EU:C:2022:639; Case C-519/18 *TB v Bevandorlasi es Menekultugyi Hivatal* [2019] ECLI:EU:C:2019:1070; Case C-411/20 *S v Familienkasse Niedersachsen-Bremen der Bundesagentur für Arbeit* [2022] ECLI:EU:C:2002:602; Case C-328/20 *European Commission v Austria* [2022] ECLI:EU:C:2022:468.

²³⁴ *UK v Commission* (n 20) para 66.

²³⁵ Strumia and Hughes (n 18); Olof Larsson and Daniel Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) 70 IO 377.

²³⁶ Larsson and Naurin (n 235).

Chapter 5: Assessing the constitutional legacy of EU citizenship: EU citizenship protections for former EU citizens and in a former Member State

5.1: Introduction

Brexit, within the context of EU citizenship constitutionalisation, offers an alternative lens of analysis for both the ongoing constitutional strength of EU citizenship as a status, as well as an example of its constitutional weakness.¹ Its anchoring in the constitutional framework of the EU Treaties, which are effectively instruments of international law which embed constitutional protections only so far as the Member States ‘allow’ them to, introduces a ‘fragility’ to EU citizenship that does not apply – indeed, cannot apply – to the nationality of a Member State within the traditional understanding of nationality and citizenship.²

The central debates about EU citizenship are exemplified, and almost forced to come to a head, in the inevitable questions surrounding the legacy of EU citizenship that Brexit has raised.³ Who is responsible for the protection of EU citizens in situations of unclear jurisdiction, such as is now the case in the United Kingdom – and for British nationals who utilised their freedom of movement rights to relocate to a different Member State?⁴

The process of renegotiating a new international framework (the Withdrawal Agreement) aimed to consolidate some rights of EU citizenship, even while it sacrificed

¹ Stijn Smismans, ‘EU citizens’ rights post-Brexit: why direct effect beyond the EU is not enough’ (2018) 14 ECL Rev 443; Oliver Garner, ‘The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status’ (2018) 20 CYELS 116.

² Garner (n 1); Dora Kostakopoulou, ‘Scala Civium: Citizenship Templates Post-Brexit and the European Union’s Duty to Protect EU Citizens’ (2018) 56 JCMS 854; Christoph Schewe, ‘Shattering the Concept of EU Citizenship? The Potential Impact of Brexit and Potential Succession of Catalonia on EU Citizenship’ (2021) 19 Baltic Yearbook of International Law 129; Volker Roeben, Petra Minnerop, Pedro Telles and Jukka Snell, ‘Revisiting Union citizenship from a fundamental rights perspective in the time of Brexit’ 5 (2018) EHRLR 450.

³ Garner (n 1); Kostakopoulou (n 2); Stephanie Reynolds, “Brexit and the (Not Quite) Constitutionalised Status of EU Citizenship” (*Constitutional Law Group*, 24 April 2019) < <https://ukconstitutionallaw.org/2019/04/24/stephanie-reynolds-brexit-and-the-not-quite-constitutionalised-status-of-eu-citizenship/> > accessed 12 December 2024.

⁴ Roeben et al (n 2); Case C-621/18 *Andy Wrightman and Others v Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:999 para 64.

others.⁵ This chapter will posit the argument that Brexit offers two ‘case studies’ that on first instance might appear counter-intuitive but build upon each other in their importance to overall analyses of EU citizenship.

On the one hand, Brexit is an example of deconstitutionalisation of EU citizenship, because of the ‘divorce’ it offers from the constitutional framework of EU citizenship itself. It formalises the restriction of access to rights that EU citizenship is meant to offer, codify and protect, and the enshrining in both a binding international agreement and domestic legal frameworks the ‘limiting’ measures on freedom of movement rights that the Citizenship Directive offered.⁶ This is particularly exemplified by the case of British citizens living in the territory of the EU post-withdrawal.⁷ On the other hand, Brexit can serve as an example of the legitimacy of the constitutional frameworks adapted and adopted to give EU citizenship expression.⁸

Brexit exemplifies the dichotomies inherent in EU citizenship – the complexity in constitutionalising a citizenship status that relies on a system with a lack of the clear constitutional parameters that underpin traditional citizenship protections – but also confirms that EU citizenship (and, by analogical extension) and membership in the EU is subject to the democratic will of majoritarian decision-making.⁹ Brexit, counterintuitively perhaps, both deconstitutionalises EU citizenship for British nationals who do not have dual nationality of a current Member State (who are now former EU citizens) by removing their access to EU citizenship rights through the decision to withdraw from the European Union, while reaffirming

⁵ Gillian More, ‘From Union Citizen to Third-Country National: Brexit, the UK Withdrawal Agreement, No-Deal Preparations and Britons Living in the European Union’ in Nathan Cambien, Elise Muir and Daniel Thym (eds), *European Citizenship Under Stress: Social Justice, Brexit, and Other Challenges* (Brill Publishing 2020); Alice Welsh and Charlotte O’Brien, ‘Side-stepping international law on the sly: The secret severing of the EU Settlement Scheme from the Withdrawal Agreement’ (2025) 39 JIANL 314.

⁶ Patricia Mindus, ‘A constitutional eyesore after Brexit: EU citizenship and British nationality’ in Devyani Prabhat (ed), *Citizenship in Times of Turmoil?* (Edward Elgar Publishing 2019); Welsh and O’Brien (n 5).

⁷ Mindus (n 6).

⁸ Niamh Nic Shuibhne, ‘Did Brexit change EU law?’ (2021) 74 Current Legal Problems 195.

⁹ Reynolds (n 3); Garner (n 1); Mindus (n 6).

the constitutional foundation of EU citizenship as both a democratic and constitutional status that relies upon Member State – and individual as well as collective – agreement and buy-in.¹⁰ EU citizenship is a fundamental status – but only for those nationals of Member States who collectively choose to belong to the community of the European Union.¹¹

EU citizenship is a status that attempts to shield those who possess it, and their family members, from the disadvantages that usually accompany ‘alienhood’ through the legal and institutional framework of a collective, international agreement of states. The removal of one state from that framework extinguishes its right to be protected by what the other Member States have agreed upon to govern their own communities.¹² The ‘unhappy byproduct’ of such a decision is the ‘extinguishing’ of EU citizenship rights for those individuals who, even while they made use of rights – specifically the freedom of movement rights – attached to EU citizenship, ceased to be EU citizens when they no longer held the nationality of a Member State.¹³ This is the example of ‘deconstitutionalisation’ offered by Brexit: the loss of freedom of movement rights for those EU citizens who had already utilised them, in both directions; as well as the loss to the provisions of nondiscrimination and equal treatment that come with EU citizenship, and the rights of access to those principles of non-discrimination in access to social security benefits, educational opportunities, and long-term residence rights for themselves and

¹⁰ Dora Kostakopoulou, ‘Co-creating European Union Citizenship: Institutional Process and Crescive Norms’ (2012) 15 CYELS 255; Roeben et al (n 2).

¹¹ Case C-673/20 *EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE)* [2022] ECLI:EU:C:2022:449 Opinion of AG Collins para 75; Niamh Nic Shuibhne, ‘Protecting the legal heritage of former Union citizens: *EP v Préfet du Gers*’ (2023) 60 CML Rev 475. This is a condensed paraphrase of AG Collins in his opinion to the *Préfet du Gers* case: see paras 28, 37, 55, 60, 70, 72. See also *Wrightman* (n **Error! Bookmark not defined.**) para 68.

¹² See Chapter 1 of this thesis; Kostakopoulou (n 10); Nic Shuibhne (n 11).

¹³ Mindus (n 6). There is a healthy academic debate centered around the question of how justifiable such a removal of a ‘fundamental’ status from those EU citizens can be considered as they were denied the right to vote in the referendum (*R (on the application of Shindler and another) (Appellants) v Chancellor of the Duchy of Lancaster and another (Respondents)* UKSC 2016/0105), but that debate lies outside the scope of this thesis. For the purposes of our arguments on the constitutional legacy of EU citizenship, it is sufficient to understand that the decision to ‘revoke’ EU citizenship from own-state nationals was considered as democratically chosen and therefore in line with constitutional parameters as stipulated within the EU Treaties. See also Francesca Strumia, ‘Brexiting European Citizenship through the Voice of Others’ (2019) 17(S1) GLJ 109.

their TCN family members.¹⁴ This can be considered, for the purposes of this chapter's argument, as the culmination of the delimitation evidenced by the imposition of immigration controls on the EU citizenship right of freedom of movement, and the permanent codification of those restrictions into domestic law – as well as the loss of the individual redress options offered by the direct jurisdiction of the CJEU.¹⁵

An examination of the constitutional legacy of EU citizenship can therefore be made by analysing the levels of protections it will grant to those who bear that status and those who derive rights from it even *after* the status has altered, or in some cases ceased to exist. The protections of status granted by international agreement, negotiated between the British government and the European Commission, can be seen as reflective of the level of prioritisation given to those rights and protections by the relevant authorities. The protections of EU citizenship continuing in the United Kingdom, and the protection of British citizens living in Europe, still contain gaps and flaws, but the embedding of protections for EU citizens in the first place is indicative of an ongoing commitment to protect those rights linked to the status of EU citizenship itself.¹⁶

Even though UK citizens lost their EU citizenship status and the relevant protections afforded by EU law after the transition period ended, the protections of EU citizenship still extend within the territory of the United Kingdom – for the EU citizens and their family members still residing there – as well as UK nationals who utilised their freedom of movement rights to live and reside in the European Union before the end of the transition period.¹⁷ This

¹⁴ Mindus (n 6); More (n 5).

¹⁵ Mindus (n 6).

¹⁶ Nic Shuibhne (n 8).

¹⁷ *Préfet du Gers* (n 11); *Wrightman* (n **Error! Bookmark not defined.**); see Oliver Garner, 'Does Member State withdrawal automatically extinguish EU citizenship?' in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy: Navigating Challenges and Crises* (Edward Elgar Publishing 2022).

chapter will therefore serve as the analysis of the regulatory framework and the case law on protections for EU citizens and the derivative rights protections case law of their TCN family members in the years post-withdrawal. The solidarity aspect of citizenship exists in a different way now that the United Kingdom has exited the European Union. This is what this chapter will seek to analyse: the levels of solidarity and protections for EU citizens and their TCN family members residing in the United Kingdom in the context of a purely domestic setting, with both domestic – in the form of assimilated EU law and international law attachments such as treaty obligations.¹⁸ This is an unprecedented context, that of a domestic setting that draws much of the relevant legislation on immigration and social security access on an EU network of laws and rights but that has now divorced itself from that EU context but must still hold with some of its citizens' rights priorities, protections and provisions, while also maintaining a complex and constitutionally significant relationship to the constitutional adjudicator that is the CJEU.¹⁹

This chapter is not positing a comparison of the two systems themselves – it is not unusual for two separate legal orders to have two separate standards of protections for its citizens – but rather to focus on the different quality of protections offered within each system.²⁰ Even though assimilated EU law and the international law obligations of the Withdrawal Agreement offer a link to the constitutional core of EU citizenship protections, EU citizens living in the United Kingdom and British citizens living in the EU now are protected from a much farther remove than EU citizens in the Union. Both are also subject to domestic

¹⁸ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2020; UK/EU and EAEC: Trade and Cooperation Agreement [TS No.8/2021] April 2021.

¹⁹ Niall O'Connor, Anastasia Karatzia and Theodore Konstadinides, 'Courting controversy? The constitutional implications of the Court of Justice of the European Union's involvement in the resolution of disputes after Brexit' (2025) 00 YEL 1.

²⁰ Nic Shuibhne (n 8).

immigration control with limited oversight or constitutional protection from the EU itself.²¹ The United Kingdom in its post-withdrawal era is an example of the ‘deconstitutionalisation’ process of EU citizenship. This can offer a helpful analysis on how ‘entrenched’ EU citizenship constitutionalisation is, and the different fragilities and avenues for strengthening that exist within the new European context that does not include the United Kingdom and its political opposition to an EU citizenship of greater social protections.²²

5.2: New frameworks governing the rights of EU citizens and their TCN family members in the United Kingdom post-Brexit

The withdrawal of the United Kingdom from the European Union has led to a new regulatory immigration framework, one that now includes EU citizens and their family members on the same footing as ‘regular’ (not protected by the freedom of movement rights inherent in EU citizenship) migrants. EU citizens not subject to the new immigration framework are subject to the rules and regulations under the Withdrawal Agreement as well as assimilated EU law. The factor determining which of these frameworks an individual citizen and their family fall under is the date of their arrival in the United Kingdom. Because of the divergence in the origin of rights that would be protected by the courts, as well as the divergence in the standard of protections offered towards citizens based upon where those rights originate, it is worth setting out these different frameworks: the immigration control that applies to EU citizens and their family members relocating to and living in the United Kingdom *after* exit day, as these citizens would have no links to the constitutional protections of EU citizens and will be treated under

²¹ *ibid.*

²² Kostakopoulou (n 10); Brigid Laffan, ‘How the EU27 Came to Be’ (2019) 57 JCMS 13; Garner (n 17); Francesco Costamagna and Stefano Giubboni, ‘EU citizenship and the welfare state’ in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy: Navigating Challenges and Crises* (Edward Elgar Publishing 2022).

British immigration law solely as TCNs; and the rights and protections guaranteed under the WA and assimilated EU law.²³

There are three key new frameworks that govern the rights of EU citizens and their TCN family members in the United Kingdom post-Brexit: domestic immigration controls, for EU citizens who arrive in the United Kingdom after the transition period concluded and are therefore completely subject to domestic immigration controls; the Withdrawal Agreement and the EUSS, which governs the rights of EU citizens and their TCN family members who were ordinarily resident in the United Kingdom prior to exit day and therefore carry over EU-law based rights of residence and the subsequent rights that derive from that status; and assimilated (formerly retained) EU law which applies to not only EU citizens, but all authorities implementing law which was, originally, EU law. The following subsections will analyse each of those frameworks to offer a better understanding of the picture of how a ‘deconstitutionalised’ EU citizenship in the UK now that it is on the periphery of EU constitutional frameworks.

5.2.1: Wholly domestic immigration controls on EU citizens and their TCN family members

One of the key practical outcomes of Brexit has been the implementation of a new immigration system, which applies to EU citizens arriving after the transition period as well as TCNs linked to those EU citizens through family ties. After the end of free movement, EU citizens coming to live or work in the UK will need to apply for visas and are subject to all the immigration

²³ This dichotomy is also mirrored in EU law: the level of protections afforded to TCN family members changes depending on which piece of EU law the EU citizen draws the original right from. For example, the rights awarded to family members are greater if the EU citizen is a child who draws their EU right from Articles 18 or 20-21 of the Treaty on the Functioning of the European Union, or if the EU citizen is a worker whose rights to move are governed merely by worker regulations. The introduction of the Citizenship Directive, and the shift in primacy towards that piece of secondary law rather than treaty rights in CJEU jurisprudence, is another example of this.

checks and controls in the Immigration Regulations 2016 and 2020 and the Nationality and Borders Act 2020. As discussed in Chapter 4, there is a difference in British immigration law between ‘leave to enter’ and ‘leave to remain’. Rights to reside in EU law tend to amalgamate the two into an EU law based right to reside that is predicated upon a right to enter, making the two indistinguishable.²⁴ Under the new system, EU citizens who do not intend to work or study in the United Kingdom will have the right to enter the UK for up to six months without a visa; anything longer than six months, or to begin a course of study or to take up employment, will require the appropriate visa, similarly to migrants from any other country.²⁵

EU citizens moving to the UK under the 2021 immigration rules will have more restrictions on access to certain kinds of support than they did under free movement. Because more migrants will be subject to visas, over the long run it is expected that a larger population of migrants will have no recourse to public funds. Most individuals entering the United Kingdom on ‘temporary’ leave to enter schemes, which includes most types of visas as well as those seeking asylum, will be subject to a ‘no recourse to public funds’ stipulation.²⁶ This is somewhat similar to the position as it existed immediately prior to Brexit (for EU migrants specifically; non-EU migrants have always been subject to limitations on their abilities to claim benefits before permanent or long-term settlement, usually acquired after five years): EU migrants were not entitled to claim any social assistance in the first three months after arrival, and even after the first three months there were limitations placed upon the benefits non-

²⁴ The Citizenship Directive introduces a slightly differentiated concept of ‘entering’ and ‘residence’ – the Citizenship Directive allows for three months of residence without any conditions, other than that of being self-sufficient, and anything beyond those three months requires either self-sufficiency and having access to health care or being in employment. See Chapter 4 for more details on the transposition of the CRD in the UK.

²⁵ Madeleine Sumption and Denis Kierans, “Integration in the UK and the post-Brexit immigration system” (The Migration Observatory, 23 March 2021),

<<https://migrationobservatory.ox.ac.uk/resources/commentaries/integration-in-the-uk-and-the-post-brexit-immigration-system/>> accessed on 12 June 2024.

²⁶ Immigration and Asylum Act 1999; CJ McKinney, Steven Kennedy, Melanie Gower, and Georgina Sturge, ‘No recourse to public funds’ (6 June 2025, House of Commons Library) research briefing

working EU citizens living in the UK were entitled to.²⁷ However, contrary to the state of play under free movement rights, EU citizens who migrate to the United Kingdom now, if they are not subject to Withdrawal Agreement protections or do not already have status under the EUSS, are now bound by the NRPF stipulations for the entire length of their visa; have to wait the stipulated number of years before they can apply for either nationality or long-term residence or indefinite leave to remain; and have to pay the NHS surcharge as part of the visa application process.²⁸ There are also now additional ways for EU citizens to contribute to the irregular migrant population, whereas under EU free movement laws an EU citizen could not be considered an ‘irregular migrant’ unless they were being removed from the territory of the United Kingdom as a ‘grave threat to public security or policy’.²⁹

Under the new immigration system, most newly arriving EU citizens will now be subject to measures implemented under the ‘hostile environment’, such as having to prove their right to rent and work.³⁰ EU citizens coming on work visas will have fewer rights than those coming under free movement. While many people on work visas are in high-paying, skilled jobs where risks of exploitation are generally lower, the post-Brexit immigration system expands the range of visa-eligible jobs into middle-skilled jobs that command lower salaries.³¹

²⁷ Case C-530/11 *European Commission v United Kingdom of Great Britain and Northern Ireland* [2014] ECLI:EU:C:2014:67; Charlotte O’Brien, ‘The pillory, the precipice and the slippery slope: the profound effects of the UK’s legal reform programme targeting EU migrants’ (2015) 37 *JSWFL* 111; Jonathan Portes ‘Migrants, benefits and the UK’s renegotiation: questions and answers’ (10 November 2015, UK in a Changing Europe) accessed 27 June 2026 <<https://ukandeu.ac.uk/migrants-benefits-and-the-uks-renegotiation-questions-and-answers/>>.

²⁸ McKinney et al (n 26); Kierans and Sumption (n 25); Immigration Act 2014, s.38. EU migrants will also be subject to the stricter minimum requirements set out in the ‘Restoring Order and Control’ white paper of November 2025, namely: not having a criminal conviction (stricter than the earlier rules, which only included sentences of 12 months or longer); annual earnings of £12,570 for a minimum of 3 to 5 years; a B2 level of English instead of the previous B1 (this will be included in new immigration rule changes, coming into force March 2027). Anybody claiming benefits will now see their settlement qualification window extending by 5 years, and anybody entering the UK illegally on initial first entry will find their window extended by 20 years.

²⁹ Eleanor Spaventa, ‘The rights of citizens under the Withdrawal Agreement: a critical analysis’ (2020) 45 *EL Rev* 193.

³⁰ Stijn Smismans, ‘Protecting EU citizens in the UK from a Brexit ‘Windrush on Steroids’: A Legislative Proposal for a Declaratory Registration System’ (2019) DCU Brexit Institute Working Paper No. 8-2019; Welsh and O’Brien (n 5).

³¹ Sumption and Kierans (n 25).

It also expands the number of work visas for low-wage jobs in seasonal agriculture, to compensate for the impacts of ending free movement.

Programmes that link workers to specific jobs have raised a range of challenges in the past in the UK and other countries. For example, while it may be possible to switch between jobs, this requires permission and workers must be able to find another employer who is willing to sponsor them. Some migrants may also arrive in the UK with debt, because of the costs of visa fees and particularly the NHS surcharge.³² These things raise the risk that workers whose visa ties them to a specific job will feel less able to assert their rights at work. There are also some concerns about discrimination on the basis of immigration status arising from the fact that, due to the digital-only nature of settled status, some members of the immigrant population – such as EU citizens with status under the EUSS – but not others (UK citizens and most non-EU citizens) will have no physical proof of immigration status to show to employers or landlords.³³ There is some evidence that not having physical proof of immigration status made it harder for non-EU citizens to secure housing.³⁴

Under the post-Brexit immigration system, all applicants for a general work visas will need to have a job offer from an approved employer for a job considered ‘middle-skilled’ or higher; speak English at the required level; and be earning a salary at or greater than £25,600, unless they are seeking to work in a job that is considered under-resourced or possess a relevant doctorate. There are some exceptions in the rules for workers taking up posts in the public sector, such as NHS nurses and secondary school teachers.³⁵ There is no clear pathway in the

³² Charlotte O’Brien, ‘‘Hand-to-mouth’’ citizenship: decision time for the UK Supreme Court on the substance of Zambrano rights, EU citizenship and equal treatment’ (2016) 38 JSCWFL 228.

³³ Sumption and Kierans (n 25).

³⁴ *ibid.* This will also be of relevance to the *Fertré* case, discussed in section 5.3.3 of this chapter: *Gwladys Fertré v Vale of White Horse District Council* [2024] EWHC 1754 (KB).

³⁵ Peter William Walsh, ‘Q&A: The UK’s new points-based immigration system after Brexit’ (The Migration Observatory, 27 April 2020), <<https://migrationobservatory.ox.ac.uk/resources/commentaries/qa-the-uks-new-points-based-immigration-system-after-brexit/>> accessed on 13 June 2024.

immigration regulations for workers deemed ‘unskilled’, or how the government is choosing to qualify skilled or unskilled.

This in and of itself can potentially be problematic, as it introduces a potentially discriminatory standing directly into the regulations surrounding immigration status and outcomes. This discrimination existing directly in the regulations will also have strong impacts on the potential rights that derive from the regulations for the workers’ family members: skilled workers can bring their dependents on the family reunification scheme, whereas care workers and workers deemed unskilled cannot.³⁶ This is, of course, a narrowing of both the number of and the type of individual who could migrate with their family members. Under freedom of movement, all workers – as well as the self-employed, students, and self-sufficient individuals – could relocate with their family members. The visa system, however, allows only skilled workers to bring only their dependents, with no specific provisions for spouses who are not dependents – spouses need to apply for their own visas, for example; under the free movement rules, spouses had their own right to reside that was not conditional upon satisfying immigration frameworks.³⁷ This is a much more restrictive framework for derivative rights bearers than those who are applying for leave to join family members who reside in the UK under the EUSS, and will also place limits upon which individuals migrating will have access to the rights of family life guaranteed under the Convention (the HRA in domestic legislation), and which individuals will be able to make derivative rights claims.³⁸ Under the Citizenship Directive and previously existing EU citizenship rights, this direct-upon-introduction

³⁶ The Immigration (European Economic Area) Regulations 2016 Appendix FM.

³⁷ Case C-89/17 *Secretary of State for the Home Department v Rozanne Banger* [2018] ECLI:EU:C:2018:570; Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECLI:EU:C:2008:449; Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department* [1992] ECLI:EU:C:1992:296; Case C-267/83 *Aissatou Diatta v Land Berlin* [1985] ECLI:EU:C:1985:67; Case C-22/21 *SRS and AA v Minister for Justice and Equality* [2022] ECLI:EU:C:2022:683.

³⁸ Walsh (n 35); Spaventa (n 29).

discrimination within the standard of protections offered to derivative rights of residence bearers did not exist as *all* workers and their family members were protected under freedom of movement law, irrespective of their earnings or ‘level of skill’.³⁹

The rules have become similarly restrictive for EU students relocating to the UK as well, for all of those who are ‘new’ migrants and therefore not protected by rights under the Withdrawal Agreement. As of April 2024, only graduate students can bring their families (defined strictly as dependent children and partners), and only if the partners meet the required income threshold and the children can be supported *entirely* by the parents. This is a different level of protections offered from the EU regimen, and where the freedom of movement for students and their families applied to undergraduate students as well.⁴⁰ EU citizens coming to the UK to join British citizens or EU citizens with pre- or settled status (if the relationship does not pre-date the end of the transition period), through the family reunification route, will need to meet the same visa requirements as non-EU citizens, including a minimum income requirement of £18,600.⁴¹ First time spousal visa applicants, as of 11 April 2024, will need to evidence that their partner in the United Kingdom earns at least £29,000. Students who wish to pursue a course of study in the United Kingdom will similarly need to apply for a visa, and will need to have already been offered a place on an approved course, have enough money to support themselves and to pay for their course – thereby excluding students who would require funding, or loans, from the state, introducing another layer of potential socioeconomic

³⁹ Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECLI:EU:C:1982:105; Case C-197/86 *Steven Malcolm Brown v the Secretary of State for Scotland* [1988] ECLI:EU:1988:323; Case C-292/89 *The Queen and the Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECLI:EU:C:1991:80; Case C-357/89 *V.J.M. Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECLI:EU:C:1992:87; Joined cases C-22/08 and C-23/08 *Athanasios Vatsouras & Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 90* [2009] ECLI:EU:C:2009:344; Case C-258/04 *Office national de l’emploi v Ioannis Ioannidis* [2005] ECLI:EU:C:2005:559; Case C-3/90 *M.J.E. Bernini v Minister van Onderwijs en Wetenschappen* [1992] ECLI:EU:C:1992:89; Case C-46/12 *L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstotte* [2013] ECLI:EU:C:2013:97; Case C-59/85 *State of the Netherlands v Ann Florence Reed* [1986] ECLI:EU:C:1986:157.

⁴⁰ *SRS and AA* (n 37).

⁴¹ *Walsh* (n 35).

discrimination into the immigration system –, and be able to speak, read, and write in English. The student visa lasts for five years for those on an undergraduate course and does offer options to switch to a different visa at the expiry of the student status; however in March 2027 the graduate visa will expire 18 months after graduation instead of the previous 2 years.⁴² These new restrictions on student visas and the loss of flexibility within the system as a student are tighter restrictions that did not apply to EU citizens under free movement rights.

As of 1 January 2021, EU citizens who wish to move to the UK will be subject to the same rules as citizens from the rest of the world, excepting Irish citizens who can continue to move to the UK without restrictions under separate arrangements.⁴³ Migrants newly arriving in the UK from January 2021 need to have permission, such as a work, family, or study visa. They face broadly the same rules regardless of their country of origin. In practice, this means that the rules have become considerably *more* restrictive for EU citizens who previously had free movement rights; and has imposed greater limits on the derivative rights of residence protections that flow from those freedom of movement provisions.

The rules were briefly (and comparatively) *less* restrictive for non-EU citizens, at least those moving for work.⁴⁴ The immigration system has since become much more strictly controlled with greater regulations and requirements imposed upon migrants than before the

⁴² *ibid.*

⁴³ Ryan Bernard, ‘The Common Travel Area between Britain and Ireland’ (2001) 64 MLR 831; Mihnea V. Cuius “EU Migration to and from the UK” (20 November 2023, The Migration Observatory) available at <<https://migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk/#:~:text=Before%20Brexit%2C%20free%20movement%20rules,citizens%20from%20non%2DEU%20countries>> accessed 13 July 2024; CJ McKinney, Michael Potter, and Terry McGuinness, ‘The Common Travel Area and the special status of Irish citizens in UK law’ for the House of Commons Library, published 16 August 2023; Sylvia de Mars and C.R.G. Murray, ‘With or without EU? The Common Travel Area After Brexit’ (2020) 21 GLJ 815.

⁴⁴ Interestingly, this came up as a key political argument during the referendum campaign: the pro-Brexit campaigners were arguing that removing the burden of freedom of movement would allow for greater choice in immigration decisions and policy-making. The ability to restrict freedom of movement for EU citizens and decrease the number of EU citizens that ‘had’ to be allowed in would allow for ‘better’ immigrants from non-EU countries as the numbers would not unnecessarily and forcibly fill up with EU migrants.

Brexit vote.⁴⁵ Until the end of 2020, non-EU citizens coming to work in the UK on an ordinary work visa would usually need a salary of at least £30,000 in a graduate job; the new rules allow a wider range of middle-skilled occupations to qualify, with the minimum salary required set at £25,600 as standard and lower still in some cases. Family migration rules remain the same for non-EU citizens, requiring a minimum income of £18,600 and payment of fees including the NHS surcharge at £624 per person, per year. These requirements will now be applied to EU citizens too, although there are different, less restrictive rules for people moving to join EU citizens who hold pre-settled or settled status under the EUSS. Until the introduction of the Citizenship Directive and the restrictive line of social access rights case law post-*Dano* and post-*Alimanovic*, free movement rules did not include income requirements or the obligation to already have a job (and even then those requirements did not significantly amend the underlying freedom of movement provisions).⁴⁶ Those can be linked to, as established in the previous chapter, the emphasis on right to reside under EU law rather than the right to enter, as in UK immigration law.⁴⁷

As is the case with non-EU students, EU students arriving in the UK from January 2021 and whose course begins after July 2021 need to be sponsored by a licensed educational institution and must also pay international tuition fees, visa fees and the healthcare surcharge (at a discounted rate of £470 a year). Previously, EU students were subject to the same rules and fee structures as UK students; any EU citizen coming to study in the United Kingdom who did not previously have pre-settled or settled status will be doing so at the same status as an

⁴⁵ See, for example, the “Restoring Order and Control” white paper of November 2025; the proposed ‘earned settlement’ policy changes; and the Immigration and Asylum Bill 2026; Steven Blaakman, ‘The Brexit paradox: How leaving the EU has led to more migration’ (June 2025) Members’ Research Service PE 772.910 European Parliament

⁴⁶ Jennifer Gordon, ‘Free movement and Equal Rights for Low-Wage Workers? What the United States Can Learn from the New EU Migration to Britain’ (2011) Fordham Law Legal Studies Research Paper No. 1864628.

⁴⁷ Catherine Barnard, Sarah Fraser Butlin and Fiona Costello, ‘The changing status of European Union nationals in the United Kingdom following Brexit: the lived experience of the European Union Settlement Scheme’ (2021) 31 Social & Legal Studies 365.

international student and will therefore have the same visa requirements and pay the elevated international fee (and will be limited in their work opportunities and work hours, which for graduate students can mean acquiring a graduate degree is prohibitively costly), as well as losing access to the student finance system in the UK. The derivative rights of their family members have similarly changed: only graduate students may bring their spouses and dependent children with them to study (if their spouses meet their own visa requirements, unlike under the freedom of movement rules); and EU students and their family members, under both the EUSS and the post-Brexit immigration framework, have no access to state support while they are following their course of study.⁴⁸ This is, once again, much more restrictive than the rights of EU citizen students and their family members under freedom of movement rules. Undergraduate students have no derived rights of residence for their family members; graduate students do, although again, the allowances for which family members and how far the residence rights extend are more limited than they were under previous free movement rules.

The implementation of the new immigration system has led to some criticism, especially regarding the impact it may have on those seeking asylum, and those whose immigration status post-withdrawal does not fall into the neat squares prescribed by the European Union Settlement Scheme (the EUSS) and the new points-based system. Immigration policy gives different groups in the UK different rights and entitlements: people living in the UK on temporary work, family or study visas generally have restrictions on what they can do while residing in the UK. Most of these restrictions no longer apply once they receive permanent status, which is usually referred to as indefinite leave to remain for non-EU citizen, or when EU citizens acquire settled status. For example, temporary visa holders and seasonal

⁴⁸ Walsh (n 35); Sumption and Kierans (n 25); Laffan (n 22).

workers generally have ‘no recourse to public funds’, which means that they cannot access a prescribed list of public funds as defined by the Home Office. That list includes most welfare benefits, including Universal Credit.⁴⁹ While under free movement EU citizens expected to be able to live and work in the UK indefinitely, under the new system newly arriving migrants will need to qualify and apply for permanent settlement rights. There will also be migrants with no legal status, and this number includes EU citizens who did not apply to the EUSS by the stated deadline.

Lastly, some migrants moving to the UK from January 2021 may join the illegally resident population. Under free movement, the vast majority of EU citizens moving to work in the UK were considered lawfully resident, while under the new rules, many jobs will no longer be eligible for work visas that were previously filled by EU citizens utilising their freedom of movement rights. Pressure for irregular migration into these jobs may increase due to the more restrictive immigration system towards workers in low-wage jobs, as seen in the EU-Mediterranean context and in the United States.⁵⁰ The size of this group is unlikely to be known as it is inherently difficult to measure. There are some concerns in the academic and human-rights fields that this new immigration system might prove to be inherently discriminatory: there is discrimination inherent in limiting immigration and family reunification to those of sufficient financial status to not rely on state support. The requirements that people moving to the UK not rely on state support can potentially put immigrants in difficulty should their circumstances change.

The immigration regulation introduced post-Brexit, part of the general political push towards ‘regaining control’ over an immigration system free from the freedom of movement

⁴⁹ Sumption and Kierans (n 25); Smismans (n 1); Smismans (n 30); Charlotte O’Brien, ‘Between the devil and the deep blue sea: vulnerable EU citizens cast adrift in the UK post-Brexit’ (2021) 58 CML Rev 431; Barnard, Butlin and Costello (n 47).

⁵⁰ Sumption and Kierans (n 25).

rules that previously governed intra-EU migration.⁵¹ It brought EU citizens out of the scope of the Withdrawal Agreement – namely, EU citizens who had utilised their freedom of movement rights prior to the withdrawal of the United Kingdom, and therefore could be protected by pre-existing constitutional rights that were entrenched into a new international framework in order to trigger a reciprocal protection for British nationals living in the European Union post-withdrawal – and solely under ‘domestic’ immigration controls. This is the ‘end stage’ example of deconstitutionalisation, and the ‘final goal’ of the political and constitutional pressures inherent in EU-UK relations from the early 2010s to now: the desire to impose immigration controls on freedom of movement rights, and limiting the access of EU citizens to social security access and residence rights on the ‘wholly domestic’ controls of immigration control and integration.⁵²

5.2.2: Continuing EU-based citizenship rights

The second framework of immigration control and citizens’ rights implementation that is worth analysing is that which governs the rights of EU citizens and their TCN family members who were residing in the United Kingdom prior to the end of the transition period, whose rights of residence in the United Kingdom were guaranteed under TFEU rights and conditioned and regulated by the Citizenship Directive. EU citizens and their family members who have resided in the United Kingdom since before the end of transition (January 1, 2020) are protected by the European Union Withdrawal Agreement (the WA), as their right to reside and work in the United Kingdom originates in EU law.

⁵¹ Strumia (n 13); Willem Maas, ‘European citizenship and free movement after Brexit’ in Scott Greer and Janet Laible (eds), *The European Union After Brexit* (UMP 2020); More (n 5); Mindus (n 6); Cian Mulligan, ‘The Fragility of Freedom of Movement’ (2017) 52 *Review of European Economic Policy* 254.

⁵² Matthew Goodwin and Caitlin Milazzo, ‘Taking back control? Investigating the role of immigration in the 2016 vote for Brexit’ (2017) 19 *The British Journal of Politics and International Relations* 450; Nic Shuibhne (n 8); Clara Muller, ‘European Public Policy and Restriction of Free Movement of Persons in EU Law’ (2024) 9 *European Papers* 1408; Susanne K. Schmidt, ‘The limits of judicializing transnational welfare: progression and retrogression of the ECJ case law on access to social benefits’ in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy: Navigating Challenges and Crises* (Edward Elgar Publishing 2022).

The main source of those continuing EU citizenship rights within the WA is Part II, which covers specifically citizens' rights. Those EU citizens and their family members who were ordinarily and lawfully residents in the United Kingdom prior to the end of the transition period regardless of the length of their residence, can continue to live and reside in the United Kingdom with the same extent of protections as they did under previous free movement laws as laid out by the Citizenship Directive.⁵³ These protections include the right of work, self-employment, non-discrimination as regards to education and social assistance (assuming the requirements of residence as laid out by the CRD are met), and acquisition of permanent residence for the EU citizen and their dependent family members.⁵⁴ Those residence rights also embrace other rights associated with the Directive, such as non-discrimination under Article 18 TFEU and the Charter of Fundamental Rights (the Charter).⁵⁵

Built within the Withdrawal Agreement are various legal and political frameworks to ensure disputes of interpretation can be resolved. Any infringement or questions of interpretation of the WA are first submitted to the Joint Committee, to attempt to find a mutually beneficial solution; should a solution fail to be found within the first three months, the question will then be referred to an arbitration panel administered by the Court of Arbitration. The five members of the arbitration panel, two from each list as nominated by both the UK and the EU, cannot work for the UK government, Member State governments, or EU institutions.⁵⁶ If a dispute involves a question of EU law or EU competence, the CJEU will be asked to provide its interpretation and the CJEU finding will be binding upon the panel. Any finding of the arbitration panel will be binding upon both parties, and any breach of the WA

⁵³ Spaventa (n 29).

⁵⁴ *ibid.*

⁵⁵ European Union (Withdrawal) Act 2018 Title II Article 10 paragraph 1.

⁵⁶ *ibid* Article 168, 170; Joe Marshall, Jess Sargeant and Dan Goss, "Disputes under the Withdrawal Agreement" (Institute for Government, 2 October 2020)

<<https://www.instituteforgovernment.org.uk/article/explainer/disputes-under-withdrawal-agreement>> accessed on 14 October 2024.

should be corrected by the offending party within thirty days of the arbitration panel's finding; should compliance not occur, the responding party has the right to suspend parts of the Withdrawal Agreement – but not any of the parts dealing with citizens' rights.⁵⁷ There have been two examples of the dispute resolution being implemented thus far, both in responses to perceived breaches of the Northern Ireland Protocol by the United Kingdom: in both cases, legal proceedings were paused while the government of the United Kingdom sought a resolution to the questions of interpretation.⁵⁸ The WA assigns a prominent role to the CJEU also insofar as it establishes its compulsory and exclusive jurisdiction over very significant parts of the agreement even after the end of the transition period.⁵⁹ The WA also provides that CJEU case law on the interpretation of the EU law referred to in the agreement will be binding upon the UK up until the end of the transition period, and 'due regard' shall be had for CJEU rulings after the end of the transition period.⁶⁰

The WA also mandated the creation of a body with equivalent powers to those of the European Commission inside the UK, the Independent Monitoring Authority (IMA), specifically for the oversight of citizens' rights protections within the United Kingdom. Finally, there remains the option for domestic courts to refer matters to the Court of Justice of the EU. These two latter points of accountability expire eight years after the end of the transition period, which falls at the end of 2028 (the domestic courts of EU Member States can still refer cases to the CJEU as necessary). The IMA, operating with equivalent powers as the European Commission within the United Kingdom, can bring cases in protection of EU citizens when the domestic protections fall short of what is constituted in the WA or in EU law – an excellent

⁵⁷ Luigi Lonardo, 'The Withdrawal Agreement and the Dispute Settlement Mechanisms of the European Union' (2022) Brexit Institute Working Paper Series No 3/2022.

⁵⁸ Marshall et al (n 56).

⁵⁹ O'Connor, Karatzia and Konstadinides (n 19); Nic Shuibhne (n 8).

⁶⁰ Lonardo (n 57).

example being the pre-settled versus settled status case brought in 2022.⁶¹ The WA also created a series of committees, including a specialist committee on citizens' rights, where issues of implementation would be monitored.⁶²

Within the protections and obligations of the WA, the government of the United Kingdom created a constitutive and protective scheme for EU citizens whose residence rights were protected by the Withdrawal Agreement to 'regularise' their immigration status within UK law once the EU right to reside would cease applying in the United Kingdom: the European Union Settlement Scheme (EUSS).⁶³ The EUSS, contrary to some of the schemes established in the EU for British citizens living in the European Union, was more generous than the free movement system originally allowed: EU citizens needed only to be ordinarily resident in the UK, rather than employed, self-employed, self-sufficient, or a provider of services as under free movement law.⁶⁴ The immigration rules of 2016, which were created to transpose the requirements of the Citizenship Directive, do not apply to EU citizens and their family members, including TCN family members – unless they are found to be an exempt person –, who were already living in the UK under the protections afforded by the Citizenship Directive before or on 31 December 2020. These individuals instead must apply to the EUSS to secure pre-settled or settled status.⁶⁵ Applications should have been submitted to the EUSS by 30 June 2021, and late applications would only be accepted if there was a valid reason for the application to have been submitted late. The question of whether the reason would be

⁶¹ *R (Independent Monitoring Authority for the Citizens' Rights Agreements) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin).

⁶² Luke Piper, 'Has the implementation of the Withdrawal Agreement been a success? An EU citizens' rights perspective' (2024) 38 JIANL 175.

⁶³ *ibid.*

⁶⁴ It is, however, more complicated than that first analysis proves (Welsh and O'Brien, n 5); see section 5.3 of this chapter.

⁶⁵ The Migration Observatory at the University of Oxford 'EU Migration to and from the UK', published online on 20 November 2023, <<https://migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk/>> accessed on May 12 2024.

considered sufficient was to be adjudicated by the Home Office, although a refusal of status could be challenged through either a request for administrative review or an appeal.⁶⁶

Settled status is a form of permanent residence in the UK, available to those who have resided lawfully in the United Kingdom for a minimum of five years and is a requirement for accessing certain levels of social security rights, such as Universal Credit.⁶⁷ The emphasis on ‘lawful’ residence is an exact replica of the emphasis on lawful residence that was considered on economic pre-conditions as established by the Citizenship Directive, and the resultant transpositions of the CRD into domestic law in the United Kingdom.⁶⁸ Pre-settled status is designed for people who have been living in the UK for less than five years. A person with pre-settled status can apply again to EUSS to receive settled status once they have met the requirement for five years’ residence. Under the initial EUSS policy, this pre-settled status was designed to expire after five years, meaning that any individual needing to reapply would potentially be at risk of losing their status if they did not reapply within the allotted time frame. This meant that EU citizens who did not realise they had to reapply would have of losing their status entirely. Following a court decision in 2022, pre-settled status will no longer expire, although it may still be necessary for people to re-apply to the EUSS to demonstrate that they have settled status.⁶⁹ Section 5.3 of this chapter will explore the legal complexities and inherent issues in the EUSS in more depth.

5.2.3: ‘Residual’ and assimilated EU law

The WA did not completely replace EU law on exit day, nor did all EU law cease to apply in

⁶⁶ 90% of appeals to EUSS decisions are successful, which is a bit concerning when considering how many decisions must have been incorrect in the first place if they were so regularly reversed.

⁶⁷ Alice Welsh, JIANL 2023 (37) 195.

⁶⁸ Cristina Juverdeanu, ‘Brexit and the EU Settlement Scheme: Continuity and rupture with the European Union’ (2025) 33 JCES 278; O’Brien (n 49); Mulligan (n 51); Piper (n 62).

⁶⁹ IMA (n 61).

the United Kingdom after the implementation of the Withdrawal Agreement. As discussed above, the CJEU continues to maintain a jurisdiction in the United Kingdom up until 2028 in cases where EU law is at stake in differing interpretations of WA provisions.⁷⁰ Any pending cases before the CJEU at the end of the transition period will fall within the CJEU's jurisdiction until they are finalised, including any decisions on appeals (as, for example, the *VI* decision in 2022 that held that access to the NHS was sufficient grounds for 'sickness cover' as per the CRD).⁷¹ The European Commission may also bring infringement proceedings against the United Kingdom for breaches of EU law that took place during the transition period for a period of up to four years.⁷² This is where the concept of assimilated EU law comes into play, as it offers another potential avenue for protections of EU citizens and their family members under the umbrella of EU law more generally.

Assimilated EU law is of particular interest to this thesis in two primary areas: retained EU case law, and the retention of directly effective EU instruments (Treaty articles, EU directives, and EU regulations). When the Withdrawal Agreement was first adopted, 'retained EU law' was effectively a 'snapshot' of all EU law as it existed in the UK at the time, and how it would continue existing pending any significant changes to national legislation, or creation of new national legislation that explicitly adapted or adopted the EU laws in question. The Retained EU Law (Revocation and Reform) Act of 2023 directly repealed section 4 of the Withdrawal Agreement, formally ending the 'direct effect' measures of EU law in the UK – meaning that any right that existed in EU law would not be applicable in the United Kingdom unless there was national legislation also providing for that right.

⁷⁰ European Union (Withdrawal) Act 2020 Article 158; Nic Shuibhne (n 8); O'Connor, Karatzia and Konstadinides (n 19); Steve Peers 'The End – or a New Beginning? The EU/UK Withdrawal Agreement' (2020) 39 YEL 122.

⁷¹ European Union (Withdrawal) Act 2020 Article 86(1) Case C-247/20 *VI v Commissioners for Her Majesty's Revenue and Customs* [2022] ECLI:EU:C:2022:177.

⁷² *ibid* Article 87.

The ending of any direct effect of Treaty rights in the United Kingdom also means that EU citizens living in the United Kingdom cannot rely on any rights to non-discrimination or citizenship protections as they exist in the EU, such as protections under TFEU Articles 14, 18, 20, or 21, *unless* those rights exist in the Withdrawal Agreement or are provided for under another set of immigration regulations. The Charter has also not been retained in British law, meaning that any Charter rights that an EU citizen might wish to challenge for in British courts will have to originate in the Withdrawal Agreement (if they have status under the EUSS) or under the Human Rights Act (the domestic policy that implements the ECHR). Where the facts of a dispute relate to the period from 2021 to the end of 2023, prior to the repeal of section 4 of the WA, it should still be possible to rely on directly effective Treaty-derived rights (on the basis that this still was the law at the time).⁷³ However, it is unclear exactly which rights continued to be available in UK law during this period. It was this gap that was explored in the cases of *Fratila* and *GC*, to determine which EU-based right for social security access was still applicable.

Post-Brexit, the UK could in theory have adopted the position that, when considering assimilated EU law, UK courts should not be bound by EU case law, nor should they have any regard to it whatsoever. This attitude was not, however, adopted into legislation and section 6 of the WA provides that, as a general rule, CJEU judgments made before 11pm on 31 December 2020 remain binding on UK courts unless there is a reason to depart from it.⁷⁴ UK courts may have regard to CJEU judgments made after that date, so far as they are considered relevant to the matter before the court (such as the rights of EU citizens residing in the United Kingdom

⁷³ Jack Williams, “Retained EU law: A guide for the perplexed” (UK-EU Relations Law, December 28th 2020) <<https://eurelationslaw.com/blog/retained-eu-law-a-guide-for-the-perplexed>> accessed on 12 October 2024.

⁷⁴ Withdrawal Act 2018 (n 18) s.6(5A) and s.6(4)(ba); European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations (SI 2020/1525); Alastair Holder Ross, “Coulda, shoulda, woulda – whether to depart from assimilated EU case law” (March 13 2025, UK_EU Relations Law) accessed 14 August 2025 <<https://eurelationslaw.com/blog/coulda-shoulda-woulda-whether-to-depart-from-assimilated-eu-case-law>>.

post-Brexit); and UK courts are required to interpret retained EU law in accordance with previous judgments on relevant EU law matters.⁷⁵ Retained EU case law, along with the sections of the Withdrawal Agreement that specifically and explicitly incorporate Charter rights, is also the only mechanism going forward in which EU citizens living in the United Kingdom can continually rely on the rights included in the Charter.⁷⁶

5.3: The EUSS as an indicator of the tensions inherent in EU citizenship constitutionalisation

The EUSS is an interesting aspect of the case study that Brexit provides as to the constitutionalisation of EU citizenship because of the way it emphasises the deficiencies of EU citizenship itself.⁷⁷ The EUSS – and the Withdrawal Agreement more broadly – ‘freezes’ the current status of EU citizenship, without allowing any room for increased EU citizenship rights protections, and locking out TCN derivative rights bearers from EU-law based protections entirely.⁷⁸ The EUSS itself highlights the strengths and weaknesses of EU citizenship, through the dismantlement of free movement and the selective downloading of the EU *acquis*, more specifically of the conditionalities imposed by the CRD.⁷⁹ The EUSS provides a ‘break’ – or, as defined within this thesis, a deconstitutionalisation – by limiting EU law protections and access routes to that protection for the most vulnerable, while re-emphasising the prioritisation of worker status and the conditionalities allowed under the Citizenship Directive (see Chapters 3-4 of this thesis).⁸⁰ Importantly, there was criticism of the EUSS as a ‘constitutive’ rather than

⁷⁵ Withdrawal Agreement (n 55) Articles 86 and 89.

⁷⁶ Williams (n 73); O’Connor, Karatzia and Konstadinides (n 19).

⁷⁷ Juverdeanu (n 68); O’Brien (n 49).

⁷⁸ O’Brien (n 49); Jo Shaw, ‘Citizenship and Free Movement in Benjamin Martill and Uta Staiger (eds), ‘A Changing EU: Navigating an Archipelago of Contradictions’ in *Brexit and Beyond: Rethinking the Futures of Europe* (UCL Press, 2018); Nora Siklodi, ‘(Br)exit citizenship: belonging, rights and participation’ (2023) JCES, DOI: [10.1080/14782804.2023.2298330](https://doi.org/10.1080/14782804.2023.2298330).

⁷⁹ Juverdeanu (n 68).

⁸⁰ Kuba Jablonowski, “There are cracks in the EU Settlement Scheme – who will fall through them?” (*London School of Economics #LSETHinks*, 6 May 2020) available at <<https://blogs.lse.ac.uk/brexit/2020/05/06/there-are-cracks-in-the-eu-settlement-scheme-who-will-fall-through-them/>> accessed on 12 June 2023; O’Brien (n 49); Juverdeanu (n 68).

‘declarative’ scheme. Constitutive systems – which includes the UK’s EUSS – have a hard deadline for people to apply for residence status and the status will not be granted until the authorities have verified that all eligibility criteria have been met; a declarative scheme, on the other hand, grants the status automatically if all conditions of the WA are met. The application requirements of the EUSS shifted the evidentiary burden on proving status to the applicants and made it potentially far too easy for vulnerable citizens to lack the sufficient evidence to prove and acquire the required status, and for the decision-makers to incorrectly reject applications.⁸¹

The EUSS has faced criticism for certain lacuna that leaves groups of EU citizens vulnerable to losing their status, and potentially losing their rights to access to education, employment, housing, and social security rights, as well as the potential risk of being exposed to the consequences of being illegally resident in the light of a stricter set of immigration controls.⁸² Those with inconsistent work histories – for example, those with intermittent caring responsibilities for children or elderly relatives, or students who relied on ‘under-the-table’ paid work – and those with intermittent housing, as well as children leaving care, and the incarcerated were all exposed to the difficulty of evidencing their lawful residence in the United Kingdom, or the length of that residence if applying for settled status, without that access to regular employment paperwork.⁸³ Interestingly, the EUSS is more generous than freedom of movement for *strictly* residence rights, but the access to rights usually *guaranteed* under

⁸¹ Spaventa (n 29) 205; Jablonowski (n 80); Welsh and O’Brien (n 5).

⁸² Jablonowski (n 80); Spaventa (n 29); Madeleine Sumption and Mihnea Cuibus, “Outstanding issues facing the EU Settlement Scheme” (18 October 2023, The Migration Observatory), <<https://migrationobservatory.ox.ac.uk/resources/commentaries/outstanding-issues-facing-the-eu-settlement-scheme/>> accessed on 10 June 2024; Alice Welsh, ‘Permission to discriminate – EU nationals, pre-settled status and access to social assistance’ (2022) 44 JSWFL 4133; Barnard, Butlin and Costello (n 47); Juverdeanu (n 68); Welsh and O’Brien (n 5).

⁸³ ‘Reforming the EU Settlement Scheme: The Way Forward for the EUSS’, JUSTICE report, published 13 March 2024, accessed on 12 June 2024, available at <<https://files.justice.org.uk/wp-content/uploads/2024/03/12150659/Reforming-the-EU-Settlement-Scheme-JUSTICE-Report-March-2024.pdf>>; Piper (n 62); Jablonowski (n 80).

⁸³ Welsh and O’Brien (n 5). O’Brien (n 49); Juverdeanu (n 68).

freedom of movement (i.e. access to social security, housing support) are only available to those individuals with settled status, a status which is difficult to attain for the more vulnerable.⁸⁴ There have also been some questions raised by the decisions made by the relevant UK authorities in granting social security access decisions that do not equate status under the EUSS with status under the WA, which would permanently (and problematically) link ongoing EU citizenship rights protections not to international or EU law, but domestic immigration policy of the UK, which is subjugated to political priorities and objectives and changes with governments and the preferences of the electorate.⁸⁵

Furthermore, if status is lost under the EUSS, for whatever reason, all rights are consequently lost as well – including the more easily accessible right of ‘residence’ and lost permanently.⁸⁶ The below subsections each address one of the key lacunae in the protections allowed under the EUSS: automatic loss of status for those individuals who fail to manually upgrade their status; the lack of status afforded to TCN derivative rights holders under the EUSS and the subsequent absence of any protections for their residence or social security access rights; and the lack of social security access for EU citizens under the EUSS more broadly.

5.3.1: Potential loss of residence rights under the EUSS

There was criticism of the aspects of the EUSS that would automatically remove the status from EU citizens who failed to apply to upgrade their status from pre-settled status to settled status when the five years of their status expired, a policy that was criticised before being ultimately overturned, for potentially failing those EU citizens living in digital deserts – areas

⁸⁴ Spaventa (n 29); O’Brien (n 49); Siklodi (n 78); Shaw (n 78); Jablonowski (n 80).

⁸⁵ Welsh and O’Brien (n 5).

⁸⁶ O’Brien (n 49); Juverdeanu (n 68).

of limited internet access, or those with limited technological knowledge and access – or without the necessary access to legal advice or help.

One of the key criticisms levelled at the EUSS in its introduction was the requirement that those holding pre-settled status would need to reapply when their pre-settled status expired to maintain status. Alternatively, they would have been required to extend their limited period of leave, if they did not meet all the necessary conditions for settled status, either under Appendix EU or a different route. Failure to make an application in time would mean that the Home Office would consider them overstayers and they would lose their right to remain living lawfully in the UK. This was considered a ‘cliff-edge’, even more so than the initial deadline of 30 June 2021 because of the individual nature of the cliff-edge in question. There was no central deadline, but rather a myriad of individual deadlines that could easily be missed for a number of reasons; and the consequences for a missed deadline could be potentially significant.⁸⁷ Any individual failing to make the required re-submission would lose their immigration status, and therefore becoming ‘unlawful overstayers’ and would be subjected to the hostile environment and the immigration controls of the United Kingdom.

The IMA brought a challenge against the Secretary of State arguing against not only the lawfulness of the automatic stripping of status of anyone failing to make the upgrade application, but also against the lawfulness of requiring a secondary application in the first place. The argument was that the WA allows for only one process of application under Article 18. The UK opted for a constitutive scheme; however the WA does not provide for the imposition of a second constitutive application process. The application process itself

⁸⁷ Charlotte O’Brien, “IMA charging to the rescue? Judicial review aims to avert oncoming EUSS expiry catastrophe for people with pre-settled status” (EU Rights and Brexit Hub: Research, Advice and Support on EU Citizens’ Rights, October 26 2022), < <https://www.eurighthub.york.ac.uk/blog/ima-charging-to-the-rescue-judicial-review-aims-to-avert-oncoming-euss-expiry-catastrophe-for-people-with-pre-settled-status> > accessed 12 April 2024.

(assuming a successful application, of course) already confers a residence right under Article 18 of the WA, and those residence rights can only be conditioned by or in accordance with the agreement itself. Nowhere in the agreement does it stipulate that residence rights would be conditional upon a secondary application, with no provisions made for it in the agreement itself.⁸⁸ The contention in this case was that, once the residence requirement for settled status was accrued, that status should be conferred automatically on anybody who had already been granted pre-settled status.⁸⁹

The challenge brought by the IMA was successful. The court held that requiring a second application was unlawful as the Withdrawal Agreement did not permit the Home Office to impose the condition of reapplication on the rights of beneficiaries. This was primarily based on Article 13 of the Withdrawal Agreement which relates to residence rights, namely the stipulations that no limitations or conditions can be imposed ‘for obtaining, retaining or losing residence rights on the persons referred to’.⁹⁰ The judge considered that the ordinary meaning of Article 13 of the Withdrawal Agreement prohibits the imposition of any limitations or conditions for obtaining, retaining or *losing* residence rights other than as expressly set out in the Agreement. Failing to make a further application was not a limitation or condition of retaining residence rights set out in the Withdrawal Agreement. This meant that after being granted a right of residence such as that of pre-settled status, this status and right of residence could not be lost by failure to make a further application in time.⁹¹

In other words, although the Withdrawal Agreement set out guidance for the initial *recognition* of residence rights, it did not provide for any further check to retain this right. Reference was also made to Article 39 of the Withdrawal Agreement which gives life-long

⁸⁸ *ibid.*

⁸⁹ Welsh and O’Brien (n 5).

⁹⁰ The Withdrawal Agreement (n 55) Article 13(4).

⁹¹ *IMA* (n 61).

protection to beneficiaries, unless there is a change in circumstances – for example, if the status is lost because continuous residence is interrupted for a long stretch of time, or because of the permanent removal from the United Kingdom:⁹²

the WA means that the rights conferred by the grant of new residence status under Article 18 to those who do not, at that point, have a right of permanent residence, includes the right to reside permanently in the United Kingdom, pursuant to Article 15, once the five-year period has been satisfied (subject to the conditions mentioned in Article 15(1)).⁹³

The effect of the ruling is that it protects the rights of many beneficiaries of the EUSS, particularly those that are vulnerable (the elderly, those with irregular housing or irregular employment).⁹⁴ It will stop those who do not make an upgrade application from being exposed to the hostile environment. While the Home Office did not appeal the decision, it is unclear how the judgment is going to be implemented in actual fact; it is unclear what the new regulations will be for those who do not meet the requirements for settled status at the expiry of their pre-settled status – for example, if they do not meet the continuous residence requirement, or cannot evidence their residence adequately. While the IMA judgment is a reinforcement of the residual constitutional strength of EU citizenship – this finding removes one obstacle from EU citizens and their family members seeking to maintain their residence rights post-withdrawal – there is still a lack of clarity for the direction this finding will take.

⁹² This was one of the key queries in the build-up of backlog cases from Covid: if someone with pre-settled status found themselves stuck outside of the United Kingdom during the height of the lockdown and requisite travel restrictions, what would this mean for those who needed to accrue continuous residence for the sake of upgrading their status? What if they had caring responsibilities outside of the United Kingdom and were obligated to remain outside the territory to look after ill or vulnerable family members? What if their right to reside was dependent upon work but their employment was terminated, or they were placed in furlough, during the pandemic? Or the citizen of whom they were the primary carer aged out of the education or dependence requirements? These are all key questions around the ending of freedom of movement and the subsequent loss of choice in immigration matters for EU citizens living and working in the United Kingdom that British immigration law has not quite caught up to yet.

⁹³ *IMA* (n 61) para 192.

⁹⁴ *Juverdeanu* (n 68).

5.3.2: Derivative rights of residence for TCN family members within and without the Withdrawal Agreement

Another danger-point in the EUSS is the explicit exclusions it included for those TCN family members whose rights of residence were anchored to an EU citizen who was now, solely, a British citizen and not eligible, or subject, to any rights within the Withdrawal Agreement because their residence had always been the territory of the United Kingdom: the *Zambrano* carers.⁹⁵

There were also people with EU rights of residence who were simply and explicitly excluded from making EUSS applications and regularising their immigration status through that route. *Zambrano* carers and others with derived rights of residence were, until the decision in *Akinsanya* in 2022 somewhat reversed this policy, explicitly excluded from EUSS protections, making it so that their residence status was even more precarious than it had been before the withdrawal period.⁹⁶ The regulatory framework that specifically governs EU citizens relocating to the United Kingdom after the transition period are the EEA amendments to the 2016 Immigration Regulations, and specifically the appendices FM and EU. The regulations were originally introduced in 2016, as discussed in Chapter 4, to transpose the requirements of the Citizenship Directive into domestic regulation.⁹⁷

It is worth quickly reiterating what portion of the regulations are at issue, as with the establishment of the EUSS the specific provisions of the protections in the 2016 Immigration Regulations are of particular relevance in the case law that grounds the rights of derivative rights bearers that should be permitted to hold status under the EUSS. The key provision in the regulations in question is Article 16, which sets out the parameters that an individual must meet

⁹⁵ Juverdeanu (n 68); O'Brien (n 49).

⁹⁶ *Akinsanya v Secretary of State for the Home Department* [2022] EWCA Civ 37.

⁹⁷ Somewhat confusingly, there were immigration regulations introduced in 2020 but these do not supercede the 2016 regulations in terms of controlling immigration decisions: the 2020 regulations merely concern the appeals of citizens whose rights are grounded in EUWA and the EUSS. They are linked specifically to appeals to immigration decisions made in light of the United Kingdom's withdrawal from the European Union.

to be considered as possessing a derived right to reside in the United Kingdom under both domestic law and the Citizenship Directive and, eventually, the EUSS in 2024.⁹⁸

An individual possesses a derived right to reside if they are: the primary carer of an EU citizen who is under the age of 18 and would be unable to reside in the United Kingdom if the individual leaves the country; or the EU citizen is in education and would not be able to remain in education should the individual be removed from the United Kingdom; or the individual is the primary carer of a British citizen that would be unable to continue their residence in the United Kingdom or in any other state of the EU should the individual be removed.⁹⁹ Within these regulations, there are exemptions carved out for who is not considered a person protected by the derivative rights law of the 2016 regulations. The right to reside in the United Kingdom under a specifically derived right of residence applies to individuals who have *no other right of residence* in the United Kingdom, confirmed by the Supreme Court decisions in *Sanneh* and *MS*.¹⁰⁰ An individual who has indefinite leave to either enter or remain in the United Kingdom is specifically excluded from having a derived right to reside, and therefore will later be excluded from applying for status under the EUSS as the Home Office will consider them to already possess a regularised immigration status.¹⁰¹

When the EUSS was first proposed within the context of the EUWA, *Zambrano* carers – those TCNs whose right to reside in EU law originates in their role as the primary carer of an EU citizen whose material access to EU rights would be substantially infringed upon by their removal from the territory of the European Union – were explicitly excluded from applying to

⁹⁸ Immigration Regulations 2016, Article 16.

⁹⁹ Immigration Regulations 2016 (n 98), EEA Amendments, article 16 paragraphs 2, 3, 4, 5; Case C-529/11 *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department* [2013] ECLI:EU:C:2013:290.

¹⁰⁰ Immigration Regulations 2016 (n 98), EEA Amendments, article 16 paragraph 7(c); *R (Sanneh & Others) v Secretary of State for Work and Pensions* [2015] CMLR 27.

¹⁰¹ Immigration Regulations 2016 (n 98), EEA Amendments, article 16 paragraph 7 (c) (iv)

the EUSS.¹⁰² Their residence and immigration status would therefore be irregular – they would become illegal aliens – once the withdrawal period ended, *unless* they held another right to reside, one that did *not* originate in EU law.¹⁰³ This, of course, was one of the key initial failings of the EUSS and its exclusion of Zambrano carers. As established in Chapter 4, the *Zambrano* right to reside for TCNs with a primary caring relationship for British citizens could only be established if *no other right to reside could be found to be established*.¹⁰⁴ Exclusion from the EUSS also meant that Zambrano carers were excluded from the lawful residence requirements that could ultimately lead to permanent residence, a much more secure residence status than the one granted by the *Zambrano* right – and one with much more access to social security support. Some of the first key cases following the withdrawal period were, therefore, centered around the gap created by explicitly excluding Zambrano carers from the EUSS protections.¹⁰⁵

Two of the more important cases on derivative rights of residence that carry over into post-withdrawal rights are those of *Velaj* and *Akinsanya*.¹⁰⁶ Both *Velaj* and *Akinsanya* interact with the way the 2016 Immigration Regulations and the EUSS intersect to protect EU citizens and their family members, specifically derivative rights of residence that originate within an EU right but have shifted to solely domestic immigration controls in the post withdrawal legal landscape. Both *Velaj* and *Akinsanya* centered around TCNs whose right to reside in the United Kingdom originated in EU law but who now find themselves needing to comply with regulation 16 of the EEA immigration regulations rather than being eligible for EUSS applications and residence rights.¹⁰⁷

¹⁰² The Immigration Regulations 2016 (n 98), Annex 1 para (b.) Appendix EU; 6th iteration of ‘EU Settlement Scheme: person with a Zambrano right to reside’ from the Home Office, published 14 December 2022.

¹⁰³ Immigration Regulations 2016 (n 98); Appendix FM and EU to the Immigration Regulations; guidance from the Secretary of State on Zambrano carers 2020.

¹⁰⁴ *Sanneh* (n 100).

¹⁰⁵ *Akinsanya* (n 96).

¹⁰⁶ *Velaj v Secretary of State for the Home Department* [2022] EWCA Civ 767; *Akinsanya* (n 96).

¹⁰⁷ *Velaj* (n 106).

The facts of the case in *Akinsanya* and the legal context in which it sits are, of the two, the most convoluted and so it is worth spending some time setting out what they were in order to stake out some clarity in the analysis of the judgment: It was established that Ms Akinsanya, a Nigerian national and sole carer of a British citizen child, was granted 30 months limited leave to remain under Appendix FM of the 2016 Immigration Regulations until 11 January 2022, with no condition preventing recourse to public funds. She then applied, on 29 January 2020, for settled status on the basis that she was a *Zambrano* carer with five years' continuous residence. Her application was refused by the Secretary of State in September 2020. The Secretary of State decided that the claimant was not eligible for the EUSS because she had already been granted limited leave to remain under a separate route than that of her *Zambrano* right, and so was barred by paragraph (b) of the definition of 'person with a *Zambrano* right to reside' in Appendix EU. This would have essentially meant that Ms Akinsanya would have been forced into a right of residence that expired every thirty months and needed re-applications that were accompanied by potentially hefty fees, as well as the 'NHS surcharge' of other non-EU based rights of residence. Ms Akinsanya challenged both her rejection from the EUSS, and the reasoning offered by the Secretary of State for why the rejection was made.

The question the Administrative Court had to decide was whether the right to reside was automatically extinguished if there was, at the time that it is claimed, a concurrent limited leave to remain – whether or not the derived right to reside ceases to exist if there is a right that the TCN also holds statutorily. The Secretary of State's position in rejecting Ms Akinsanya's claim was that the true meaning of *Zambrano* is that any national award of limited leave to remain acts to thwart an application for a *Zambrano* derivative right to reside.¹⁰⁸ The Court, however, did not agree with the Secretary of State's reasoning. The Court found that the

¹⁰⁸ Alice Muzira, "Zambrano EUSS Primary Carers 'New' Guidance: Akinsanya and Velaj" (Electronic Immigration Network, 4 July 2022) < <https://www.ein.org.uk/blog/zambrano-euss-primary-carers-new-guidance-akinsanya-and-velaj> > accessed 27 June 2024.

Secretary of State had made a mistake of law in the understanding of regulation 16 of the EEA Immigration Regulations 2016 when providing, in Annex 1 to Appendix EU that the definition of a ‘person with a *Zambrano* right to reside’ *only* includes ‘a person without leave to enter or remain in the UK’.¹⁰⁹ It was, in essence, incorrect for the Home Office to assume that because Ms Akinsanya had a right to reside that was not considered a *Zambrano* right, she was barred from applying to the EUSS as a *Zambrano* carer.¹¹⁰

The judgment in *Akinsanya* subsequently had a very clear, very immediate impact: the guidance issued by the Home Office on EUSS applications was immediately revised, so that people making applications under the *Zambrano* right were to be considered as making a valid application *regardless* of any previously extant right to reside or leave to remain. Any late applications to the scheme made in light of the judgment, for those applying with a *Zambrano* right, would be considered valid applications despite their lateness.¹¹¹

What is clear, however, is the impact *Akinsanya* heard on the subsequent case of *Velaj*. The appellant, a Kosovan national, was subject to deportation proceedings and had had his appeal allowed by the First Tier Tribunal on the basis that his British son would be unable to reside in the UK or another European Union state if both his parents, including the child’s British mother with whom the appellant was in a relationship with, left the UK for an indefinite period. This obligation would mean that, consequently Mr Velaj had a derivative right of residence under Regulation 16(5) of the 2016 Immigration Regulations.¹¹²

¹⁰⁹ *Akinsanya* (n 96) para 69. Emphasis mine.

¹¹⁰ *ibid.*

¹¹¹ *Muzira* (n 108).

¹¹² It was not considered, either by the appellant or the court, that the ending of freedom of movement for EU citizens into the United Kingdom and British citizens into the EU would, by its very nature, preclude the removal of the family to any Member State of the EU, and that the removal of the family from the United Kingdom would therefore also obligatorily lead to a removal of the territory of the European Union (which should have brought in *Alokpa* as well as *Zambrano* protections, but these arguments were not submitted in the claims).

The initial finding, which the Secretary of State was appealing, was that Mr Velaj did have a right to reside in the United Kingdom, as his criminal offence was not sufficiently severe to automatically exclude him from a right to reside. The appellate court, however, overturned this decision, concluding that Mr Velaj did not have a derivative right to reside and that the family life he would be leaving behind would not be materially or substantially impacted by his removal.¹¹³ Having concluded that the appellant did not have a derivative right of residence, the Upper Tribunal upheld the decision on his appeal against the refusal of his human rights claim, accepted that Mrs Velaj would not go to live in Kosovo and found that it would not be reasonable to expect her to do so. The Upper Tribunal concluded that, although the effects of the appellant's deportation would be harsh on the family and indeed distressing, his removal would not make it *impossible* for the family to continue residing in the United Kingdom without him. This line of reasoning adopted by the court followed the precedent established in *Robinson* and *Dereci*: the desire to keep the family unit together did not necessarily equate to compulsion and could not, therefore, entail a derived right to reside for the individual in question.¹¹⁴ It would be unfortunate for the family to be separated if Mr Velaj (and Mr Robinson, and Mr Dereci) were to be removed from the United Kingdom, but the mother and child would not be compelled to follow him and therefore the threat presented to the public because of the father's illegal residence and criminal conviction outweighed the familial claim.¹¹⁵

This, read in conjunction with *Akinsanya*, offers a complicated and not necessarily overly positive lens of analysis for the future applications of Zambrano carers residing in the UK post-withdrawal. Though the inclusion of derivative rights protections in the EUSS and the

¹¹³ *Velaj* (n 106).

¹¹⁴ *Harrison v Secretary of State for the Home Department* [2012] EWCA Civ; Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECLI:EU:C:2011:734; *Robinson (Jamaica) v Secretary of State for the Home Department* [2019] UKSC/2019/0010.

¹¹⁵ See Chapter 3 and Chapter 4 for a discussion on why this very minimum requirement of 'compulsion' does not always present the full, or adequate, picture of what it would mean for a citizen mother to become the sole carer for a citizen child.

WA was, perhaps, initially considered generous, the actual definition of a person with a *Zambrano* right to reside offered by the transposition of the Immigration Regulations into enforceable mechanisms post-2020 is very restrictive.¹¹⁶ It expressly excludes anyone who has or had limited leave to remain on another basis at the end of the transition period or during any of the period on which they seek to rely.

Since most *Zambrano* carers would also have been eligible for limited leave to remain under the parent route in Appendix FM, this effectively excludes anyone who applied for such leave, even though at the time they would have had no idea they were closing off a more advantageous route to settlement – namely, that of the *Zambrano* right to reside under the EUSS.¹¹⁷ This guidance was compounded and confirmed by the judgment given in *Velaj*. The guidance confirms that anybody who had the ‘realistic prospect’ of obtaining leave under Appendix FM, rather than Appendix EU, was to be excluded from making an application under *Zambrano* grounds, *even if they had never made an application under any other route*. This ‘realistic prospect’ is considered to knock out any *Zambrano* claims, as the ‘realistic prospect’ of obtaining other leave means that the compulsion element of being granted a derived right of residence is, effectively, completely eliminated.¹¹⁸ The result is that, as of June 2024, only 2,335 applications for pre-settled or settled status under the *Zambrano* route had been granted out of 15,381 applications.¹¹⁹ Since August 2023, the *Zambrano* route has been closed to new applications.¹²⁰

¹¹⁶ *ibid.*

¹¹⁷ Michael Spencer, ‘Derivative residence rights and the EU Settlement Scheme’ for Doughty Street Chambers, published on 28 August 2024, available at < <https://insights.doughtystreet.co.uk/post/102jhov/derivative-residence-rights-and-the-eu-settlement-scheme> > accessed on 3 September 2024.

¹¹⁸ EU Settlement Scheme: person with a *Zambrano* right to reside; government guidance; version 8.0. Updated on 26 September 2024.

¹¹⁹ ‘How many people have been granted settlement via the EU Settlement Scheme?’, official government statistics, published 22 August 2024.

¹²⁰ Spencer (n 117).

The five-year route to settlement under Appendix EU is significantly more favourable than the 10-year route to settlement under Appendix FM. Not only is the route to settlement much shorter, it includes no application fee and no requirement to pay the Immigration Health Surcharge. By contrast, Appendix FM leave is subject to a no recourse to public funds restriction and requires renewal every thirty months with significant fees and NHS surcharges. This can trap many foreign national parents of British citizen children in a precarious cycle of poverty.¹²¹ The EUSS has in actuality not granted status to many individuals applying under derivative rights claims that are linked uniquely to EU law. Of the 32,560 applications made, as of 31 March 2024, 18,280 were made under the ‘Chen’, ‘Ibrahim/Teixeira’, or ‘Zambrano’ routes. The Chen route accounts for 1,740 grants of status and the Ibrahim/Teixeira route for 990 grants of status, but the guidance for applications under Chen routes and Teixeira/Ibrahim routes are worded similarly to the Zambrano route, making them equivalently restrictive – only grants of residence under those regulations that were assigned as solely that residence, with no other claims, would be considered valid.¹²² The EUSS and the WA includes provisions to protect those residing in the United Kingdom under the *Chen* and *Ibrahim/Teixeira* principles, but not *Zambrano* or *Chavez-Vilchez*.

This is why the *Akinsanya* and *Velaj* judicial reviews were taken on, and why the failure of the judgments to amend the regulations in the guidance issued by the Home Office to expand the routes of access for individuals in precarious situations, and whose derivative rights would be indicative of a greater strength of citizenship and protective status, can be considered a significant downgrade of EU citizenship protections.¹²³ The lack of focus on protection of derivative rights of residence claims for TCN carers of British citizen children are a clear example of EU citizenship deconstitutionalisation: these individuals no longer have routes of

¹²¹ *ibid.*

¹²² How many people have been granted EU settlement status? (n 119).

¹²³ Spaventa (n 29); Spencer (n 117); Smismans (n 1); Juverdeanu (n 68); O’Brien (n 49).

access to individual redress at the CJEU, and are instead dependent upon a wholly domestic system that offers fewer rights protections than the ones they would have been able to claim the protections of otherwise.¹²⁴ The ‘divorce’ from the constitutional framework underpinning EU citizenship, and the removal of that status from individuals who should, in theory, remain fully protected by the domestic frameworks of their Member State of both nationality and residence, has led to a stripping of rights and of protections to rights access that is not shared by the individuals who still possess EU citizenship status, even within the United Kingdom and under the Withdrawal Agreement.¹²⁵

5.3.3: Access to social security benefits for EU citizens under the EUSS

The current nexus of debate is around social security access, and what rights to social assistance come with the right of lawful residence on the territory of the United Kingdom.¹²⁶ The government of the United Kingdom has indicated, with the rollout of the new immigration system, that their priority is immigration that would not rely on state support at all.¹²⁷ Because settled status under the EUSS is a status and a right to reside that can only be lost if the migrant relocates out of the United Kingdom for five years, the right to reside therefore has to be limited to only residence – and thereby employment – but no state support in order to bring the priority of the government in line with the citizens’ rights that were protected by treaty under EUWA.¹²⁸

¹²⁴ Mindus (n 6); Nathan Cambien, ‘Residence Rights for EU Citizens and Their Family Members: Navigating the New Normal’ in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill 2020); O’Brien (n 49).

¹²⁵ More (n 5); Anne Wesemann, ‘The power of the norm: EU as a constitutional right’ in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar Publishing 2022).

¹²⁶ Why social security access has been so contentious, particularly in the United Kingdom, is a particularly interesting question both politically and legally, but does lie outside the scope of this thesis. See: Cecilia Bruzelius, Elaine Chase and Martin Seeleib-Kaiser, ‘Social Rights of EU Migrant Citizens: Britain and Germany Compared’ (2016) 15 *Social Policy and Society* 403.

¹²⁷ As mentioned above, all migrants on visas and those with pre-settled status are explicitly excluded from reliance on public funds.

¹²⁸ Piper (n 62); Spaventa (n 29); Barnard and Butlin (n 47); Herwig Verschueren, ‘The complex social security provisions of the Brexit Withdrawal Agreement’ (2020) 23 *EJSS* 7.

The linked cases of *Fratila* and *CG* are an example of this, as they both address the access to social security rights for citizens with pre-settled status; although *Fratila* is a UK-based decision and *GC* was referred to the CJEU as a preliminary reference.¹²⁹

In *CG*, the claimant was an EU citizen who moved to Northern Ireland several years ago with her then-partner. She has two children, both of whom were born in Northern Ireland and therefore have both British and Irish nationality, making them EU citizens through their link to Ireland. In June 2020, CG was granted pre-settled status and therefore has a right of residence in the United Kingdom independently of any potential derivative rights claim as the primary carer for her two young children (although this fact also applies and was not disputed by any of the parties in the case). Also in June 2020, CG made a claim for UC which was denied because of her pre-settled status. The CJEU confirmed with their finding that Article 18 TFEU, the free movement and non-discrimination protection that CG was relying on in her claim, only applies in its own right to situations where the TFEU *does not* already lay down specific rules on non-discrimination. The piece of EU legislation that was, therefore, at play in denial of universal credit was the Citizenship Directive, which contained a specific expression on the principle of non-discrimination; rather than the more ‘blanket’ assessment of Article 18 TFEU.¹³⁰

The Court acknowledged that Article 24(1) of the Citizenship Directive requires that EU citizens residing in another Member State on the basis of the Directive enjoy equal treatment with nationals of the Member State. However, in respect of access to social assistance, an EU citizen can *only* claim equal treatment if their residence complies with the conditions of the Directive and that Member States retain the right under Article 7 of the Citizenship Directive to restrict access to social security rights of economically inactive Union

¹²⁹ *Fratila and another (AP) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1741; Case C-709/20 *CG v the Department of Communities in Northern Ireland* [2021] ECLI:EU:C:2021:602.

¹³⁰ *CG* (n 129) paras 65-68.

citizens who do not have the sufficient resources to support themselves, meaning that they cannot be considered as lawfully or habitually resident under the Directive and claim its non-discrimination protections.¹³¹ In the specific example of CG, the CJEU decided that the information submitted by the Northern Irish authorities indicated that CG, lacking sufficient resources to support herself and her family, would be likely to become an unreasonable burden on the social assistance system of the UK and therefore cannot rely on the principle of non-discrimination in the Citizenship Directive to access those social security benefits.¹³² That assessment, according to the CJEU, cannot be called into question by the fact that CG has a right of temporary residence under national law which was granted without condition as to resources. To permit such claimants to rely on the principle of non-discrimination when they do not satisfy the conditions under the Citizenship Directive, would, in the CJEU's view, give them broader protection that they would have enjoyed under the Directive, even if national law can in principle be written to allow broader protections than the Directive itself.¹³³ It is, in a sense, an inversion of the 'lowest common denominator' principle of protection in EU law and its binding impact on Member State legislation and policies.

In the initial judgment in *Fratila*, however, the judiciary of the United Kingdom took a different approach to that held under *CG*: the Court of Appeal considered it unlawful that the rule of pre-settled status not being considered a sufficient residence to prove 'habitual residence' and therefore be ineligible for universal credit was unlawful. The reason for unlawfulness was, unlike in *CG*, the non-discrimination provision in Article 18 of TFEU.¹³⁴ In light of *CG*, however, a decision which was binding on all Member States – including, at this time, the United Kingdom – the Secretary of State's appeal was allowed and the United

¹³¹ *ibid* para 78.

¹³² *ibid* para 92.

¹³³ *ibid* para 93.

¹³⁴ *Fratila* (n 129) paras 71, 74.

Kingdom Supreme Court overturned the original decision in *Fratila*, making the exclusion of those with pre-settled status from universal credit once again lawful.¹³⁵

The decision in *CG* did, however, confirm that – even though the EU citizens residing in the United Kingdom with pre-settled status were covered by national law as well as EU law – their residence was within scope of EU law, and therefore they could rely on Charter protections.¹³⁶ Thus, Member States must ensure that the EU citizen’s rights under Article 1 (human dignity), Article 7 (respect for private and family life) and Article 24(2) (rights of the child) of the Charter are protected. Under these rights, the decision-maker – in the case of *CG* and *Fratila*, the Department for Work and Pensions – would be required to verify that the denial of UC to the claimants would not expose the citizens and their children to any violations of the rights enshrined in the relevant articles of the Charter.¹³⁷ While the Supreme Court’s decision in *Fratila* does not deal with the rights of EU citizens claiming UC under the Charter, that decision will be binding on decision-makers and will have to be taken into consideration by the DWP when granting or refusing access to universal credit – or, since January 2021 when the Charter was no longer a portion of retained EU law, the equivalent rights found in the general principles of EU law that do remain as part of domestic law through their encoding in the WA.¹³⁸ There are also questions being currently raised about whether or not EUSS residence rights can be considered separate – i.e., purely domestic – to residence rights acquired and protected by EU and international law that is the WA.¹³⁹

This complicated interplay between residence rights under the Withdrawal Agreement, and the key distinctions between pre-settled versus settled status, and the resultant rights that

¹³⁵ *Fratila (and another) v Secretary of State for Work and Pensions* [2020] UKSC 53 on appeal from [2020] EWCA Civ 1741.

¹³⁶ *CG* (n 129) paras 86-88.

¹³⁷ *ibid* paras 89-91.

¹³⁸ *AT v Secretary of State for Work and Pensions* [2023] EWCA Civ 1307.

¹³⁹ *Welsh and O’Brien* (n 5).

it confers come into particular focus in the case of *Fertré*.¹⁴⁰ Gwladys Fertré, a French citizen living but not working in the United Kingdom prior to the end of the transition period and in possession of pre-settled status, had applied for housing assistance to her local authority which was denied on the basis of her being resident, not on the basis of the WA and therefore her EU law right to reside, but on a visa which stipulated that she had no recourse to public funds (of which the housing assistance was); the argument presented by Ms Fertré was that to deny her the housing assistance, which was made available unconditionally to British citizens habitually resident in the United Kingdom, was a violation of her right to equal treatment as per Article 23(1) of the Withdrawal Agreement as an EU citizen residing in the UK on the basis of WA rights.¹⁴¹ The original judgment was that the local authority was correct to deny her the housing assistance, as her residence was not conditioned upon the Withdrawal Agreement since she was not in compliance with its limitations and conditions (that of being economically active or self-sufficient), and that the grants of pre-settled status did not necessarily correlate to those who could have a lawful right to reside under the Withdrawal Agreement.¹⁴² Furthermore, because Ms Fertré's right to reside was under a 'new residence status' (that of pre-settled status) rather than under the WA, any protections she was entitled to would come solely from domestic law; meaning that she was excluded from the protections of equal treatment stipulated in Articles 23(1) of the WA as her right to reside was conditioned upon solely domestic law rather than EU law.¹⁴³

This judgment is a potential example of the 'deconstitutionalisation' of EU citizenship for two key reasons: it illustrates the emphasis on domestic law and immigration controls even in the case of rights exercised under the WA; and the judgment creates, by making pre-settled

¹⁴⁰ *Fertré* (n 34).

¹⁴¹ *ibid* paras 10, 12, 4.

¹⁴² *ibid* paras 72, 75, 76, 88.

¹⁴³ *ibid* paras 89-90. This was upheld by the Court of Appeal in July 2025.

status an immigration status *very explicitly excluded from access to a WA-based residency*, a dangerous precedent that would limit the rights of individuals with pre-settled status and also their methods of individual redress in case of rights violations.¹⁴⁴ It further decouples rights under the EUSS, which originate in EU citizenship rights, from the constitutional framework of the EU and any potential routes of redress within the EU system.¹⁴⁵ If an individual with pre-settled status is not considered resident based upon the WA, they cannot after all have recourse to the protections encoded within the Charter – which would protect against the extreme destitution and resultant affronts to dignity that being made homeless as a result of being denied housing assistance.¹⁴⁶ That pre-settled status is not considered a ‘lawful enough’ residence to be eligible for social security benefits was already established within both the WA and the EUSS guidance; however to further limit the protections of pre-settled status to exclude the residual EU law protections included in them is a further deconstitutionalisation of EU citizenship because it removes, even further, any potential avenue to redress.¹⁴⁷

It is a further embedding of the economic pre-conditions – for example, the emphasis placed by the respondent in the *Fertré* case on the fact that Ms Fertré could not be lawfully resident under the WA because she was economically inactive and reliant on state support – found within the ‘limiting measures’ of the CRD into domestic law, and a further emphasis placed on the importance of work within the context of EU citizenship rights rather than the social rights of EU citizens.¹⁴⁸ The rights of EU citizens to non-discrimination, equal treatment, Charter protections, and residence rights guaranteed under and by EU law, as well as to access any further citizenship rights, will only apply in the United Kingdom in the increasingly narrow

¹⁴⁴ Piper (n 62); Charlotte O’Brien, ‘The Great EU Citizenship Illusion Exposed: equal treatment rights evaporate for the vulnerable’ (2021) 46 EL Rev 801; O’Brien (n 49); Welsh and O’Brien (n 5).

¹⁴⁵ Ignacio Forcado Barona, ‘Brexit and European Citizenship: Welcome Back to International Law’ (2020) 24 Span Yrbk Intl L 210; Welsh and O’Brien (n 5).

¹⁴⁶ *AT* (n 138); O’Brien (n 32).

¹⁴⁷ *Fratila* (n 129); *GC* (n 130); O’Brien (n 144); Verschueren (n 128).

¹⁴⁸ Piper (n 62); O’Brien (n 32).

applications of the WA and *only* the WA – and this can be found to exclude pre-settled status, if the recourse of the individual with pre-settled status to basic social security assistance can be deemed ‘an unreasonable burden’.¹⁴⁹ The ‘deconstitutionalisation’ of EU citizenship is therefore evident here: the limiting restrictions of the CRD have been permanently adopted as methods for restricting the rights of EU citizens, but because those rights are now restrictable under solely domestic law, there is no redress to be found in the constitutional provisions of proportionality and non-discrimination under EU law for EU citizens.¹⁵⁰

The picture is not wholly bleak however: the Court of Appeal has found, at least for now, that rights to social security access are *still* applicable in the United Kingdom even as the right to reside no longer exists under EU law – therefore ruling out Charter protections – but rather within the protections found in the Withdrawal Agreement.¹⁵¹ The rights to protection from cruel and degrading treatment, as well as the right to dignity, must be considered by the DWP before their application to access Universal Credit is unilaterally refused solely on the grounds of only having pre-settled status under the EUSS.¹⁵² Questions, however, still remain as to whether or not this judgment can be relied on to access other social assistance, such as housing; and new DWP operational guidance, issued in 2023, excludes other claimants from universal credit even within the scope of EUWA.¹⁵³ The debates and discussions around who, and how much, should have access to social security access and how deeply that should be conditioned upon status are therefore likely to continue.¹⁵⁴

5.4: Deconstitutionalisation: former EU citizens (British nationals) in the EU

¹⁴⁹ Welsh (n 82); O’Brien (n 144); Rui Tavares Lanceiro, ‘Brexit and EU Citizen’s Social Rights – the Commission v United Kingdom and the CJEU case law on social rights’ in Ingolf Pernice and Ana Maria Guerra Martins (eds), *Brexit and the Future of EU Politics: A Constitutional Law Perspective* (Nomos 2019).

¹⁵⁰ O’Brien (n 49); Verschueren (n 128); Welsh and O’Brien (n 5).

¹⁵¹ Charlotte O’Brien and Alice Welsh, ‘Court of appeal decides the Secretary of State is wrong, wrong, wrong: the Charter applies to people with pre-settled status’ (2024) 46 J Soc Wel & Fam L 133.

¹⁵² *AT* (n 138) paras 124-125.

¹⁵³ O’Brien and Welsh (n 151).

¹⁵⁴ Welsh and O’Brien (n 5).

Another example of deconstitutionalisation as evidenced through Brexit is British citizens – formerly EU citizens – residing in the territory of the European Union after having utilised their right to freedom of movement. It is worth briefly touching on this group of individuals, which at last count included nearly 1.5 million people.¹⁵⁵ Their situation has no clear analogy anywhere in the literature on EU citizenship – the closest equivalent is discussions of TCNs who are lawfully resident in the EU under the Long-Term Residence Directive, and before the Withdrawal Agreement was ratified British citizens residing in the territories of the Member States of the EU would have become ‘third-country residents’ overnight with limited, or no, protections available under EU law that were not already afforded to TCNs.¹⁵⁶ In fact, in some cases those British citizens would not be eligible for the protections afforded in the LTRD as their residence in those Member States of which they were resident, concluded under freedom of movement rules, would not match up with the requirements TCNs must meet in order to be considered lawfully resident under the LTRD.¹⁵⁷ Despite the fact that the most serious stripping of rights, and the loss of EU citizenship itself, happened to this group of individuals, they have received little attention in the literature, compared to the EU citizens who were losing freedom of movement protections in the United Kingdom.¹⁵⁸ Perhaps a reason for the lesser focus on these 1.5 million individuals is that they are, on average, choosing to naturalise in the country of their residence (and once again become EU citizens) and so the interesting legal position they occupy is becoming more and more academic.¹⁵⁹ This, however, does not compare, to the

¹⁵⁵ ‘How many British citizens live in the EU?’, UK in a Changing Europe, last updated 21 September 2020: <<https://ukandeu.ac.uk/the-facts/how-many-british-citizens-live-in-the-eu/#:~:text=In%202019%2C%20according%20to%20UN,Italy%20was%20fifth%20with%2066%2C000.>> accessed on 11 April 2025.

¹⁵⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L16/44; Mindus (n 6); Nic Shuibhne (n 11).

¹⁵⁷ Mindus (n 6).

¹⁵⁸ *ibid.*

¹⁵⁹ Maarten Vink, ‘The Brexit Naturalisation Effect: An Update Eight Years After the Referendum’ (EUI Global Citizenship Observatory, March 6 2025) available at <<https://globalcit.eu/the-brexit-naturalisation-effect-an-update-eight-years-after-the-referendum/>> accessed on 4 August 2025.

reams of material (cited extensively in Chapters 4 and above here in Chapter 5) that discuss the position of EU citizens residing in the United Kingdom.

Rights for ‘former EU citizens’ living in the territory of the European Union after the end of the transition period follow the same general principle as the protections offered EU citizens in the United Kingdom: the ‘freezing’ of rights protections at the current level, as well as a protection offered to ‘past’ rights rather than future ones.¹⁶⁰

This difference in treatment in the scholarly literature goes to the heart of both the ‘deconstitutionalisation’ phase that was exemplified in Brexit, while also underlining the constitutional legitimacy of EU citizenship as a status.¹⁶¹ Former EU citizens – British citizens living in the territory of the European Union – are no longer the ‘problem’ of the EU, in the sense of a traditional nationality: the responsibility for the protection of their rights can no longer belong to the community of Member States that they elected to leave on the same democratic grounding that they had initially elected to join.¹⁶² They are losing EU citizenship rights – deconstitutionalisation – and it could be argued that they are losing them against their will (British citizens living in the European Union were not permitted to vote in the British referendum, despite the fact that they would be most affected by the decision); and they are losing the routes of access to individual redress against infringement of citizenship rights that are offered in the EU under EU law.¹⁶³

¹⁶⁰ Shaw (n 78); Mindus (n 6); More (n 5).

¹⁶¹ Hanneke van Eijken, *EU Citizenship and the Constitutionalisation of the European Union* (Europa Law Publishing 2015); Carole Lyons, ‘Citizenship in the Constitution of the European Union: rhetoric or reality?’ in Richard Bellamy (ed), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avesbury 1996); Dora Kostokapoulou, ‘Epilogue: on guest houses and institutional reconfigurations’ in Dora Kostokapoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar Publishing 2022).

¹⁶² *Préfet du Gers* (n 11); *Wrightman* (n **Error! Bookmark not defined.**); Nic Shuibhne (n 11).

¹⁶³ Mindus (n 6).

Most notably, of course, they have lost the right to freedom of movement linked to EU citizenship – in most of the frameworks that exist to govern their immigration status (the European equivalents of the EUSS in the UK) they cannot move or reside out of the Member State of their residence for longer than six months without losing their status, and of course there is no ‘harmonisation’ standard between the different schemes that would offer a minimum standard of protections guaranteed by the EU.¹⁶⁴ They are guaranteed, by the principles of reciprocity within the Withdrawal Agreement, to have a continuing right to reside in the state to which they moved when exercising their freedom of movement rights, but any future right to freedom of movement is lost.¹⁶⁵ The protections for social security access for EU citizens vary within each individual Member State system, as well, introducing a new layer of potential discrimination into access to social security and national health systems.¹⁶⁶ Former EU citizens have also lost the political rights associated with EU citizenship.¹⁶⁷

The lack of greater – or more unified – protections offered to former EU citizens can be understood, to a certain extent, as a political choice made by the EU negotiators to prioritise the protections of EU citizens, as well as to create another layer of disincentivisation to other Member States to consider withdrawal.¹⁶⁸ That can, perhaps, go some ways to explaining why the academic coverage tends to congregate more around EU citizens who have lost EU-law based protections in the United Kingdom: they are more easily perceived as the ‘victims’ of a political choice made by others.¹⁶⁹ But the British citizens living in Europe who have now lost

¹⁶⁴ *ibid.*

¹⁶⁵ More (n 5); Reuven Ziegler, ‘UK Citizens as Former EU Citizens: Predicaments and Remedies’ in Rainer Bauböck (ed), *Debating European Citizenship* (IMISCOE Research Series, 2018).

¹⁶⁶ More (n 5); Anne Daguerre, ‘Access to Means-Tested Benefits for Low-Income EU Nationals Before and After the Withdrawal Agreement: A French-UK Comparison’ (2023) 30 *JSSL* 73.

¹⁶⁷ More (n 5).

¹⁶⁸ Kostakopoulou (n 2); More (n 5); Martijn van den Brink and Dimitry Kochenov, ‘Against Associate EU Citizenship’ (2019) 57 *JCMS* 1366; Sara Wallace Goodman, ‘EU Citizenship: A Tool for Integration?’ in Roxana Barbulescu, Sara Wallace Goodman, and Luicy Pedroza (eds), *Revising the Integration-Citizenship Nexus in Europe: Sites, Policies and Bureaucracies of Belonging* (Springer Cham, 2018).

¹⁶⁹ Van den Brink and Kochenov (n 168).

their freedom of movement rights, political rights, rights to non-discrimination and equal treatment, as attached to EU citizenship, are also living with the consequences of a political choice they did not make.¹⁷⁰ The vulnerability and conditionality of EU citizenship is even more apparent when addressing the consequences of its loss.¹⁷¹ The consigning of those former EU citizens to the status of TCNs (albeit favored ones) also consigns their TCN family members to a complete and total loss of any derived right within EU law, and throws them entirely to the mercy of domestic immigration controls.¹⁷² Those individuals – as discussed in Chapters 1-2, oftentimes the primary carers of vulnerable children and vulnerable individuals themselves – have been left completely out of the academic discussion on the consequences of a deconstitutionalised EU citizenship.

Both EU citizens in the United Kingdom, and British citizens living in the EU, are being permanently ‘divorced’ from the locality of EU citizenship rights. But a reinforcement of the constitutional expression that is EU citizenship: they are not being made stateless by the decision, as they retain their nationality of Member State of origin; and the democratic will of the polity to which they belong is being respected: their Member State, of whom they are nationals, is responsible for their rights protections and there can be no further recourse to EU rights because of the binding nature of a democratic decision taken by the electorate, and the public, to which they belong.¹⁷³ The constitutional framework that underpins EU citizenship and EU institutions, with its emphasis on democratic will and rule of law, has been respected and solidified, and what – perhaps – has been sacrificed is the notion that EU citizenship could,

¹⁷⁰ Shaw (n 78); More (n 5).

¹⁷¹ Juverdeanu (n 68); Dora Kostakopoulou, ‘When EU Citizens become Foreigners’ (2014) 20 ELJ 447.

¹⁷² More (n 5); O’Brien (n 49); Kostakopoulou (n 171).

¹⁷³ Kurić and Others v Slovenia App no 26828/06 (ECtHR, 26 June 2012); *Préfet du Gers* (n 11) Opinion of AG Collins.

or should, exist as an autonomous status – or even a fundamental status on the same grounding as Member State nationality.¹⁷⁴

5.5: Concluding remarks

The complications inherent in the different layering and access points of rights for EU citizens residing in the United Kingdom can be construed as evidence of the dangers of deconstitutionalising, and geographically divorcing, the protections of citizenship from their constitutional framework and the legislation and means of judicial review that allow for individual redress.¹⁷⁵ The restrictions in access to social security rights to only those with settled status, and only to those who were never in contravention of the limiting measures of the CRD; the complicated routes of evidence for permanent residence rights for TCN family members and the explicit exclusion of those TCN family members from the residence schemes that came with WA and therefore EU-protected rights; the limitation and further embedding of the restrictive measures of the CRD into domestic law and the establishment of the economic pre-conditions of the CRD into the definitions of who would be permitted to carry over an EU citizenship right post-transition period; the focus on being a ‘good’ EU migrant by being in work and not requiring social security support – all of these are indications of a deconstitutionalisation of EU citizenship, not only away from the legal and constitutional framework that underpins EU citizenship.¹⁷⁶

¹⁷⁴ Volker Roeben, Petra Minnerop, Pedro Telles and Jukka Snell, ‘Revisiting Union citizenship from a fundamental rights perspective in the time of Brexit’ (2018) 5 EHRLR 450; Henri de Waele, ‘EU Citizenship: Revisiting its Meaning, Place and Potential’ (2010) 12 EJML 319; Garner (n 1).

¹⁷⁵ Mindus (n 6); Spaventa (n 29); Nic Shuibhne (n 8).

¹⁷⁶ Daguerre (n 166); Piper (n 62); Verschueren (n 128); O’Brien (n 49); Victoria Wooton, ‘Is article 14 the new article 18? Social welfare access, fundamental rights, and non-discrimination in Europe’ (2022) 29 JSSL 172; Iyiola Solanke, ‘The Impact of Brexit on Black Women, Children and Citizenship’ (2020) 58 JCMS 147; Spaventa (n 29); Barnard, Butlin and Costello (n 47); Wesemann (n 125); Juverdeanu (n 68); More (n 5); Cambien (n 124); Elise Muir, ‘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’ in Nathan Cambien, Dimitry Kochenov, and Elise Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020); Strumia (n 13).

Meanwhile, the deconstitutionalisation of EU citizenship in the UK – as it started under the CRD transposition and ‘finalised’ under Brexit – is perhaps a reflection of the UK’s historic role on the ‘fringes’ of the European project, but in a practical perspective means that EU citizens living in the UK were operating at a ‘remove’ from the constitutional protections of EU citizenship because the ‘greatest’ instrument of their rights was the CRD, and Treaty rights were interpreted (and backed up by the Court in the relevant jurisprudence) as operating on a lesser constitutional lever than the limiting power of the CRD.¹⁷⁷ This has continued under the Withdrawal Agreement and the EUSS, because of the ‘declining’ nature of rights they are afforded under the ‘divorce’ from the geographic and constitutional framework that guarantees those rights.¹⁷⁸ The rights that EU citizens can access under the EUSS and the WA are narrowing, and do not allow for much beyond the strict residence right that would have been permitted themselves and their family members under the CRD, as well as attempting to exclude those with pre-settled status from any access to social assistance such as Universal Credit, or social security like housing assistance.¹⁷⁹ Derivative rights of residence for TCN family members have also been downgraded to very minimal protections, with no regularised immigration status, and a complex and byzantine system of redress that leaves vulnerable individuals in increasingly precarious positions.¹⁸⁰ The status of derivative rights holders in Europe is even less well known than in the UK, as there is very little research conducted on the current status of those individuals; but it is perhaps safe to assume that it is not much more secure.¹⁸¹

The years between 2021-2024, as this chapter has argued, have proven to be the ‘next stop’ of deconstitutionalisation of EU citizenship protections in the United Kingdom, and

¹⁷⁷ Piper (n 62).

¹⁷⁸ Spaventa (n 29).

¹⁷⁹ Piper (n 62); O’Brien (n 49); *AT* (n 138); *Fertré* (n 34).

¹⁸⁰ O’Brien (n 49); Cambien (n 124).

¹⁸¹ Cambien (n 124).

perhaps the EU more generally. The political aspect of ‘limited’ citizenship jurisprudence has been removed, as other Member States, while remaining sceptical of increased integration and full-flow freedom of movement regulations, are less inclined to operate right on the edges of minimum protections for EU citizenship, and have gone less far than the United Kingdom in explicitly and actively reducing access to social security rights for non-economically active EU citizens and their family members resident on their territories. The implementation into domestic law of retained EU case law, and the explicit exclusion of any Charter protections from domestic legislation, seems to indicate that the fundamental rights of EU citizens will not be protected in the United Kingdom going forward – at least not under the guise of fundamental rights of EU citizenship. As shown in the cases of *Akinsanya* and *Velaj*, protections for derivative rights bearers under a purely domestic setting are likely to dip below the minimum standard protections available in the European Union, for TCNs who derive their rights from children and adults alike.

Brexit also offers a key analytical point in the dichotomies of EU citizenship constitutionalisation more generally: the disparity in where EU citizenship rights have been strengthened rather than weakened is some indicator towards where the final political and constitutional break occurred.¹⁸² On the one hand, the political and fundamental rights of EU citizens were strengthened even while the right to access social security were significantly ‘hollowed’.¹⁸³ This is at the root of the constitutional and political pressures between the CJEU,

¹⁸² Dora Kostakopoulou, ‘European Citizenship: Writing the Future’ (2007) 13 ELJ 623.

¹⁸³ Case C-650/13 *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde* [2015] ECLI:EU:C:2015:648; Case C-182/15 *Aleksei Petruhin v Latvijas Republikas Generalprokuratūra* [2016] ECLI:EU:C:2016:630; Case C-191/16 *Romano Pisciotti v Bunderspublik Deutschland* [2018] ECLI:EU:C:2018:222; *Kurić* (n 173); *Jeunesse v Netherlands* App no 12738/10 (ECtHR, 3 October 2014); Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrari and Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385; *X and Y v. Romania* App no 2145/16 and 20607/16 (ECtHR, 19 January 2021); Jesse Moritz and Daniel William Carter, ‘Life after the ‘Dano-Trilogy’: Legal Certainty, Choices and Limitations in EU Citizenship Case Law’ in Nathan Cambien, Dmitri Kochenov and Elise Muir (eds), *EU Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020); Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358; Case C-67/14 *Jobcenter Berlin Neukoln v Nazifa Alimanovic and Others* [2015] ECLI:EU:C:2015:597; Case C-299/14 *Vestische Arbeit*

the EU, and the Member States, which bubbled over in Brexit with the United Kingdom – perhaps the Member State always ‘best placed’ to be the first to make this break – in a way that was perhaps inevitable.¹⁸⁴ Rights that are ‘cheap’ to enforce – such as political rights to vote, to consular protection, and to higher bars to clear before extradition to a third country can be made possible – and which do not come at a political cost to the CJEU or the institutional frameworks of the EU can be strengthened.¹⁸⁵ Rights that were easy to frame as parasitic, or as a use as an example of ‘overburdening’ a host Member State because of ‘unnecessarily permissive’ EU citizenship rights, such as social security and TCN derivative rights of residence, were restricted because it would be more politically ‘expensive’ to let those rights embed further.¹⁸⁶

The possibility of a new stage of ‘reconstitutionalisation’ for EU citizenship within the EU, as well as a new stance of the EU in protecting its citizens more completely, is now a greater political likelihood without the ‘brake’ provided previously by the United Kingdom’s competing constitutional and political pressures.¹⁸⁷ It is this potential new stage, the avenues that it might open for a greater ‘social’ aspect to the constitutional protections inherent in EU citizenship, and how the stages of constitutionalisation that preceded it can both inform that

Jobcenter Kreis Recklinghausen v Jovanna Garcia-Nieto, Joel Pena Cuevas, Jovanlis Pena Garcia, Joel Luis Pena Cruz [2016] ECLI:EU:C:2016:114; CG (n 129).

¹⁸⁴ Catherine Barnard and Emilija Leinarte, ‘The Creation of European Citizenship: Constitutional Miracle or Myopia?’ (2022) 24 CYELS 24; Susanne K. Schmidt, ‘Extending Citizenship Rights and Losing It All: Brexit and the Perils of ‘Over-Constitutionalisation’ in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Bloomsbury Publishing 2017).

¹⁸⁵ Wesemann (n 125).

¹⁸⁶ Muir (n 176); Hester Kroeze, ‘Distinguishing Between Use and Abuse of EU Free Movement Law: Evaluating Use of the ‘Europe-route’ in Family Reunification to Overcome Reverse Discrimination’ in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020); Costamagna and Giubboni (n 22); Schmidt (n 52); Jaan Paju, ‘The outer limits of transnational solidarity between the EU’s Member States in a social security setting’ in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy: Navigating Challenges and Crises* (Edward Elgar Publishing 2022).

¹⁸⁷ Roeben et al (n 2); Mindus (n 6); Wesemann (n 125); Kostakopoulou (n 2); Laffan (n 22); Sandra Seubert, ‘Shifting Boundaries of Membership: The politicisation of free movement as a challenge for EU citizenship’ (2019) 26 ELJ 48; Maas (n 51); Strumia (n 13).

new phase and allow it a stronger foundation for a future, fully constitutionalised, and more greatly protective, citizenship, that will be the focus of the concluding chapter.

Conclusion: How will a reconstitutionalisation of EU citizenship in a post-Brexit EU evolve?

1.1: Summary of the thesis

This thesis has offered an analysis of the constitutionalisation of EU citizenship through two main ‘narrative’ stages, namely that of constitutionalisation through rights-expansion and constitutionalisation through rights-definition, and will offer a brief discussion of the current phase, that of reconstitutionalisation in the European Union – now that Brexit has ended the ‘deconstitutionalisation’ phase of EU citizenship. The phases of EU citizenship constitutionalisation – and the consequent ‘embedding’ of citizenship rights into a solid constitutional framework that could be used to defend those rights against the national authorities of the individual Member States, even when outside the scope of freedom of movement – did not occur in a linear, or even necessarily chronological fashion, as this thesis has demonstrated.

The first part of this thesis focused on the ‘rights-enhancing’ constitutionalisation phase of EU citizenship. It was in this stage that the CJEU, through its case law, emerged as a key constitutional actor in not only the creation of the status of EU citizen (*Wijsenbeek, Grzelcysk*), but also in its embedding into the constitutional and legal framework of the EU (*van Gend & Loos, Costa, Micheletti, Rottman*).¹ EU citizenship was originally ‘grafted’ onto the previously existing category of rights to encourage the free movement of workers (see Chapter 1).²

¹ See the Appendix for a full list of cases cited and the Introduction for an indicative table.

² Sandra Seubert, ‘Shifting Boundaries of Membership: The politicisation of free movement as a challenge for EU citizenship’ (2019) 26 ELJ 48; Catherine Barnard and Emilija Leinarte, ‘The Creation of European Citizenship: Constitutional Miracle or Myopia?’ (2022) 24 CYELS 24; Jo Shaw, ‘EU citizenship: still a fundamental status?’ [2018] EUI Working Paper RSCAS 2018/14; Dora Kostakopoulou, ‘European Citizenship: Writing the Future’ (2007) 13 ELJ 623; Katarina Hyltén-Cavallius, ‘The Unfolding Destiny of Union Citizenship: From a Fundamental Status to a Status of Genuine Substance’ (2022) 24 EJML 430; Theodore Konstadinides, ‘European Citizenship in a Constitutional Context: where the ‘social’ coexists with the ‘market’ <sieps.se/en/publications/2022/European-citizenship-in-a-constitutional-context-where-the-social-coexists-with-the-market> accessed November 2022; Niamh Nic Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47 CML Rev 1597; Willem Maas, ‘The Origins, Evolution and Political Objectives of EU Citizenship’ (2014) 15 GLJ 797.

Therefore the first stage of EU citizenship constitutionalisation was the process of attaching the rights that had previously been linked to freedom of movement of workers to the freedom of movement of *citizens*.³ The original marketplace dimension of EU citizenship has never quite vanished, even as the ‘aspirational’ and social rights of the citizenship have come to take up more weight, in both the constitutional vision of EU citizenship and the political pressures that it has engendered. It is also the case, and remains the case to this day, that EU citizens who fall most obviously into the ‘worker’ camp have an easier time of proving and enforcing their rights than those who are not economically active.⁴

Part of the constitutionalisation of EU citizenship through the rights-expansion phase discussed in Chapters 1-2 was the expansion of those rights to students, self-employed persons, job-seekers, self-sufficient movers, and those in irregular employment.⁵ The expansion of those rights has included, and was most helpfully exemplified by, the expansion of derivative rights of residence for the TCN family members of not just EU workers but EU citizens, and the expansion of rights for EU citizens to access social security in their Member States of residence.⁶ The ‘rights-expansion’ of EU citizenship constitutionalisation therefore led to a greater emphasis placed on the constitutional rights of EU citizens, namely those of

³ Chapters 1 and 2 of this thesis; Seubert (n 2); Willem Maas, *Creating European Citizens* (Rowman & Littlefield 2007); Anja Wiesbrock, ‘The self-perpetuation of EU constitutionalisation in the area of free movement of persons: Virtuous or vicious cycle?’ (2013) 2 *GlobCon* 125.

⁴ Seubert (n 2); Nic Shuibhne (n 2); Charlotte O’Brien, ‘Civis capitalist sum: Class as the new guiding principle of EU free movement rights’ (2016) 53 *CML Rev* 937; Niall O’Connor and Darren Harvey, ‘Freedom of Movement and the Normative Value of the Right to Work in the United Kingdom Post-Brexit’ (2024) 25 *CYELS* 174; Charlotte O’Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Oxford Hart Publishing 2017); Henri de Waele, ‘EU Citizenship: Revisiting its Meaning, Place and Potential’ (2010) 12 *EJML* 319; Floris de Witte, ‘The Liminal European: Subject to the EU Legal Order’ (2021) 40 *YEL* 56; Catherine Jacqueson, ‘Union citizenship and the Court of Justice: Something new under the sun? Towards social citizenship’ (2002) 27 *EL Rev* 260; Matthew Goodwin and Caitlin Milazzo, ‘Taking back control? Investigating the role of immigration in the 2016 vote for Brexit’ (2017) 19 *The British Journal of Politics and International Relations* 450; Susanne K. Schmidt, ‘Extending Citizenship Rights and Losing It All: Brexit and the Perils of ‘Over-Constitutionalisation’’ in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Bloomsbury Publishing 2017).

⁵ Robin White, ‘Free movement, equal treatment and citizenship of the Union’ (2005) 54 *ICLQ* 885.

⁶ Sara Iglesias Sánchez, ‘Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?’ (2014) 20 *ELJ* 464; Jacqueson (n 4).

proportionality, equal treatment and non-discrimination, and fundamental rights protections (including the right to private and family lives) that could run counter to, and in some cases even supersede, the rights of the Member States to impose immigration controls and restrict access to welfare benefits for EU citizens and their family members.⁷ The rights that belonged to an EU citizen were those of a constitutionally guaranteed status that could be enforced and utilised by an individual seeking redress of a rights violation.⁸ This period of constitutionalisation ended with the *Zambrano* decision, discussed in great detail in Chapter 2.

The rights-delimiting phase, however, occurred when the competing constitutional and political pressures of Member States – particularly the United Kingdom, as exemplified in this thesis – began to restrict the access to EU citizens to social security benefits, occasionally in violation of their rights to proportionality and non-discrimination, and the CJEU allowed a line of more restrictive case law that prioritised the rights of the Member States to limit access to social security for non-nationals, even in the cases of EU citizens who had utilised their freedom of movement rights to work and could therefore be considered ‘desirable’, or ‘good’, EU migrants (as opposed to those who were seeking to ‘benefit tour’).⁹ This rights-delimitation phase cannot be considered as completely opposite to the rights-expansion phase, as even while the rights of EU citizens to social security access in their Member States of residence were

⁷ White (n 5); Steve Peers, ‘Free movement, Immigration Control and Constitutional Conflict’ (2009) 5 ECL Rev 173.

⁸ See Chapter 2.

⁹ Michael Blauberger, Anita Heindlmaier, Dion Kramer, Dorte Sindbjerg Martinsen, Jessica Sampson Thierry, Angelika Schenk and Benjamin Werner, ‘ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence’ (2018) 25 JERP 1422; Schmidt (n 4); Charlotte O’Brien, ‘The Great EU Citizenship Illusion Exposed: equal treatment rights evaporate for the vulnerable’ (2021) 46 EL Rev 801; Ferdinand Wollenschläger, ‘An EU Fundamental Right to Social Assistance in the Host Member State? The CJEU’s Ambivalent Approach to the Free Movement of Economically Inactive Union Citizens Post Dano’ (2022) 24 EJML 151; Matthew Evans, ‘Abusing or Misusing the Right of Free Movement? The UK’s Policy towards EU Nationals Sleeping Rough’ in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Publishing 2020); Barnard and Leinarte (n 2); Jaan Paju, ‘The outer limits of transnational solidarity between the EU’s Member States in a social security setting’ in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy: Navigating Challenges and Crises* (Edward Elgar Publishing 2022).

being restricted, the rights of residence (see Chapter 3) of those citizens and their TCN family members were continually reinforced even in the light of restrictive immigration controls (*Metock, MRAX, K.A.*). Similarly, the political and fundamental rights of EU citizens were continually being expanded throughout this period and exceptions to the social security restrictions were made in cases involving the rights of citizen children (*Chavez-Vilchez*).¹⁰ This phase in EU citizenship constitutionalisation has therefore been called the ‘citizenship-defining’ phase, when some rights were being restricted but other rights were more fully fleshed-out.

The main difference between the two phases was the emphasis placed by the CJEU on the source of law identified as the primary source of both rights and rights definition: in this delimitation phase, the primary source of EU citizenship rights used in CJEU jurisprudence was the Citizenship Directive, an instrument adopted to ‘give limiting measures and scope’ to the rights of EU citizens as found in the Treaties. Because of this emphasis on ‘limiting measures’ rather than the emphasis on the broader rights found in the Treaties or the Charter, this period was the phase in which the CJEU defined and set the outer edges of who and to what extent would be protected by the constitutional status that was EU citizenship.

This period of deconstitutionalisation was most easily identified, and also came to an end, throughout the process of the negotiations surrounding the withdrawal of the United Kingdom from the Union.¹¹ The ‘limiting measures’ of the CRD were adopted into permanent domestic law that will only allow for EU citizens to access the social security rights embedded in that restrictive legislation without also accessing the fundamental and political rights expanded during the deconstitutionalisation period, and with limited means of access to the individual redress opportunities afforded in a Member State still attached to the constitutional

¹⁰ Kostakopoulou (n 2).

¹¹ See Chapters 4-5.

framework of EU citizenship.¹² EU citizens living in the United Kingdom therefore find themselves subject to a domestic setting divorced from the constitutional frameworks that protect their access to social security along the lines of equal treatment and proportionality, and also potentially subject to a domestic system of immigration control that limits the rights of their TCN family members to residence.¹³ The case of British citizens – formerly EU citizens – living in the territory of the Union is an even starker picture of the deconstitutionalisation of EU citizenship.¹⁴

1.2: A new phase in the EU: towards a reconstitutionalisation of EU citizenship?

So where does EU citizenship go from here? Brexit has raised perhaps the most pressing, and the most difficult to answer, questions about the fundamental value and benefits of a status that can be so easily revoked as the status was from British citizens.¹⁵ There are many competing claims and arguments as to what, and how, the constitutional processes of EU citizenship as well as the EU as a whole will evolve and change to reflect the seismic political shift that was Brexit.¹⁶ How EU citizenship policy and jurisprudence might – once again – expand not only the range of rights that come under the umbrella of EU citizenship, but also the extent to which they can be protected, now that the ‘brakes’ on the broad readings of EU citizenship rights and

¹² Luke Piper, ‘Has the implementation of the Withdrawal Agreement been a success? An EU citizens’ rights perspective’ (2024) 38 JIANL 175; Anne Wesemann, *Citizenship in the European Union* (Edward Elgar Publishing 2020); Patricia Mindus, ‘A constitutional eyesore after Brexit: EU citizenship and British nationality’ in Devyani Prabhat (ed), *Citizenship in Times of Turmoil?* (Edward Elgar Publishing 2019).

¹³ Charlotte O’Brien, ‘Between the devil and the deep blue sea: vulnerable EU citizens cast adrift in the UK post-Brexit’ (2021) 58 CML Rev 431.

¹⁴ Niamh Nic Shuibhne, ‘Protecting the legal heritage of former Union citizens: EP v Préfet du Gers’ (2023) 60 CML Rev 475; Mindus (n 14).

¹⁵ Anne Wesemann, ‘The power of the norm: EU as a constitutional right’ in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar Publishing 2022); Mindus (n 12).

¹⁶ *Research Handbook on European Union Citizenship Law and Policy*, eds. Dora Kostakopoulou and Daniel Thym (Edward Elgar Publishing 2022); *The European Union After Brexit*, eds. Scott Greer and Janet Laible (UMP 2020); *Reconsidering EU Citizenship: Contradictions and Constraints*, eds. Sandra Seubert, Oliver Eberl and Frans van Waarden; and Sandra Seubert, ‘Dilemmas of EU Citizenship: The Persistent Divide Between Economic and Political Integration’ in Niklas Bremberg and Ludvig Norman (eds), *Dilemmas of European Democracy: New Perspectives on Democratic Politics in the European Union* (UEP 2023) all provide excellent summaries of these differing analyses.

EU citizenship rights-expansions of the United Kingdom have been removed from the Union.¹⁷ There has certainly been a greater uptick in social security access cases that find for more permission on the side of the applicant, rather than prioritising the restrictions of the Member States: this has been found either in cases of removing bureaucratic barriers that the CRD could have allowed to remain in place in cases of social security coordination for a highly mobile family (as was the case in *S v Familienkasse*), or by placing emphasis on the right of the child to a greater quality of life as a result of her father's EU movement (*Jobcenter Krefeld*).¹⁸ Not only are restrictions on social security access becoming loosened – perhaps as a direct result of the threat of the ‘safeguarding mechanism’, as raised prior to the *UK v Commission* case and specifically within the United Kingdom being lifted, and showing limited signs of reappearing – but there is reason to believe that the levers of social solidarity will once again extend towards EU citizens as well as horizontally between the Member States.¹⁹

I believe, therefore, that we are now entering a new phase of ‘reconstitutionalisation’ of EU citizenship, one that focuses on the expansion of fundamental – and, subsequently, some social – rights as well as loosening the restrictions on the traditionally social rights associated to the Marshallian definition of citizenship.²⁰ This can be exemplified by the recent CJEU decision reached in *Mirin*, in which the CJEU held that the Romanian government was incorrect in not updating the applicant's (a dual British-Romanian national) Romanian birth certificate to reflect, and match, his change of gender in Britain.²¹ The different gender

¹⁷ Shaw (n 2).

¹⁸ Case C-550/16 *A v Staatssecretaris van Veiligheid en Justitie* [2018] ECLI:EU:C:2018:248; Case C-411/20 *S v Familienkasse Niedersachsen-Bremen der Bundesagentur für Arbeit* [2022] ECLI:EU:C:2022:602; Case C-181/19 *Jobcenter Krefeld – Widerspruchsstelle v JD* [2020] ECLI:EU:C:2020:794.

¹⁹ Case C-328/20 *European Commission v Austria* [2022] ECLI:EU:C:2022:468; Sandra Mantu and Paul Minderhoud, ‘Struggles over social rights: Restricting access to social assistance for EU citizens’ (2023) 25 EJSS 3.

²⁰ Dora Kostakopoulou, ‘Co-creating European Union Citizenship: Institutional Process and Crescive Norms’ (2012) 15 CYELS 255; Jacqueson (n 4); Shaw (n 2).

²¹ Case C-4/23 *M.-A.A. v Directia de Evidenta a Persoanelor Cluj, Serviciul stare civila, Directia pentru Evidenta Persoanelor si Administrarea Bazelor de Date din Ministerul Afacerilor Interne, Municipiul Cluj-Napoca* [2024] ECLI:EU:C:2024:845.

identities and names, and therefore incoherent travel documents, caused by the Romanian authorities' refusal to acknowledge the applicant's change in gender identity and name was found to be a violation of the applicant's EU citizenship rights to free movement.²² Where this judgment is of particular interest is the framing that the infringement on the applicant's EU citizenship right to freedom of movement could not be undertaken, even if 'legitimate and proportional aims' had been established, because of the potential for infringement on the applicant's right to private and family life under the ECHR and the Charter.²³

This is interesting because of the avenues it offers for a reconstitutionalisation of EU citizenship rights, through the greater emphasis once again placed on freedom of movement as a fundamental right attached to that EU citizenship status.²⁴ Social rights beyond social security access – such as transgender rights, marriage rights for the LGBTQIA community, and gender recognition and gender identity – and the corresponding fundamental rights as anchored in the Charter and the Convention are, potentially, now linked to the fundamental freedom that comes with freedom of movement. For a Member State to infringe on those rights could potentially be seen as an infringement, therefore, upon the right to freedom of movement, in a way which the CJEU might once again be poised to no longer accept.²⁵ Social and fundamental (or human rights, more generally) rights of EU citizenship are, perhaps, becoming more grounded, both within the CJEU jurisprudence and the general mindset, in a broader reading of citizenship protections that unite the aspirational status of 'migrant' at the core of EU citizenship.²⁶ These

²² *ibid* paras 50-53.

²³ *ibid* paras 62-67; Convention for the Protection of Human Rights and Fundamental Freedoms (1950) Articles 8, 21; Charter of Fundamental Rights of the European Union [2000] O.J. C364/01 Article 7.

²⁴ Audrey Plan, "Why does the CJEU talk in hypotheticals? The *Mirin* case beyond Gender Recognition" (European Law Blog, October 21 2024) available at <

<https://www.europeanlawblog.eu/pub/38k0ck9o/release/3?readingCollection=9bf115c0>> accessed 9 April 2025

²⁵ *Mirin* (n 21) para 61; Case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* [2021] ECLI:EU:C2021:1008; *X and Y v. Romania* App no 2145/16 and 20607/16 (ECtHR, 19 January 2021).

²⁶ Adrienne Yong, 'Free movement or fundamental rights? EU citizenship as a legal gateway to fundamental rights protection' in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar Publishing 2022). See Chapter 1 of this thesis.

rights are also rights that can be more easily accessed by all EU citizens, not simply the mobile ones.²⁷ It is not hard to imagine a world in which an applicant can successfully argue that *Mirin* set a hypothetical precedent as well as a practical one.²⁸ *Mirin* also sparked the return to the prioritisation of the CJEU in its jurisprudence of the ‘primary law’ rights of the Treaties, and the Charter, for individual rights protections. This might, therefore, mean a return to a ‘reconstitutionalisation’ of EU citizenship rights, where the rights grounded in the Treaties and other primary sources are given greater weight than the ability of the Member States to impose ‘restrictions’ along the limiting measures found in secondary law instruments.²⁹ The anchoring of more fundamental, social, and human rights protections to the constitutional status of EU citizen might also allow for a new process of EU citizenship constitutionalisation to begin, where freedom of movement provides the entry point to those rights – as was the case in *Mirin* – before broadening out into a, perhaps, more general application.³⁰

1.3: Conclusion

This thesis sought to answer the question: how can the constitutionalisation of EU citizenship create a permanent framework for the protection of individual rights? How reliably are those rights protected, if one looks at the examples offered (TCNs, former EU citizens, EU citizens living in the UK post-Brexit) at the periphery of EU citizenship? The answer posited in this thesis is that the constitutionalisation process has created an ‘outline’ of basic rights protections for EU citizens and their TCN family members which are ‘permanently’ anchored in primary law frameworks, but the overall permanence of a fully constitutionalised status is not applicable to EU citizenship because of the role the CJEU has played in ‘filling in’ the details of EU

²⁷ *Pancharevo* (n 25) paras 58-59, 63, 69.

²⁸ *Plan* (n 24).

²⁹ *Yong* (n 26).

³⁰ Dora Kostakopoulou, ‘Co-creating European Union Citizenship: Institutional Process and Crescive Norms’ (2012) 15 CYELS 255.

citizenship protections, and in that backwards and forwards shift, those individuals at the periphery lose out on citizenship protections. Sometimes the CJEU has chosen to prioritise Member State pushback (see Chapters 3-4), and sometimes the CJEU chooses to prioritise the pushing of individual rights (*Mirin, Pancharevo, Coman*).

It is, on the one hand, a genuinely admirable sign of political and judicial commitment by both the EU and the participating Member States to the aspirational nature that is embodied within EU citizenship (see Chapter 1) and the political difficulties that come with the EU as an institution.³¹ This thesis is another piece of scholarly literature on EU citizenship, an academic field that produces limited avenues of either completely new angles of analysis.³² I have not attempted to posit any completely new points of view on EU citizenship or its constitutionalisation, merely to offer a more pointed and narrow explanation of how the constitutionalisation process of EU citizenship has allowed for greater individual redress of rights violations than is immediately obvious within the ‘delimitation’ phase of the 2010s. I have used derivative rights of residence of TCN family members and Brexit as examples of both the rights-enhancing phases and rights-defining phases of EU citizenship constitutionalisation, as examples of how the anchoring of citizenship rights within an ever-clearer constitutional framework and greater body of jurisprudence allows for both greater clarity and ‘easier’ enforcement of those rights. Primary law instruments when they protect EU citizenship offer a broader, more generalized, perhaps less well-defined layer of constitutional protections for EU citizens; and this lack of clear definition is exposed when the questions centre around ‘marginal’ cases of workers or non-workers, or family members of varying levels of dependence. The introduction of secondary law instruments within the jurisprudence, even limiting instruments, allow for a more specific definition of those rights and a ‘checklist’ that

³¹ Kostakopoulou (n 20).

³² See the introduction of this thesis for a (restricted) summary of the literature as it exists on EU citizenship constitutionalisation.

enabled Member States to clearly identify the rights that needed protecting in their domestic law – even if some of those Member States used that checklist to limit the rights being protected, specifically that of social assistance.

It is no longer a question of whether or not EU citizenship exists as a status, or whether or not possessing that status confers an advantage. It is certainly true that the status exists in ‘gradations’ – some individuals have more ‘protection points’ within it because of whether or not they have crossed a Schengen border, or are workers, or otherwise more clearly fit into the pre-conditions that exist in the legislation surrounding the access to rights that the status provides.³³ EU citizenship remains, however, a discrete legal category that protects the individuals who are EU citizens and, as well, extends that umbrella of protections to their TCN family members when necessary. Those protective capabilities, and the routes of individual redress that it offers, are rooted and anchored in the constitutional framework of both the EU itself, and EU citizenship as well; namely, the constitutional characteristics of freedom of movement, nondiscrimination and equal treatment, and proportionality.³⁴

The future of EU citizenship offers avenues for future constitutionalisations, and possibly greater protections as well.³⁵ The anchoring of free movement to a greater scope of rights, namely fundamental and political rights, might lead to a constitutional framework for the protection of a larger ‘swathe’ of rights than has existed previously.³⁶ This will potentially bridge the ‘democratic deficits’ inherent in EU citizenship, when making use of freedom of movement can lead to a loss of voting rights or presence in the electoral registers in the home Member State with no concurrent right to vote in the Member State of residence.³⁷ By using

³³ O’Brien (n 4).

³⁴ Consolidated Treaty on the Functioning of the European Union [2012] OJ C326/56 Articles 20(2)(a) and 21, 18.

³⁵ Kostakopoulou (n 30).

³⁶ Yong (n 26); Wesemann (n 15).

³⁷ Sandra Seubert, ‘Constituting European Citizenship: Struggles for Political Empowerment in the EU’ (2024) 11 Democratic Theory 99.

freedom of movement rights as the key constitutional cornerstone of EU citizenship rights, and by emphasizing the CJEU's role in protecting access to freedom of movement itself as well as by enforcing the rights of those who have already utilised it, EU citizenship could potentially expand to encompass not only the citizenship rights that exist in the Marshallian definition, but more social rights – as in *Mirin* – and more fundamental or human rights, guaranteed under the Charter and the ECHR.³⁸ The first steps towards this can be seen in the renewed commitment of the European Council and the European Parliament to both reinforce and broaden the scope of citizenship rights that mobile EU citizens can have recourse to.³⁹ This will, perhaps, lead to an EU citizenship that feels more permanently grounded in the EU constitutional framework, and will not only empower more individuals to utilise their political rights within EU citizenship but more firmly link those political rights to the European space more generally.⁴⁰

³⁸ Yong (n 26); Kostakopoulou (n 30).

³⁹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strategy to strengthen the application of the Charter of Fundamental Rights in the EU, COM(2020) 711 Final, Brussels 2.12.2020.

⁴⁰ Seubert (n 37); T.H. Marshall, *Citizenship and Social Class: And Other Essays* (University Print 1950); Hyltén-Cavallius (n 2); Seubert (n 37); Michael Dougan, 'The constitutional dimension to the case law on Union citizenship' (2006) 31 EL Rev 613; Nic Shuibhne (n 2); Konstadinides (n 2); Hanneke van Eijken, *EU Citizenship and the Constitutionalisation of the European Union* (Europa Law Publishing 2015); Wiesbrock (n 3); Kostakopoulou (n 30).

Appendix

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European cases:

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Case C-529/11 Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department [2013] ECLI:EU:C:2013:290 (Alarape)

Case C-67/14 Jobcenter Berlin Neukoln v Nazifa Alimanovic and Others [2015] ECLI:EU:C:2015:597 (Alimanovic)

Case C-67/14 Jobcenter Berlin Neukoln v Nazifa Alimanovic and Others [2015] ECLI:EU:C:2015:597, Opinion of AG Wathelet

Case C-86/12 Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration [2013] ECLI:EU:C:2013:645 (Alokpa)

Case C-292/89 The Queen and the Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen [1991] ECLI:EU:C:1991:80 (Antonissen)

Case C-93/18 Ermira Bajratari v Secretary of State for the Home Department [2019] ECLI:EU:C:2019:809 (Bajratari)

Case C-89/17 Secretary of State for the Home Department v Rozanne Banger [2018] ECLI:EU:C:2018:570 (Banger)

Case C-413/99 Baumbast and R. v. Secretary of State for the Home Department [2002] ECLI:EU:C:2002:493 (Baumbast)

Case C-413/99 Baumbast and R. v. Secretary of State for the Home Department [2002] ECLI:EU:C:2002:493, Opinion of AG Geelhoed

Case C-3/90 M.J.E. Bernini v Minister van Onderwijs en Wetenschappen [1992] ECLI:EU:C:1992:89 (Bernini)

Case C-38/24 Bervidi G.L. v AB SpA [2025] ECLI:EU:C:2025:690 (Bervidi)

Case C-274/96 PreturaCircondariale di Bolzano, Sezione Distaccata di Silandro v Horst Otto Bickel and Ulrich Franz [1998] ECLI:EU:C:1998:563 (Bickel and Franz)

Case C-209/03 The Queen on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills [2006] ECLI:EU:C:2005:169 (Bidar)

Case C-73/08 Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française [2010] ECLI:EU:C:2010:181 (Bressol)

Case C-140/12 Pensionversicherungsanstalt v Peter Brey [2013] ECLI:EU:C:2013:565 (Brey)

Case C-197/86 Steven Malcolm Brown v the Secretary of State for Scotland [1988] ECLI:EU:1988:323 (Brown)

Case C-60/00 Mary Carpenter v Secretary of State for the Home Department [2002] ECLI:EU:C:2002:434 (Carpenter)

Case C-709/20 CG v the Department of Communities in Northern Ireland [2021] ECLI:EU:C:2021:602 (CG)

Case C-133/15 H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others [2017] ECLI:EU:C:2017:354 (Chavez-Vilchez)

Case C-138/02 Collins v. Secretary of State for Work and Pensions [2003] ECLI:EU:C:2004:172 (Collins)

Case C-673/16 Relu Adrian Coman and Others v Inspectoratul General pentru Imigrari and Ministerul Afacerilor Interne [2018] ECLI:EU:C:2018:385 (Coman)

Case C-328/20 European Commission v Austria [2022] ECLI:EU:C:2022:468 (Commission v Austria)

Case C-408/03 European Commission v Belgium [2005] ECLI:EU:C:2005:638 (Commission v Belgium)

Case C-408/03 European Commission v Belgium [2005] ECLI:EU:C:2005:638, Opinion of AG Ruiz-Jarabo Colomer

Case C-132/22 European Commission v Hungary [2024] ECLI:EU:C:2024:493 (Commission v Hungary)

Case C-181/23 European Commission v Malta [2025] ECLI:EU:C:2025:283 (Commission v Malta)

Case C-181/23 European Commission v Malta [2025] ECLI:EU:C:2025:283, Opinion of AG Collins

Case C-542/09 European Commission v Kingdom of the Netherlands [2012] ECLI:EU:C:2012:346 (Commission v Netherlands)

Case C-157/03 Commission of the European Communities v Kingdom of Spain [2005] ECLI:EU:C:2005:225 (Commission v Spain)

Case C-308/14 European Commission v United Kingdom of Great Britain and Northern Ireland [2016] ECLI:EU:C:2016:436 (Commission v UK)

Case C-308/14 European Commission v United Kingdom of Great Britain and Northern Ireland [2016] ECLI:EU:C:2016:436, Opinion of AG Cruz Villalón

Case C-6/64 Flaminio Costa v E.N.E.L [1964] ECLI:EU:C:1964:66 (Costa)

Case C-304/14 Secretary of State for the Home Department v CS [2016] ECLI:EU:C:2016:674 (CS)

Case C-224/98 Marie-Nathalie D’Hoop v Office national de l’emploi [2002] ECLI:EU:C:2002:103 (D’Hoop)

Case C-333/13 Elisabeta Dano and Florin Dano v Jobcenter Leipzig [2014] ECLI:EU:C:2014:2358 (Dano)

Case C-87/74 Procureur du Roi v Benoît and Gustave Dassonville [1974] ECLI:EU:C:1974:82 (Dassonville)

Case C-406/04 Gérald De Cuyper v Office national de l’emploi [2006] ECLI:EU:C:2006:491 (De Cuyper)

Case C-385/00 F.W.L. de Groot v Staatssecretaris van Financiën [2002] ECLI:EU:C:2002:750 (de Groot)

Case C-650/13 Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde [2015] ECLI:EU:C:2015:648 (Delvigne)

Case C-256/11 Murat Dereci and Others v Bundesministerium für Inneres [2011] ECLI:EU:C:2011:734 (Dereci)

Case C-256/11 Murat Dereci and Others v Bundesministerium für Inneres [2011] ECLI:EU:C:2011:734, Opinion of AG Mengozzi

Case C-267/83 Aissatou Diatta v Land Berlin [1985] ECLI:EU:C:1985:67 (Diatta)

Joined Cases C-389/87 and 390/87 G.B.C. Echternach and A. Moritz v Minister van Onderwijs en Wetenschappen [1989] ECLI:EU:C:1989:130 (Echternach and Moritz)

Case C-291/05 Minister voor Vreemdelingenzaken en Integratie v R.N.G. Eind [2007] ECLI:EU:C:2007:771 (Eind)

Case C-291/05 Minister voor Vreemdelingenzaken en Integratie v R.N.G. Eind [2007] ECLI:EU:C:2007:771, Opinion of AG Mengozzi

Case C-624/20 EK v Staatsecretaris van Justitie en Veiligheid [2022] ECLI:EU:C:2022:639 (EK v Staatsecretaris)

Case C-344/95 Commission of the European Communities v Kingdom of Belgium [1997] ECLI:EU:C:1997:81 (European Communities v Belgium)

Case C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECLI:EU:C:1990:391 (Fedesa)

Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v Estado português* [2015] ECLI:EU:C:2015:565 (Ferreira da Silva)

Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Group* [2008] ECLI:EU:C:2008:630 (Förster)

Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECLI:EU:C:2003:539 (Garcia Avello)

C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna Garcia-Nieto, Joel Pena Cuevas, Jovanlis Pena Garcia, Joel Luis Pena Cruz* [2016] ECLI:EU:C:2016:114 (Garcia-Nieto)

Case C-55/94 *Richard Gebhard v Consiglio dell'Ordine Avvocati e Procuratori di Milano* [1995] ECLI:EU:C:1995:411 (Gebhard)

Case C-213/05 *Wendy Geven v Land Nordrhein-Westfalen* [2007] ECLI:EU:C:2007:438 (Geven)

Case C-20/12 *Giersch v État du Grand-Duché du Luxembourg* [2013] ECLI:EU:C:2013:41 (Giersch)

Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECLI:EU:C:2001:458 (Grzelczyk)

Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECLI:EU:C:2001:458, Opinion of AG Alber

Case C-212/05 *Gertraud Hartmann v Freistaat Bayern* [2007] ECLI:EU:C:2007:437 (Hartmann)

Joined Cases C-245/94 and C-312/94 *Ingrid Hoever and Iris Zachow v Land Nordrhein-Westfalen* [1996] ECLI:EU:C:1996:379 (Hoever & Zachow)

Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* [2009] ECLI:EU:C:2010:80 (Ibrahim)

Case C-40/11 *Yoshikazu Iida v Stadt Ulm* [2012] ECLI:EU:C:2012:691 (Iida)

Case C-258/04 *Office national de l'emploi v Ioannis Ioannidis* [2005] ECLI:EU:C:2005:559 (Ioannidis)

Jeunesse v Netherlands App no 12738/10 (ECtHR, 3 October 2014) (*Jeunesse v Netherlands*)

Case C-1/05 *Yunying Jia v Migrationsverket* [2007] ECLI:EU:C:2007:1 (Jia)

Case C-181/19 Jobcenter Krefeld – Widerspruchsstelle v JD [2020] ECLI:EU:C:2020:794 (Jobcenter Krefeld)

Case C-118/20 JY v Wiener Landesregierung [2022] ECLI:EU:C:2022:34 (JY)

Case C-82/16 K.A. and Others v Belgische Staat [2018] ECLI:EU:C:2018:308 (K.A.)

C-192/99 The Queen v Secretary of State for the Home Department, ex parte Manjit Kaur [2001] ECLI:EU:C:2001:106 (Kaur)

Case C-139/85 R.H. Kempf v Staatssecretaris van Justitie [1986] ECLI:EU:C:1986:223 (Kempf)

Case C-224/01 Gerhard Köbler v Republik Österreich [2003] ECLI:EU:C:2003:513 (Köbler)

Kurić and Others v Slovenia App no 26828/06 (ECtHR, 26 June 2012) (Kurić)

Case C-188/00 Bülent Kurz né Yüce and Land Baden-Württemberg [2002] ECLI:EU:C:2002:694 (Kurz)

Case C-162/09 Secretary of State for Work and Pensions v Taous Lassal [2010] ECLI:EU:C:2010:592 (Lassal)

Case C-53/81 D.M. Levin v Staatssecretaris van Justitie [1982] ECLI:EU:C:1982:105 (Levin)

Case C-46/12 L.N. v Styrelsen for Videragående Uddannelser og uddannelsesstøtte [2013] ECLI:EU:C:2013:97 (LN v Styrelsen)

Case C-165/16 Toufik Lounes v Secretary of State for the Home Department [2017] ECLI:EU:C:2017:862 (Lounes)

Case C-7/94 Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal [1995] ECLI:EU:C:1995:118 (Lubor Gaal)

Case C-91/20 LW v Germany [2022] EU:C:2021:898 (LW v Germany)

Case C-85/96 María Martínez Sala v Freistaat Bayern [1998] ECLI:EU:C:1997:335 (Martínez Sala)

Case C-434/09 Shirley McCarthy v Secretary of State for the Home Department [2011] ECLI:EU:C:2011:277 (McCarthy)

Case C-127/08 Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform [2008] ECLI:EU:C:2008:449 (Metock)

Case C-369/90 Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria [1992] ECLI:EU:C:1992:295 (Micheletti)

Case C-4/23 M.-A.A. v Directia de Evidenta a Persoanelor Cluj, Serviciul stare civilian, Directia pentru Evidenta Persoanelor si Administrarea Bazelor de Date din Ministerul Afacerilor Interne, Municipiul Cluj-Napoca [2024] ECLI:EU:C:2024:845 (Mirin)

Case C-459/99 Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State [2002] ECLI:EU:C:2002:461 (MRAX)

Case C-46/12 NY v Styrelsen for Videregaende Uddannelser og Uddannelsesstøtte [2013] ECLI:EU:C:2013:97 (NY v Styrelsen)

Case C-456/12 O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B. [2014] ECLI:EU:C:2013:837 (O. and B.)

Joined Cases C-356/11 and C-357/11 O, S Maahanmuuttovirasto and Maahanmuuttovirasto [2012] ECLI:EU:C:2012:776 (O. and S.)

Case C-378/12 Nnamdi Onuekwere v Secretary of State for the Home Department [2014] ECLI:EU:C:2014:13 (Onuekwere)

Case C-378/12 Nnamdi Onuekwere v Secretary of State for the Home Department [2014] ECLI:EU:C:2014:13, Opinion of AG Bot

Joined Cases C-482/01 and 493/01 Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg [2004] ECLI:EU:C:2004:262 (Orfanopoulos)

Case C-490/20 V.M.A. v Stolichna obshtina, rayon 'Pancharevo' [2021] ECLI:EU:C:2021:1008 (Pancharevo)

Case C-228/07 Jörn Petersen v Arbeitsmarktservice Niederösterreich [2007] ECLI:EU:C:2007:494 (Petersen)

Case C-228/07 Jörn Petersen v Arbeitsmarktservice Niederösterreich [2007] ECLI:EU:C:2007:494, Opinion of AG Colomer

Case C-182/15 Aleksei Petruhhin v Latvijas Republikas Generalprokuratūra [2016] ECLI:EU:C:2016:630 (Petruhhin)

Case 157/79 Regina v Stanislaus Pieck [1980] ECLI:EU:C:1980:179 (Pieck)

Case C-191/16 Romano Piscioti v Bunderspublik Deutschland [2018] ECLI:EU:C:2018:222 (Pisciotti)

Case C-673/20 EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE) [2022] ECLI:EU:C:2022:449 (Préfet du Gers)

Case C-673/20 EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE) [2022] ECLI:EU:C:2022:449, Opinion of AG Collins

Case C-367/11 Déborah Prete v Office national de l'emploi [2012] ECLI:EU:C:2012:668 (Prete)

Case C-83/11 Secretary of State for the Home Department v Muhammad Sazzadur Rahman and Others [2012] ECLI:EU:C:2012:519 (Rahman)

Case C-357/89 V.J.M. Raulin v Minister van Onderwijs en Wetenschappen [1992] ECLI:EU:C:1992:87 (Raulin)

Case C-59/85 State of the Netherlands v Ann Florence Reed [1986] ECLI:EU:C:1986:157 (Reed)

Case C-165/14 Alfredo Rendón Marin v Administración del Estado [2016] ECLI:EU:C:2016:675 (Rendón Marin)

Case C-423/12 Flora May Reyes v Migrationsverket [2014] ECLI:EU:C:2014:16 (Reyes)

Case C-135/08 Janko Rottman v Freistaat Bayern [2010] ECLI:EU:C:2010:104 (Rottman)

Case C-363/89 Danielle Roux v Belgian State [1991] ECLI:EU:C:1991:41 (Roux)

Case C-411/20 S v Familienkasse Niedersachsen-Bremen der Bundesagentur für Arbeit [2022] ECLI:EU:C:2022:602 (S v Familienkasse)

Case C-551/07 Deniz Sahin v Bundesminister für Inneres [2008] ECLI:EU:C:2008:755 (Sahin)

Case C-370/90 The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department [1992] ECLI:EU:C:1992:296 (Singh)

Case C-363/08 Romana Slanina v Unabhängiger Finanzsenat, Außenstelle Wien [2009] ECLI:EU:C:2009:732 (Slanina)

Case C-22/21 SRS and AA v Minister for Justice and Equality [2022] ECLI:EU:C:2022:683 (SRS and AA)

Joined Cases C-684/22 and 686/22 S.Ö and Others v Stadt Duisburg and Others [2024] ECLI:EU:C:2024:345 (Stadt Duisburg)

Case C-503/09 Lucy Stewart v Secretary of State for Work and Pensions [2011] ECLI:EU:C:2011:500 (Stewart)

Case-C836/18 Subdelegación del Gobierno en Ciudad Real v RH [2020] ECLI:EU:C2020:119 (Subdelegación)

Case C-519/18 TB v Bevandorlasi es Menekultugyi Hivatal [2019] ECLI:EU:C:2019:1070 (TB v Bevandorlasi)

Case C-480/08 Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department [2010] ECLI:EU:C:2010:83 (Teixeira)

Case C-18/95 F.C. Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland [1999] ECLI:EU:C:1999:22 (Terhoeve)

Case C-221/17 M.G. Tjebbes and Others v Minister van Buitenlandse Zaken [2019]
ECLI:EU:C:2019:189 (Tjebbes)

Case C-456/02 Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS) [2004]
ECLI:EU:C:2004:488 (Trojani)

Case C-26/62 NV Algemene Transport en Expeditie Onderneming van Gend & Loos v
Netherlands Inland Revenue Administration [1963] ECLI:EU:C:1963:1 (van Gend & Loos)

Joined cases C-22/08 and C-23/08 Athanasios Vatsouras & Josif Koupatantze v
Arbeitsgemeinschaft (ARGE) Nürnberg 90 [2009] ECLI:EU:C:2009:344 (Vatsouras)

Case C-247/20 VI v Commissioners for Her Majesty's Revenue and Customs [2022]
ECLI:EU:C:2022:177 (VI)

Case C-621/18 Andy Wightman and Others v Secretary of State for Exiting the European
Union [2018] ECLI:EU:C:2018:999 (Wightman)

Case C-621/18 Andy Wightman and Others v Secretary of State for Exiting the European
Union [2018] ECLI:EU:C:2018:999, Opinion of AG Campos Sánchez-Bordona

Case C-378/97 Arrondissementsrechtbank te Rotterdam, Netherlands v Florus Ariël
Wijsenbeek [1999] ECLI:EU:C:1999:439 (Wijsenbeek)

Case C-378/97 Arrondissementsrechtbank te Rotterdam, Netherlands v Florus Ariël
Wijsenbeek [1999] ECLI:EU:C:1999:439, Opinion of AG Cosmas

Case C-459/20 X v Staatssecretaris van Justitie en Veiligheid [2023] ECLI:EU:C:2023:499
(X v Staatssecretaris)

X and Y v. Romania App no 2145/16 and 20607/16 (ECtHR, 19 January 2021) (X and Y)

Case C-87/12 Kreshnik Ymeraga, Kasim Ymeraga, Afijete Ymeraga-Tafarshiku, Kushtrim
Ymeraga, Labinot Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration [2013]
ECLI:EU:C:2013:291 (Ymeraga)

Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm) [2011]
ECLI:EU:C:2011:124 (Zambrano)

Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm) [2011]
ECLI:EU:C:2011:124, Opinion of AG Sharpston

Case C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the
Home Department [2004] ECLI:EU:C:2004:639 (Zhu and Chen)

Joined Cases C-424/10 and C-425/10 Tomasz Ziolkowski, Barbara Szeja, Maria-Magdalena
Szeja, Marion Sjeza v Land Berlin [2011] ECLI:EU:C:2011:866 (Ziolkowski & Szeja)

British cases:

R (on the application of Agyarko) and R (on the application of Ikuga) v Secretary of State for the Home Department [2017] UKSC 11 on appeal from [2015] EWCA Civ 440 (Agyarko and Ikuga)

Akinsaya v Secretary of State for the Home Department [2022] EWCA Civ 37 (Akinsaya)

R (on the application of Ali) v Secretary of State for the Home Department [2024] EWCA Civ 1546 (Ali)

AT v Secretary of State for Work and Pensions [2023] EWCA Civ 1307 (AT)

Ayinde and Thinjom [2015] UKUT 560 (IAC) (Ayinde and Thinjom)

F v London Borough of Barking and Dagenham [2015] EWHC 2838 (Admin) (F v Dagenham)

Gwladys Fertr   v Vale of White Horse District Council [2024] EWHC 1754 (KB) (Fertr  )

Fratila and another (AP) v Secretary of State for Work and Pensions [2020] EWCA Civ 1741 (Fratila)

Fratila (and another) v Secretary of State for Work and Pensions [2020] UKSC 53 on appeal from [2020] EWCA Civ 1741 (Fratila appeal)

FZ (China) v Secretary of State for the Home Department [2015] EWCA Civ 550 (FZ (China))

Secretary of State for Work and Pensions v Gubeladze [2019] UKSC 31 on appeal from EWCA Civ 1751 (Gubeladze)

Harrison v Secretary of State for the Home Department [2012] EWCA Civ 1736 (Harrison)

R (on the application of HC) (Appellant) v Secretary of State for Work and Pensions and others (Respondents) [2017] UKSC 73 on appeal from [2015] EWCA Civ 49 (HC)

Hines v Lambeth LBC [2014] EWCA Civ 660 (Hines)

R (Independent Monitoring Authority for the Citizens' Rights Agreements) v Secretary of State for the Home Department [2022] EWHC 3274 (Admin) (IMA)

Mirga v Secretary of State for Work and Pensions [2016] UKSC 1 (Mirga)

MS v Secretary of State for the Home Department [2016] Upper Tribunal (Immigration and Asylum Chamber) IA/38332/2014 (MS)

M.Y. & Ors v The Minister for Justice & Ors [2015] IEHC 7 (M.Y. & Ors)

Okafor & others v Secretary of State for the Home Department [2011] EWCA Civ 499 (Okafor)

Patel v. Secretary of State for the Home Department [2019] UKSC 59 (Patel)

Patel, Shah and Bourouisa v SSHD [2017] EWCA 2028 (Patel, Shah & Bourouisa)

Patmalniece (FC) v Secretary of State for Work and Pensions [2011] UKSC 11 (Patmalniece)

Pryce and London Borough of Southwark and Secretary of State for the Home Department [2012] EWCA Civ 1572 (Pryce)

Robinson (Jamaica) v Secretary of State for the Home Department [2019] UKSC/2019/0010 (Robinson)

R (Sanneh & Others) v Secretary of State for Work and Pensions [2015] CMLR 27 (Sanneh)

R (on the application of Shindler and another) (Appellants) v Chancellor of the Duchy of Lancaster and another (Respondents) UKSC 2016/0105 (Shindler)

R. (on the application of Stewart) v Secretary of State for the Home Department [2015] EWHC 806 (Admin) (Stewart)

Velaj v Secretary of State for the Home Department [2022] EWCA Civ 767 (Velaj)

R. (on the application of Yekini) v Southwark LBC [2014] EWHC 2096 (Admin) (Yekini)

R. (on the application of Zewdu) v Secretary of State for the Home Department [2015] EWHC 2148 (Admin) (Zewdu)

Other jurisdictions:

X v. Office National d'Allocations Familiales pour Travailleurs Salariés; Cour du travail de Bruxelles; number: RG n 2010/AB/333, 22 December 2011 (Belgium)

ECLI:NL:HR:2014:277 Hoge Raad, Number 13/00409, 14 February 2014 (Netherlands)

Legislation

European legislation:

Convention for the Protection of Human Rights and Fundamental Freedoms [1950], ECHR

Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257, Freedom of movement for workers directive

Treaty on European Union [1992] OJ C191, Maastricht Treaty

Charter of Fundamental Rights of the European Union [2000] OJ C364/01, the Charter

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44, LTR Directive

Council Directive 2004/38/EC 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/30, the Citizenship Directive

The Consolidated Treaty on European Union [2009] OJ C115/13, TEU

Consolidated Treaty on the Functioning of the European Union [2012] OJ C326/56

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01, Treaty of Lisbon

Decision of the Heads of State of Government meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, Annex 1 to the Conclusions of the European Council Meeting (18/19 February 2016), Brussels, 19 February 2016, EUCO 1/16

British legislation:

Human Rights Act 1998

The Immigration (European Economic Area) Regulations 2006

Social Security Regulations 2012 (SI 2012/2587)

The Social Security (Habitual Residence) (Amendment) Regulations 2012

The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012

The Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012

The Immigration (European Economic Area) Regulations 2016

The Immigration (European Economic Area) Regulations 2016 SI 2016/1052, Appendix EU, detailed guidance

The European Union (Withdrawal) Act 2018

International agreements:

Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] C384/I101

Bibliography:

Adam S and P van Elsuwege 'Citizenship and the federal balance between the European Union and its Member States: Comment on Dereci' (2012) 37(2) EL Rev 176

Ali Khan A, 'Has Chavez-Vilchez altered the approach to derivative claims for residence in the UK?' (United Kingdom Immigration Law Blog, May 19 2019)
<<https://asadakhan.wordpress.com/2019/05/19/has-chavez-vilchez-altered-the-approach-to-derivative-claims-for-residence-in-the-uk/>> accessed on 12 May 2024

Austin-Greenall G and S George, 'Brexit and Loss of EU Citizenship: Cases, Options, Perceptions', ECAS [2017]

Alonso Sanz L, 'When there is no family: Unaccompanied minors in the EU' in M Pascual and A Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge 2017)

Azoulai L, 'La citoyenneté européenne, un statut d'intégration sociale' in G Cohen-Jonathan (ed), *Chemins d'Europe: Mélanges en l'honneur de Jean-Paul Jacqué* (Daloz 2010)

Azoulai L, 'Le bon citoyen ou l'infortune d'être Européen' (2014) EUI Working Papers Law 2014/14

Barbier J-C, 'To what extent can the European Union deliver 'social citizenship' to its citizens?' in A Evers and A-M Guillemard (eds.) *Social Policy and Citizenship: The Changing Landscape* (OUP 2012)

Barbulesco R and A Favell, 'Commentary: A Citizenship without Social Rights? EU Freedom of Movement and Changing Access to Welfare Rights' (2020) 58(1) International Migration 151

Barnard C, *The Substantive Law of the EU* (6th edition, OUP 2019)

Barnard C and S Fraser Butlin, 'Free movement vs fair movement: Brexit and managed migration' (2018) 55(SI) CML Rev 203

Barnard C, S Butlin and F Costello 'The changing status of European Union nationals in the United Kingdom following Brexit: the lived experience of the European Union Settlement Scheme' (2021) 31 (3) S&LS 365

Barnard C and S Fraser Butlin 'Ceding Control and Taking it Back: The Origins of Free Movement in EU Law' (2022) 51(3) ILJ 643

Barnard C and E Leinarte, 'The Creation of European Citizenship: Constitutional Miracle or Myopia?' (2022) 24 CYELS 24

Barnard C, F Costello and S Fraser Butlin, *Low Paid EU Migrant Workers: The House, The Street, The Town* (BUP 2024)

Barrett G, 'Family matters: European Community law and third-country family members' (2003) 40(2) CML Rev 369

- Bauböck R, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8(2) Theoretical Inquiries in Law 453
- Baude W, A Chilton and A Malani, 'Making Doctrinal Work More Rigorous: Lessons from Systemic Reviews' (2017) 84 U Chi L Rev 37
- Bellenghi G, 'The Court of Justice in JY v. Wiener Landesregierung: Could we expect more?' (2023) MJ 30, 83
- Bernard R, 'The Common Travel Area between Britain and Ireland' (2001) MLR 64, 831
- Berner C, 'Family Reunification between Static EU Citizens and Third Country Nationals' (2018) EJML 20, 289
- Bierbach J, 'The reality test of residence goes through the looking glass' (2017) EuConst 13, 383
- Biten M, T Kuhn and W van der Brug 'How does fiscal austerity affect trust in the European Union? Analyzing the role of responsibility attribution' (2022) JEPP 30, 1033
- Blauberger M and S Schmidt 'Welfare migration? Free movement of EU citizens and access to social benefits' (2014) Research & Politics 1, 1
- Blauberger M and S Schmidt, 'The European Court of Justice and its political impact' (2017) West European Politics 40, 907
- Blauberger M, A Heindlmaier, D Kramer, D Sindbjerg Martinsen, J Sampson Thierry, A Schenk and B Werner, 'ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence' (2018) JERP 25, 1422
- Blauberger M and D Sindbjerg Martinsen, 'The Court of Justice in times of politicisation: 'law as a mask and shield' revisited' (2020) 27(3) JEPP 382
- Bloemraad I and A Sheares, 'Understanding Membership in a World of Global Migration: (How) Does Citizenship Matter?' (2017) IMR 51, 823
- Boeles P, *European Migration Law* (Intersentia 2014)
- Bruzelijs C, E Chase and M Seeleib-Kaiser, 'Social Rights of EU Migrant Citizens: Britain and Germany Compared' (2016) 15(3) Social Policy and Society 403
- Bruzelijs C, C Reinprecht and M Seeleib-Kaiser, 'Stratified Social Rights Limiting EU Citizenship' (2017) 59(6) JCMS 1239
- Cambien N, 'Union Citizenship and Immigration: Rethinking the Classics?' (2012) 5(1) EJLS 10
- Cambien N, 'The impact of Union citizenship on member-states' immigration laws: Some potentially perverse side effects resulting from recent ECJ case-law' (SSRN, 2012)

Cambien N, 'Cases C-456/12 O. and B. and C-457/12 S. and G.: Clarifying the inter-state requirement for EU citizens?' (European Law Blog, April 11 2014) <<https://www.europeanlawblog.eu/pub/cases-c-45612-o-and-b-and-c-45712-s-and-g-clarifying-the-inter-state-requirement-for-eu-citizens/release/1>> accessed 12 December 2024

Cambien N, 'Residence Rights for EU Citizens and Their Family Members: Navigating the New Normal' in N Cambien, D Kochenov and E Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill 2020)

Cambien N, 'EU Citizenship and the ECJ: Why Care about Primary Carers?' (UACES Annual Conference, September 2021, accessed on 5 December 2025)

Cameron D, EU speech, 28 November 2014, <<https://www.bbc.com/news/uk-politics-30250299>> accessed 24 May 2024

Castro Oliveira A, 'Workers and other persons: step-by-step from movement to citizenship – case law 1995-2001' (2002) 39 (1) CML Rev 77

Clarke H, M Goodwin and P Whiteley, *Brexit: Why Britain really voted to leave the European Union* (CUP 2017)

Costamagna F and S Giubboni, 'EU citizenship and the welfare state' in D Kostakopoulou and D Thym (eds), *Research Handbook on European Union Citizenship Law and Policy: Navigating Challenges and Crises* (Edward Elgar Publishing 2022)

Conant L, 'Failing backward? EU citizenship, the Court of Justice, and Brexit' (2021) 28(10) JEPP 1592

Constantinou E, 'Judicial Europeanisation Through Deconstitutionalisation: The Case of the Analogous Application of the Citizenship Directive' (2024) 9(2) European Papers 529

Costello C, 'Metock: Free movement and 'normal family life' in the Union' (2009) 46(2) CML Rev 587

Costello C and E Hancox, 'The UK, EU Citizenship and Free Movement of Persons: Policy Primer' (Migration Observatory, 1 June 2014) <https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-UK_EU_Citizenship_Free_Movement.pdf> accessed on 13 May 2024

Costello C, *The Human Rights of Migrants in European Law* (OUP 2016)

Cousins M, 'The baseless fabric of this vision': EU citizenship, the right to reside and EU law' (2016) 23(2) JSSL 10

Coutts S, 'Union citizenship as probationary citizenship: Onuekwere' (2015) 52(2) CML Rev 531

Coutts S, 'The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Rights' (2019) 21 CYELS 318

Craig P and de Burca G, *EU Law: Text, Cases and Materials* (7th edition, UK Version, OUP 2020)

Cuibus M, 'EU Migration to and from the UK' (20 November 2023, The Migration Observatory) <<https://migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk/#:~:text=Before%20Brexit%2C%20free%20movement%20rules,citizens%20from%20non%2DEU%20countries>> accessed 13 July 2024

Currie S, 'Accelerated justice or a step too far? Residence rights of non-EU family members and the court's ruling in Metock' (2009) 34(2) EL Rev 310

Daguerre A, 'Access to Means-Tested Benefits for Low-Income EU Nationals Before and After the Withdrawal Agreement: A French-UK Comparison' (2023) 30(2) JSSL 73

Daly P and J Tomlinson, 'Introduction: The Importance of Methodology in Public Law Research' in P Daly and J Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar 2023)

Dautricourt C and S Thomas, 'Reverse discrimination and free movement of persons under Community law: all for Ulysses, nothing for Penelope?' (2009) 34(3) EL Rev 433

Dauvergne C, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67(4) MLR 588

Davies G, *Nationality Discrimination in the European Internal Market* (Wolters Kluwer 2003)

Davies G, 'The High-Water Point of Free Movement of Persons: Ending Benefit Tourism and Rescuing Welfare' (2004) 26 JSWFL 211

Davies G, 'The entirely conventional supremacy of Union citizenship and rights' (2011) in Jo Shaw (ed) *Has the European Court of Justice Challenged Member-State Sovereignty in Nationality Law?*, EUI RSCAS Working Paper No. 2011/62

Davies G, 'The Right to Stay at Home: a basis for expanding European family rights' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2015)

Davies G, 'When Do Union Citizens and Their Families Have the Right to Equal Treatment on Grounds of Nationality in EU Law?' (2024) 26(3) EJML 267

Dawson M and D Augustin, "After Brexit: Time for a Decoupling of European and National Citizenship?" (*Verfassungsblog*, 14 July 2016) <<https://verfassungsblog.de/brexit-decoupling-european-national-citizenship/>> accessed 22 October 2021

De Becker E, 'Social Security in the Fundamental Rights Case Law of the CJEU' in F Pennings and G Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing 2023)

De Burca G, 'The Mutual Judicial Influence of National Courts and the European Court of Justice through the Preliminary Rulings mechanism: Evidence from the UK' (2020) NYU School of Law, Public Research Paper No. 20-25

De Grauwe P, 'Towards a New Euro Crisis?' (2022) 57(5) *Review of European Economic Policy* 273

De Groot D 'Free Movement of Dual EU Citizens' in N Cambien, D Kochenov and E Muir (eds), *EU Citizenship Under Stress: Social Justice, Brexit, and Other Challenges* (Brill 2020)

De Groot D, 'CJEU asked to rule on acquisition of nationality in light of EU citizenship: The fundamental status on the horizon?' (EUI Global Citizenship Observatory, 16 June 2020) < <https://globalcit.eu/cjeu-asked-to-rule-on-acquisition-of-nationality-in-light-of-eu-citizenship-the-fundamental-status-on-the-horizon-c-118-20-jy-v-wiener-landesregierung/>> accessed 15 February 2025

De Groot G-R and N Chun Luk, 'Twenty Years of CJEU Jurisprudence on Citizenship' (2014) 15(5) *GLJ* 821

De Mars S and C.R.G. Murray, 'With or without EU? The Common Travel Area After Brexit' (2020) 21(5) *GLJ* 815

De Mars S, C Murray, A O'Donoghue, and B Warwick 'Continuing EU Citizenship 'Rights, Opportunities and Benefits' in Northern Ireland after Brexit' for the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission, published March 2020

De Waele H, 'EU Citizenship: Revisiting its Meaning, Place and Potential' (2010) 12(3) *EJML* 319

De Witte F, 'The End of EU Citizenship and the Means of Non-Discrimination' (2011) 18(1) *MJ* 86

De Witte F, 'EU Law, Politics, and the Social Question' (2013) 14(5) *GLJ* 581

De Witte F, 'The constitutional quality of the free movement provisions: looking for context in the case law on Article 56 TFEU' (2017) 42(3) *EL Rev* 313

De Witte F, 'The Liminal European: Subject to the EU Legal Order' (2021) 40 *YEL* 56

Derlén M and J Lindholm, 'Goodbye van Gen den Loos, Hello Bosman? Using Network Analysis to Measure the Importance of Individual CJEU Judgments' (2023) 20(5) *ELJ* 667

Dennison J, 'Why did the UK leave in the EU? The state of the science of explaining Brexit' in JE Fossum and C Lord (eds), *Handbook of the European Union and Brexit* (Edward Elgar Publishing 2023)

Denizeau C, 'La citoyenneté européenne: une valeur en quête d'identité' (Citoyenneté: Conférence-débat, Paris, 2013) < <https://centre-droit-public-compare.assas->

universite.fr/fr/evenements/la-citoyennete-conference-debat-ndeg1/> accessed 13 February 2022

Dicosola M, 'The right to citizenship in Europe: Brexit as a stress test' (2020) 1(1) *Democrazia e Sicurezza* 15

Donnelly B, 'On the edge: Britain and the European Union' (2012) *European View* 11, 31

Dougan M, 'The constitutional dimension to the case law on Union citizenship' (2006) *EL Rev* 31, 613

Dougan M, 'Free Movement: The Workseeker as Citizen' (2011) 4 *CYELS* 93

Douglas-Scott S, 'Whither, the EU Charter of Fundamental Rights' (Verfassungblog, 30 October 2024) < <https://verfassungsblog.de/whither-the-eu-charter-of-fundamental-rights/> > accessed 12 August 2025

Dubout E, 'L'échec de la citoyenneté européenne? Les mutations d'une citoyenneté complexe en période de crise identitaire' [2017] *Jus Politicum* 18

Durin-Wasowicz R, 'EU Citizens in the UK are in a particularly weak position and need an independent authority to monitor their rights' (LSE Law Blogs, 26 March 2018) < <https://blogs.lse.ac.uk/brexit/2018/03/26/eu-citizens-in-the-uk-need-a-independent-authority-to-monitor-their-rights/> > accessed 18 June 2025

Editorial Comments, 'The free movement of persons in the European Union: Salvaging the dream while explaining the nightmare' (2014) 51 (3) *CML Rev* 729

Enchelmaier S, 'Four Freedoms, Ever More Principles?' (2016) 36(1) *OJLS* 192

Evans M, 'EU Migrants, abuse and access to welfare' (2015) 29(3) *JIANL* 273

Evans M, 'Abusing or Misusing the Right of Free Movement? The UK's Policy towards EU Nationals Sleeping Rough' in S Mantu, P Minderhoud and E Guild (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Publishing 2020)

Fahey E, 'Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in Metock' (2009) *Legal Issues of Economic Integration* 36, 83

Farnelli GM, F Ferri, M G and S Villani, 'Introduction: Judicial Precedent in International and European Law' (2022) 2(2) *The Italian Review of International and Comparative Law* 264

Fernhout R and R Wever, 'Thematic Report: Follow-Up of the Case law of the Court of Justice of the European Union' [2011]

Ferri D and G Martinico 'Revisiting the Ruiz Zambrano Doctrine and Exploring the Potential for its Extensive Application' (2021) 27(4) *EPL* 690

Fischella D, 'European Union Citizenship and 'Tourism of Welfare': Challenging European Social Rights in Time of Enduring Crisis' (2018) 3(3) *Il Diritto dell'Unione Europea* 467

Floistad K, *The EEA Agreement in a Revised EU Framework for Welfare Services* (Springer Cham 2018)

Forcado Barona I, 'Brexit and European Citizenship: Welcome Back to International Law' (2020) 24 *Span Yrbk Intl L* 210

Fornaroli G, 'Meaningful and meaningless rights proclamations' (2022) 13(4) *Jurisprudence* 545

Fortin J, 'Are Children's Best Interests Really Best? ZH (Tanzania) (FC) v Secretary of State for the Home Department' (2011) 74 (6) *MLR* 947

Gago A and F Maiani 'Pushing the boundaries: a dialogical account of the European case-law on access to welfare' (2022) 44(2) *J Eur Integr* 261

Gambardella I, 'JY v Wiener Landesregierung: Adding Another Stone to the Case Law Built Up by the CJEU on Nationality and EU Citizenship' (2022) 7(1) *European Papers* 399

Garner O, 'The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status' (2018) 20 *CYELS* 116

Garner O, 'Does Member State withdrawal automatically extinguish EU citizenship?' in D Kostakopoulou and D Thym (eds), *Research Handbook on European Union Citizenship Law and Policy: Navigating Challenges and Crises* (Edward Elgar Publishing 2022)

Gatta F, 'The If and How: Losing the EU Citizenship, but with Due Regard to the Due Process of (EU) Law' (2024) 9(1) *European Papers* 131

Gehrig M, *Europe's Second Constitution: Crisis, Courts and Community* (CUP 2020)

George S, 'Britain: Anatomy of a Eurosceptic state' (2000) 22(1) *J Eur Integr* 15

Ginés Martín, D 'Citizens or migrants? Precarious residence in the context of EU citizenship' (2021) 69 *Revista de Derecho Comunitario Europeo* 653

Goldner Lang I, 'Extending the Scope of EU Law to Internal Situations: In the Child's Best Interests We Swear, but not one step further' (EU Immigration and Asylum Law and Policy, 29 June 2018) <<https://eumigrationlawblog.eu/extending-the-scope-of-eu-law-to-internal-situations-in-the-childs-best-interests-we-swear-but-not-a-step-further/>> accessed 7 January 2022

Giubboni S, 'European Citizenship and Social Rights in Times of Crisis' (2014) 15(5) *GLJ* 953

Golynker O, 'Partial Migration in the EU after the Baumbast Case: Bringing Social and Legal Perspectives Together' (2004) 15(2) *KLJ* 367

Golynker O, 'The correlation between the status of Union citizenship, the rights attached to it and nationality in Rottmann' (2011) in J Shaw (ed) *Has the European Court of Justice Challenged Member-State Sovereignty in Nationality Law?*, EUI RSCAS Working Paper No.2011/62, 19

Golynker O, *Ubiquitous Citizens of Europe: The Paradigm of Partial Migration* (Intersentia 2016)

Goodwin M and C Milazzo 'Taking back control? Investigating the role of immigration in the 2016 vote for Brexit' (2017) 19(3) *The British Journal of Politics and International Relations* 450

Gordon J, 'Free movement and Equal Rights for Low-Wage Workers? What the United States Can Learn from the New EU Migration to Britain' (2011) *Fordham Law Legal Studies Research Paper* No. 1864628

Granger M-P, 'The civil right to free movement: the beating heart of European Union citizenship?' in S de Vries, H de Waele and M-P Granger (eds), *Civil Rights and EU Citizenship* (Edward Elgar Publishing 2018)

Greer S and J Laible (eds), *The European Union After Brexit* (UMP 2020)

Guild E, *Brexit and its consequences for UK and EU citizenship, or monstrous citizenship* (Brill Publishing 2017)

Guild E, 'EU Citizens, Foreign Family Members and European Union Law' (2019) 21(3) *EJML* 358

Guild E, 'Who wants to be an EU citizen?' in S Mantu, E Guild, and P Minderhoud (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Publishing 2020)

Guiraudon V, 'Equality in the making: implementing European non-discrimination law' (2009) 13(5) *Citizenship Studies* 527

Haag H, 'Former EU workers, school children, and the limits of social solidarity in the EU – Case C-181/19 Jobcenter Krefeld v JD' (European Law Blog, 16 October 2020) <
<https://europeanlawblog.eu/2020/10/16/former-eu-workers-school-children-and-the-limits-of-social-solidarity-in-the-eu-case-c-181-19-jobcenter-krefeld-v-jd/>> accessed 18 October 2022

Haag M, 'The muddle about the Union citizen's equal access to social security benefits: Familienkasse Niedersachsen-Bremen (C-411/20)' (2023) 48(2) *EL Rev* 206

Haag M, 'The Court of Justice's shift in interpreting Directive 2004/38 and Union citizenship: An illusion of legislative intention and legal certainty' (2025) 32(1) *MJ* 8

Hailbronner K and D Thym 'Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, not yet reported' (2011) 48(4) *CML Rev* 1253

Hamenstädt K, 'The impact of the duration of lawful residence on the rights of European citizens and their third-country family members' (2017) 24(1) MJ 63

Harvey D, 'The Best Interests of the Child Need Not Necessarily be a Primary Consideration' (2024) 20(4) ECL Rev 569

Heli A, 'A Tale of Two Citizenships? Citizenship, Migration and Care in the European Union' (2012) 21(3) S&LS 341

Hilson C, 'What's in a right? The relationship between Community, fundamental and citizenship rights in EU law' (2004) 29 EL Rev 636

Hinarejos A, 'Citizenship of the EU: Clarifying 'genuine enjoyment of the substance' of citizenship rights' (2012) 71(2) CLJ 279

Hobolt S, 'The Brexit Vote: A divided nation, a divided continent' (2016) 23(9) JEPP 1259

Hoogenboom A, 'In Search of a Rationale for the EU Citizenship Jurisprudence' (2015) 35(2) OJLS 301

Hooghe M and J Oser, 'Social and Political Citizenship in European Public Opinion: An Empirical Analysis of T.H. Marshall's Concept of Social Rights' (2018) 53(4) Government and Opposition 595

Hyltén-Cavallius K, *EU Citizenship at the Edges of Freedom of Movement* (Oxford: Hart Publishing 2020)

Hyltén-Cavallius K, 'Who cares? Caregivers' derived residence rights from children in EU free movement law' (2020) 57(2) CML Rev 399

Hyltén-Cavallius K, 'Stateless union citizens in a nationality conundrum: EU law safeguarding against broken promises' (2022) 18(3) ECL Rev 556

Hyltén-Cavallius K, 'The Unfolding Destiny of Union Citizenship: From a Fundamental Status to a Status of Genuine Substance' (2022) 24(3) EJML 430

Hyltén-Cavallius K, 'Union Citizenship: Towards a Deepened Legal Meaning' in B Lundqvist and A Michalski (eds), *The Depth and Size of the European Union in a Time of War* (Palgrave Macmillan 2025)

Iglesias Sánchez S, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?' (2014) 20(4) ELJ 464

Iglesias Sánchez S, 'The Constitutional Status of Foreigners and European Union Citizens: Loopholes and Interactions in the Scope of Application of Fundamental Rights' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Oxford: Hart Publishing 2017)

Insin E and M Saward 'Questions of European Citizenship' in E Insin and M Seward (eds), *Enacting European Citizenship* (CUP 2013)

Jablonowski K, “There are cracks in the EU Settlement Scheme – who will fall through them?” (London School of Economics #LSEThinks, 6 May 2020)
 <<https://blogs.lse.ac.uk/brexit/2020/05/06/there-are-cracks-in-the-eu-settlement-scheme-who-will-fall-through-them/>> accessed 12 June 2023

Jablonowski K and P Pinkowska, ‘Vulnerability in the EUSS: looking back, going forward. A review of evidence from the Law Centres’ casework’ (Law Centres Network, 2021)

Jacob M, *Precedents and Case-based Reasoning in the European Court of Justice* (CUP 2014)

Jacobs F, ‘Citizenship of the European Union – A Legal Analysis’ (2007) 13(5) ELJ 591
 Jacqueson C, ‘Union citizenship and the Court of Justice: Something new under the sun? Towards social citizenship’ (2002) 27(3) EL Rev 260

Jacqueson C, ‘EU social citizenship: between individual rights and national concerns’ in F Pennings and M Seeleib-Kaiser (eds), *EU Citizenship and Social Rights* (Edward Elgar Publishing 2018)

Jacqueson C and F Pennings, ‘Equal Treatment of Mobile Persons in the Context of a Social Market Economy’ (2019) 15(2) Utrecht Law Review 64

Jenson J, ‘The European Union’s Citizenship Regime: Creating Norms and Building Practices’ (2007) 5(5) Comparative European Politics 53

Jose Menendez A, ‘Which Citizenship? Whose Europe? – The Many Paradoxes of European Citizenship’ (2014) 15(5) GLJ 908

Juverdeanu C, ‘The EU Market Citizenship paradigm: embraced or abandoned?’ (2022) 44(7) J Eur Integr 101

Juverdeanu C, ‘Brexit and the EU Settlement Scheme: Continuity and rupture with the European Union’ (2025) 33(1) JCES 278

Kalaitzaki K, ‘EU Citizenship as a Means of Broadening the Application of EU Fundamental Rights: Developments and Limits’ in N Cambien, D Kochenov and E Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill 2020)

Kalaitzaki K, ‘The Application of EU Fundamental Rights During the Financial Crisis: EU Citizenship to the Rescue?’ (2021) 27(2) EPL 331

Karstens F, ‘How public discourse affects attitudes towards Freedom of Movement and Schengen’ (2019) 21(1) European Union Politics 43

Klaassen M, ‘Between facts and norms: Testing compliance with Article 8 ECHR in immigration cases’ (2019) 37(2) NQHR 157

Kochenov D, ‘Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights’ (2009) 15(2) Colum J Eur L 169

Kochenov D, 'Two Sovereign States vs a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters' in J Shaw (ed.) *Has the European Court Challenged Member-State Sovereignty in Nationality Law?*, EUI RSCAS Working Paper No.2011/62

Kochenov D, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2011) Jean Monnet Working Paper 08/10

Kochenov D and R Plender, 'EU Citizenship: from an incipient form to an incipient substance? The discovery of the treaty text' (2012) *EL Rev* 37, 369

Kochenov D and B Pirker, 'Deporting the Citizens within the European Union: A Counter-Intuitive Trend in Case C-348/09 P.I. V Oberbürgermeisterin der Stadt Remscheid' (2013) *Colum. J Eur. L* 19, 369, 374

Kochenov D, 'The essence of EU citizenship emerging from the last ten years of academic debate: beyond the cherry blossoms and the moon?' (2013) *ICLQ* 62, 97

Kochenov D, 'The Right to Have What Rights? EU Citizenship in Need of Clarification' (2013) *ELJ* 19, 502

Kochenov D, 'EU Citizenship: Some Systemic Constitutional Implications' (2018) 3(3) *European Papers* 1061

Kochenov D, 'The Oxymoron of 'Market Citizenship' and the Future of the Union' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (CUP 2019)

Kochenov D, 'EU Citizenship: Some Systemic Constitutional Implications' in N Cambien, D Kochenov and E Muir (eds) *EU Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill 2020)

Kochenov D and U Belavusau, 'After the celebration: Marriage equality in EU Law post-Coman in eight questions and some further thoughts' (2020) *MJ* 27, 549

Konstadinides T, 'La fraternité européenne? The extent of national competence to condition the acquisition and loss of nationality from the perspective of EU citizenship' (2010) 35(3) *EL Rev* 401

Konstadinides T, 'European Citizenship in a Constitutional Context: where the 'social' coexists with the 'market'' (SIEPS, 2022) <sieps.se/en/publications/2022/European-citizenship-in-a-constitutional-context-where-the-social-coexists-with-the-market> accessed November 2022

Konstadinides K and N Nic Shuibhne, 'A Constitutional Reading of EU Citizenship' in L Besselink, N Lupo and M Wendel (eds), *Research Handbook on EU Constitutional Law* (Edward Elgar Publishing 2024)

Kostakopoulou D, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68(2) *MLR* 233

Kostakopoulou D, 'European Citizenship: Writing the Future' (2007) 13(5) ELJ 623

Kostakopoulou D, 'Co-creating European Union Citizenship: Institutional Process and Crescive Norms' (2012) 15 CYELS 255

Kostakopoulou D, 'European Union citizenship rights and duties: Civil, political and social' in E Insin and P Nyers (eds), *Routledge Handbook of Global Citizenship Studies* (Routledge 2014)

Kostakopoulou D, 'When EU Citezens become Foreigners' (2014) 20(4) ELJ 447

Kostakopoulou D, 'Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (2018) 56(4) JCMS 854

Kostakopoulou D, *EU Citizenship Law and Policy: Beyond Brexit* (Edward Elgar Publishing 2020)

Kostakopoulou D, 'Epilogue: on guest houses and institutional reconfigurations' in D Kostakopoulou and D Thym (eds) *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar Publishing 2022)

Kostakopoulou D and D Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar Publishing 2023)

Kramer D, 'EU citizenship: a double-edged sword for European social security' in F Pennings and G Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing 2023)

Kroeze H, 'The substance of rights: new pieces of the Ruiz Zambrano puzzle' (2019) 44(2) EL Rev 238

Kroeze H, 'Distinguishing Between Use and Abuse of EU Free Movement Law: Evaluating Use of the 'Europe-route' in Family Reunification to Overcome Reverse Discrimination' in N Cambien, D Kochenov and E Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit, and Other Challenges* (Brill 2020)

Kroeze H and P Van Elsuwege 'Revisiting *Ruiz Zambrano*: A Never-Ending Story?' (2021) 23(1) 23 EJML 1

Kruma K, 'Family reunification: A tool to shape the concept of EU citizenship' in M Pascual and A Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge 2017)

Kyriazi A and F Visconti 'Free movement and Welfare in the European Union: The Social Consequences of the Right to Exit' (2023) 59(1) International Migration Review 235

Laffan B, 'How the EU27 Came to Be' (2019) 57(S1) JCMS 13

Lansbergen A, 'Metock, implementation for the Citizens' Rights Directive and lessons for EU citizenship' (2009) 31(3) J Soc Wel & Fam L 285

Lansbergen A and N Miller, 'European citizenship rights in internal situations: an ambiguous revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v Office National de l'emploi (ONEM)' (2011) 7(2) ECL Rev 287

Lant B, 'Uncertainty persists for Zambrano carers following Court of Appeal ruling' (Freemovement, 26 January 2022) < <https://freemovement.org.uk/uncertainty-persists-for-zambrano-carers-following-court-of-appeal-ruling/> > accessed 13 March 2022

Larsson O and D Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) 70(2) IO 377

Lasok P, 'Precedent in EU Law: A Practitioner's View' (2024) 13(SI) International Journal of Language & Law 8

Lazzerini N, 'The Scope and Effects of the Charter of Fundamental Rights in the Case Law of the European Court of Justice' in G Palmisano (ed), *Making the Charter of Fundamental Rights a Living Instrument* (Brill Publishing 2015)

Łazowski A, 'Children of the lesser law: comment on Ziolkowski and Szeja' (2013) EL Rev 38, 404

Łazowski A, 'Court of Justice of the European Union and the United Kingdom after Brexit: Game Over?' (2022) 47(6) EL Rev 666

Lenaerts K, 'The concept of EU citizenship in the case law of the European Court of Justice' (2013) 13(4) ERA Forum 569

Lenaerts K, 'EU Citizenship and the European Court of Justice's 'stone-by-stone' approach' (2015) 1(1) International Comparative Jurisprudence 1

Lenaerts K and JA Guitérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in D Kochenov (ed), *EU Citizenship and Federalism* (CUP 2017)

Lenaerts K, 'Proportionality as a matrix principle promoting the effectiveness of EU law and the legitimacy of EU action', ECB Legal Conference, May 2019, < https://www.ecb.europa.eu/press/conferences/shared/pdf/20211125_legal/ECB-Symposium_on_proportionality_25_November_2021.en.pdf > accessed 21 November 2021

Lenaerts K, Van Nuffel P, and T Corthaut, *Citizenship of the Union* (OUP 2022)

Littlewood A, 'Preliminary references after transition: out with the old, in with the new' (UK-EU Relations Law, June 24 2020) < <https://eurelationslaw.com/blog/preliminary-references-after-transition-out-with-the-old-in-with-the-new> > accessed 12 October 2024

Lock T, *The European Court of Justice and International Courts* (OUP 2015)

Lock T, 'Rights and principles in the EU Charter of Fundamental Rights' (2019) 56(5) CML Rev 1201

Lonardo L, 'The Withdrawal Agreement and the Dispute Settlement Mechanisms of the European Union' (2022) Brexit Institute Working Paper Series No 3/2022

Lutz P, 'Allowing mobility and preventing migration? The combination of entry and stay in immigration policies' (2023) 47(4) West European Politics 840

Lyons C, 'Citizenship in the Constitution of the European Union: rhetoric or reality?' in R Bellamy (ed), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avesbury 1996)

Maas W, *Creating European Citizens* (Rowman & Littlefield 2007)

Maas W, 'Unrespected, Unequal, Hollow? Contingent citizenship and reversible rights in the European Union' (2009) 15(2) Colum J Eur L 265

Maas W, 'The Origins, Evolution and Political Objectives of EU Citizenship' (2014) 15(5) GLJ 797

Maas W, 'European citizenship and free movement after Brexit' in Scott Greer and Janet Laible (eds), *The European Union After Brexit* (UMP 2020)

Maas W, 'European Citizenship in the Ongoing Brexit Process' (2021) 58(2) International Studies 58

Mantha-Hollands A and J Dzankic 'Ties that bind and unbind: charting the boundaries of European Union citizenship' (2022) 49(9) Journal of Ethnic and Migration Studies 2091

Mantu S, 'European Union citizenship 2011: *Zambrano*, *McCarthy* and *Dereci*' (2012) 26(1) JIANL 40

Mantu S and P Minderhoud, 'EU citizenship and social solidarity' (2017) 24(5) MJ 703

Mantu S, 'EU citizenship and the rule of law in times of Brexit: Generosity by reciprocity' (EU Global Leadership in the Rule of Law, February 2019, Zagreb)

Mantu S, 'EU Citizenship and EU Territory: Unsettling the National, Embedding the Supranational' in S Mantu, P Minderhoud and E Guild (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Publishing 2020)

Mantu S, E Guild and P Minderhoud 'Introduction' in S Mantu, E Guild and P Minderhoud (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Publishing 2020)

Mantu S, 'EU citizenship, integration, and equal treatment: The worker-citizen divide' (2021) Nijmegen Migration Law Working Papers Series 2021/01

Mantu S and P Minderhoud 'Struggles over social rights: Restricting access to social assistance for EU citizens' (2023) 25(1) EJSS 3

Marshall J, J Sargeant and D Goss 'Disputes under the Withdrawal Agreement' (Institute for Government, 2 October 2020)

<<https://www.instituteforgovernment.org.uk/article/explainer/disputes-under-withdrawal-agreement>> accessed 14 October 2024

Marshall T.H., *Citizenship and Social Class: And Other Essays* (University Print 1950)

Martin D, 'Comments on *Förster* (Case C-158/07), *Metock* (Case C-127/08) and *Huber* (Case C-524/06)' (2009) 95(1) EJML 108

Martinico G and AM Russo, 'Is the European Union a Militant Democracy? The Perspective of the Court of Justice in *Zambrano* and *Kadi*' (2015) 21(4) Eur Pub L 659

McKinney CJ, M Potter, and T McGuinness 'The Common Travel Area and the special status of Irish citizens in UK law' for the House of Commons Library, published 16 August 2023

Meehan E, *Citizenship and the European Community* (Sage Publishing 1993)

Meers J, J Tomlinson, A Welsh and C O'Brien, 'Rights on Paper? The Discriminatory Effects of Digital Immigration Status on Private Landlord Decisions' (UKCLA, 14 March 2023) <<https://ukconstitutionallaw.org/2023/03/14/jed-meers-joe-tomlinson-alice-welsh-and-charlotte-obrien-rights-on-paper-the-discriminatory-effects-of-digital-immigration-status-on-private-landlord-decisions/>> accessed 18 June 2025

Mindus P, 'Dimensions of Citizenship' (2014) 15(5) GLJ 735

Mindus P, *European Citizenship After Brexit: Freedom of Movement and Rights of Residence* (Palgrave Macmillan 2017)

Mindus P, 'A constitutional eyesore after Brexit: EU citizenship and British nationality' in D Prabhat (ed), *Citizenship in Times of Turmoil?* (Edward Elgar Publishing 2019)

Montaldo S, 'Freedom of movement, social integration and naturalization: Testing reverse discrimination in the recent case law of the Court of Justice' (2018) 3(3) European Papers 1481

More G, 'From Union Citizen to Third-Country National: Brexit, the UK Withdrawal Agreement, No-Deal Preparations and Britons Living in the European Union' in N Cambien, E Muir and D Thym (eds), *European Citizenship Under Stress: Social Justice, Brexit, and Other Challenges* (Brill Publishing 2020)

Moritz J and D Carter 'Life after the 'Dano-Trilogy': Legal Certainty, Choices and Limitations in EU Citizenship Case Law' in N Cambien, D Kochenov and E Muir (eds), *EU Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill 2020)

Moser C and B Rittberger, 'The CJEU and EU (de)-constitutionalization: Unpacking jurisprudential responses' (2022) 20(3) ICON 1038

Muir E, 'The fundamental rights implications of EU legislation: some constitutional challenges' (2014) 51(1) CML Rev 219

Muir E, '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' in N Cambien, D Kochenov, and E Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020)

Muller C, 'European Public Policy and Restriction of Free Movement of Persons in EU Law' (2024) 9(3) *European Papers* 1408

Mulligan C, 'The Fragility of Freedom of Movement' (2017) 52(5) *Review of European Economic Policy* 254

Musolff A, 'The Scenario of (Im-)Migrants as Scroungers and/or Parasites in British Media Discourses' in B Schmidt-Haberkamp, M Gymnich, and K Scheinder (eds), *Representing Poverty and Precarity in a Postcolonial World* (Brill 2020)

Muzira A, 'Zambrano EUSS Primary Carers 'New' Guidance: Akinsanya and Velaj' (Electronic Immigration Network, 4 July 2022) < <https://www.ein.org.uk/blog/zambrano-euss-primary-carers-new-guidance-akinsanya-and-velaj> > accessed 27 June 2024

Neuvonen P, 'EU citizenship and its 'very specific' essence: Rendón Marin and CS' (2017) *CML Rev* 54, 1201

Neuvonen P, 'A Revised Democratic Critique of EU (Citizenship) Law: From Relative Homogeneity to Political Judgment' (2020) 21(5) *GLJ* 867

Nic Shuibhne N, 'The Resilience of EU Market Citizenship' (2010) 47(6) *CML Rev* 1597

Nic Shuibhne N, 'Seven Questions for Seven Paragraphs' (2011) 36(2) *EL Rev* 161

Nic Shuibhne N, '(Some of) The Kids Are All Right: Comment on McCarthy and Dereci' (2012) 49(1) *CML Rev* 349

Nic Shuibhne N, 'The Third Age of EU Citizenship' in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012)

Nic Shuibhne N, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP 2013)

Nic Shuibhne N, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52(4) *CML Rev* 889

Nic Shuibhne N, 'What I tell you three times is true: lawful residence and equal treatment after Dano' (2016) 23(6) *MJ* 908

Nic Shuibhne N, 'Reconnecting free movement of workers and equal treatment in an unequal Europe' (2019) 43(4) *EL Rev* 477

Nic Shuibhne N, 'The 'territory of the Union' in EU citizenship law' (2019) 38 *YEL* 267

Nic Shuibhne N, 'Did Brexit change EU law?' (2021) 74(1) *CLP* 195

Nic Shuibhne N, 'Applying Solidarity as a Procedural Obligation in EU Citizenship Law' (2023) 19 CYELP 1

Nic Shuibhne N, *EU Citizenship Law* (OUP 2023)

Nic Shuibhne N, 'Protecting the legal heritage of former Union citizens: EP v Préfet du Gers' (2023) 60(2) CML Rev 475

Nissen E, 'A Children's Rights Perspective to Ruiz Zambrano and Chavez-Vilchez: An Examination in Light of Theory, Practice and Child Development Research' (2021) 23(1) EJML 68

O'Brien C, 'I trade therefore I am: legal personhood in the European Union' (2013) 50(6) CML Rev 1643

O'Brien C, 'The pillory, the precipice, and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants' (2015) 37(1) J Soc Wel & Fam L 111

O'Brien C, 'Civis capitalist sum: Class as the new guiding principle of EU free movement rights' (2016) 53(4) CML Rev 937

O'Brien C, '“Hand-to-mouth” citizenship: decision time for the UK Supreme Court on the substance of Zambrano rights, EU citizenship and equal treatment' (2016) 38(2) J Soc Wel & Fam L 228

O'Brien C, 'Don't think of the children! CJEU approves automatic exclusions from family benefits in Case C-308/14 Commission v UK' (EU Law Analysis, 16 June 2016) <<https://eulawanalysis.blogspot.com/2016/06/dont-think-of-children-cjeu-approves.html>> accessed on 12 May 2024

O'Brien C, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Oxford, Hart Publishing 2017)

O'Brien C, 'The ECJ sacrifices EU Citizenship in vain: Commission v UK' (2017) 54(1) CML Rev 209

O'Brien C, 'Acte cryptique? Zambrano, welfare rights and underclass citizenship in the tale of the missing preliminary reference' (2019) 56(6) CML Rev 1697

O'Brien C, 'Between the devil and the deep blue sea: vulnerable EU citizens cast adrift in the UK post-Brexit' (2021) 58(2) CML Rev 431

O'Brien C, 'The Great EU Citizenship Illusion Exposed: equal treatment rights evaporate for the vulnerable' (2021) 46(6) EL Rev 801

O'Brien C and A Welsh, 'Court of appeal decides the Secretary of State is wrong, wrong, wrong: the Charter applies to people with pre-settled status' (2024) 46(1) J Soc Wel & Fam L 133

O'Brien C, 'IMA charging to the rescue? Judicial review aims to avert oncoming EUSS expiry catastrophe for people with pre-settled status' (EU Rights and Brexit Hub: Research, Advice and Support on EU Citizens' Rights, October 26 2022),
 <<https://www.eurighthub.york.ac.uk/blog/ima-charging-to-the-rescue-judicial-review-aims-to-avert-oncoming-euss-expiry-catastrophe-for-people-with-pre-settled-status>> accessed 12 April 2024

O'Brien C, 'Socio-economic discrimination in the EUSS' (Challenging unfairness in the immigration system, London, February 2025)

O'Connor N and D Harvey 'Freedom of Movement and the Normative Value of the Right to Work in the United Kingdom Post-Brexit' (2024) 25 CYELS 174

O'Connor N, A Karatzia and T Konstadinides 'Courting controversy? The constitutional implications of the Court of Justice of the European Union's involvement in the resolution of disputes after Brexit' (2025) 00 YEL 1

O'Leary S, *The evolving concept of Community citizenship: from free movement of persons to Union citizenship* (Kluwer Law International 1996)

O'Neill R, 'A Stitch in Time? Mutual Trust as the EU's Fix-All in Case C-183/23 Commission v Malta' (2025) 10(2) European Papers 463

Olivier B and J Herman Reestman, 'European citizens' third-country family members and Community law' (2007) 3(3) ECL Rev 463

Oosterom-Staples H, 'The Triangular Relationship Between Nationality, EU Citizenship and Migration in EU Law: A Tale of Competing Competences' (2018) 65 NILR 431

Oršolic Dalessio T, 'The Social Dimension of EU Citizenship – A Castle in the Air or Construction Gone Wrong?' (2013) 14(7) GLJ 869

Page Moch L, *Moving Europeans: migration in Western Europe since 1650* (Indiana University Press 2015)

Paju J, 'Case C-181/19, Jobcenter Krefeld: The End of Union Citizenship as Previously Understood?' (2019) 14(4) Review of European Administrative Law 47

Paju J, 'On the lack of legal reasoning in case C-308/14, European Commission v United Kingdom' (2019) 48(1) ILJ 117

Paju J, 'The outer limits of transnational solidarity between the EU's Member States in a social security setting' in D Kostakopoulou and D Thym (eds), *Research Handbook on European Union Citizenship Law and Policy: Navigating Challenges and Crises* (Edward Elgar Publishing 2022)

Pascouau Y, 'Strong attack against the freedom of movement of EU citizens: Turning back the clock' (European Policy Centre, April 30th 2013)
 <<https://www.epc.eu/en/Publications/Strong-attack-against-the-free~1c7140>> accessed 10 October 2024

Pech L and D Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case' (SIEPS 2021) < <https://sieps.se/en/publications/2021/respect-for-the-rule-of-law-in-the-case-law-of-the-european-court-of-justice/>> accessed 13 August 2025

Peers S, 'Metock in the Council: a UK attack on the rule of law and EU fundamental freedoms' ILPA European Update, December 2008

Peers S, 'Free movement, Immigration Control and Constitutional Conflict' (2009) 5(2) ECL Rev 173

Peers S, "Benefit Tourism by EU citizens: the CJEU just says No" (EU Law Analysis, 11 November 2014) available at < <https://eulawanalysis.blogspot.com/2014/11/benefit-tourism-by-eu-citizens-cjeu.html>> accessed on 15 March 2025

Pender S, 'After Zambrano and McCarthy, we now have Dereci...' (Freemovement, 23 January 2012) available at < <https://freemovement.org.uk/article-20-of-the-tfeu-after-zambrano-and-mccarthy-we-now-have-dereci-2/>> accessed 17 December 2021

Perry A and A Tucker, 'Top-Down Constitutional Conventions' (2018) 81 MLR 765

Piper L, 'Has the implementation of the Withdrawal Agreement been a success? An EU citizens' rights perspective' (2024) 38(2) JIANL 175

Plan A, 'Why does the CJEU talk in hypotheticals? The Mirin case beyond Gender Recognition' (European Law Blog, October 21 2024) <<https://www.europeanlawblog.eu/pub/38k0ck9o/release/3?readingCollection=9fl15c0>> accessed 9 April 2025

Poleshcuk V, 'Statelessness, Proportionality and Access to (EU) Citizenship' (EUI Global Citizenship Observatory, 15 June 2021) < <https://globalcit.eu/statelessness-proportionality-and-access-to-eu-citizenship/#:~:text=How%20should%20proportionality%20be%20tested,could%20arguably%20decide%20either%20way>> accessed 15 February 2025

Pobjoy J, 'The best interests of the child principle as an independent source of international protection' (2015) 64(2) ICLQ 327

Progin-Theuerkauf, S 'K.A. and others – the Zambrano Story Continues' (European Law Blog, 22 May 2018) < <https://europeanlawblog.eu/2018/05/22/k-a-and-others-the-zambrano-story-continues/>> accessed 7 January 2022

Pullano T, 'Free movement, Social Citizenship, and the Production of the EU's legal territory as a 'Social Milieu': Reading the Laval case law through Foucault' [2023] La Revue des droits de l'homme 23

Pulvirenti R, 'A New Settlement for the United Kingdom in the European Union: A New Challenge to EU Citizens' Social Benefits and Freedom of Movement?' (2016) 1(2) European Papers 727

Ragni C, 'The impact of EU citizenship on the traditional balance between national migration policies and the protections of fundamental rights' (2017) 4 *Il Diritto dell'Unione Europea* 769

Rasmussen M and D Sindbjerg Martinsen, 'EU constitutionalisation revisited: Redressing a central assumption in European studies' (2019) 25(3) *ELJ* 251

Raucea C, 'Fundamental rights: The missing pieces of European citizenship?' (2013) 14(10) *GLJ* 2021

Raucea C, 'European Citizenship and the Right to Reside: 'No One on the Outside has a Right to be Inside''? (2016) 22(4) *ELJ* 470

Reland J, 'UK citizens in the EU: what you need to know' (UK in a Changing Europe, 27 April 2021) < <https://ukandeu.ac.uk/explainers/uk-citizens-in-the-eu-what-you-need-to-know/> > accessed 10 April 2025

Reynolds S, 'Exploring the 'intrinsic connection' between free movement and the genuine enjoyment test: reflections on EU citizenship after Iida' (2013) 38(3) *EL Rev* 376

Reynolds S, 'May We Stay? Assessing the Security of Residence for EU Citizens Living in the UK' in M Dougan (ed), *The UK after Brexit: Legal and Policy Challenges* (Intersentia 2018)

Reynolds S, 'Brexit and the (Not Quite) Constitutionalised Status of EU Citizenship' (Constitutional Law Group, 24 April 2019) < <https://ukconstitutionallaw.org/2019/04/24/stephanie-reynolds-brexit-and-the-not-quite-constitutionalised-status-of-eu-citizenship/> > accessed 12 December 2024

Reynolds S, '(De)constructing the Road to Brexit: Paving the Way to Further Limitations on Free Movement and Equal Treatment?' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Bloomsbury Publishing 2020)

Richards T, 'Zambrano, McCarthy and Dereci: reading the leaves of EU citizenship jurisprudence' (2012) 17(3) *JR* 272

Rincón-Eizaga L, 'Human rights in the European Union: Conflict between the Luxembourg and Strasbourg courts regarding interpretation of Article 8 of the European Convention of Human Rights' (2008) 11 *Int. Law. Rev* 119

Ristuccia F, 'The right to social assistance of children in education and their primary carers: Jobcenter Krefeld' (2021) 58(3) *CML Rev* 877

Ristuccia F, 'Ties that bind and ties that compel: Dependency and the Ruiz Zambrano doctrine' (2023) 60(5) *CML Rev* 1227

Roeben V, P Minnerop, P Telles and J Snell 'Revisiting Union citizenship from a fundamental rights perspective in the time of Brexit' (2018) 5 *EHRLR* 450

Rogers N, 'Supremacy and proportionality – the missing element in the UK's implementation of free movement law' (2007) 21(3) JIANL 181

Royston T and C O'Brien, 'You can check out anytime you like, but you can never leave' (2018) 25(1) J Soc Wel & Fam L D20

Royston T and C O'Brien, 'Fantasy welfare is not enough: people with pre-settled status are entitled to actually live in dignified conditions' (2024) 31(2) JSSL D47

Ryan B, 'The European Dimension to British Border Control' (2004) 18(1) JIANL 6

Sacha G, 'The constitutional (im)balance between "the market" and "the social" in the European Union' (2017) 13(1) ECL Rev 23

Šadl U and S Sankari 'Why Did the Citizenship Jurisprudence Change?' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity* (Hart Publishing 2017)

Šadl U and S Hermansen 'The European Court of Justice, an Able and Unwilling Lawmaker: Evidence from 920 Free Movement and Persons Judgments' in M Dawson, E Muir and B de Witte (eds), *Judicial Politics in the EU* (Edward Elgar Publishing 2023)

Sarmiento D and E Sharpston, 'European Citizenship and Its New Union: Time to Move On?' in D Kochenov (ed), *Citizenship within the EU Federal Context* (CUP 2017)

Sauter W, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 CYELS 439

Schain M, 'The state strikes back: immigration policy in the European Union' (2009) 20(1) EJIL 93

Schewe C, 'Shattering the Concept of EU Citizenship? The Potential Impact of Brexit and Potential Succession of Catalonia on EU Citizenship' (2021) 19(1) Baltic Yearbook of International Law 129

Schiek D, 'Perspectives on social citizenship in the EU – from status positivus to status socialis activus via two forms of transnational solidarity' (2015) Queen's University Belfast CETLS Paper Series 4

Schmidt S, 'Judicial Europeanisation: The Case of Zambrano in Ireland' (2014) 37(4) West European Politics 769

Schmidt S, 'Extending Citizenship Rights and Losing It All: Brexit and the Perils of 'Over-Constitutionalisation'' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Bloomsbury Publishing 2017)

Schmidt S, *The European Court of Justice and the Policy Process: The Shadow of the Case Law* (OUP 2018)

Schmidt S, M Blauberger and D Sindbjerg Martinsen 'Free movement and equal treatment in an unequal union' (2018) 25(10) JEPP 1391

Schmidt S, 'No match made in heaven: Parliamentary sovereignty, EU over-constitutionalisation and Brexit' (2020) 27(1) JEPP 779

Schmidt S, 'The limits of judicializing transnational welfare: progression and retrogression of the ECJ case law on access to social benefits' in D Kostakopoulou and D Thym (eds), *Research Handbook on European Union Citizenship Law and Policy: Navigating Challenges and Crises* (Edward Elgar Publishing 2023)

Schoenmaekers S and A Hoogenboom 'Singh and Carpenter revisited: some progress but no final clarity' (2014) 21(3) MJ 494

Schroeder P, 'Seizing opportunities: the determinants of the CJEU's deference to national courts' (2023) 31(9) JEPP 1391

Seubert S, O Eberl and van Waarden F (eds), *Reconsidering EU Citizenship: Contradictions and Constraints* (Edward Elgar Publishing 2018)

Seubert S, 'Shifting Boundaries of Membership: The politicisation of free movement as a challenge for EU citizenship' (2019) 26(1) ELJ 48

Seubert S, 'Dilemmas of EU Citizenship: The Persistent Divide Between Economic and Political Integration' in N Bremberg and L Norman (eds), *Dilemmas of European Democracy: New Perspectives on Democratic Politics in the European Union* (UEP 2023)

Seubert S, 'Constituting European Citizenship: Struggles for Political Empowerment in the EU' (2024) 11(12) Democratic Theory 99

Shaw J, 'The many pasts and futures of citizenship in the European Union' (1997) 22(6) EL Rev 554

Shaw J, 'The Interpretation of European Citizenship' (1998) 61(3) MLR 293

Shaw J, *EU Citizenship and Political Rights in an Evolving European Union* (Routledge 2013)

Shaw J and N Miller, 'When legal worlds collide: an exploration of what happens when EU free movement law meets UK immigration law' (2013) 38(2) EL Rev 137

Shaw J, 'Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law' (2015) 17 CYELS 247

Shaw J, 'Citizenship and Free Movement' B Martill and U Staiger (eds), *A Changing EU: Navigating an Archipelago of Contradictions* (UCL Press 2018)

Shaw J, 'EU citizenship: still a fundamental status?' [2018] EUI Working Paper RSCAS 2018/14

Shaw J, 'Towards a Political Europe?' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (CUP 2019)

Shaw J, 'EU Citizenship: Still a Fundamental Status?' in Rainer Bauböck (ed) *Debating EU Citizenship* (IMISCOE Research Series 2019)

Shaw J, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalisation' (2020) EUI Working Paper RSCAS 2020/33

Shaw J, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalisation' in P Craig and G de Burca (eds), *The Evolution of EU Law* (3rd edition, OUP 2021)

Shutes I, 'Work-related Conditionality and the Access to Social Benefits of National Citizens, EU and Non-EU Citizens' (2016) 45(4) JSP 691

Sklodi N, '(Br)exit citizenship: belonging, rights and participation' (2023) 31(1) Journal of Contemporary European Studies 1

Smismans S, 'EU citizens' rights post-Brexit: why direct effect beyond the EU is not enough' (2018) 14(3) ECL Rev 443

Smismans S, 'Protecting EU citizens in the UK from a Brexit 'Windrush on Steroids': A Legislative Proposal for a Declaratory Registration System' (2019) DCU Brexit Institute Working Paper No. 8-2019

Smits J, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in H Micklitz and E Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (CUP 2017)

Smyth C, 'A turn towards fundamental rights or just a swerve? The jurisprudence of the CJEU on family reunification for static Union citizens and third country national immigrants' (2019) 33(4) JIANL 283

Smyth C, 'The Dublin Regulation, mutual trust and fundamental rights: No exceptionality for children?' (2022) 28(4) ELJ 242

Solanke I, 'Using the citizen to bring the refugee in: *Gerardo Ruiz Zambrano v Office National de l'Emploi*' (2012) 75(1) MLR 101

Solanke I, 'Another type of 'Other' in EU Law? AB (2) MVC v Home Office and Rahman v Secretary of State for the Home Office' (2013) 76(2) MLR 383

Solanke I, 'HC and Sanneh – 'genuine enjoyment' does not include social welfare' (Electronic Immigration Network, 20 December 2013) < <https://www.ein.org.uk/blog/hc-and-sanneh-genuine-enjoyment-does-not-include-social-welfare> > accessed on 13 April 2023

Solanke I, 'On the frontline: residency rights and non-EU parents of British citizens' (Discover Society, June 6 2017) < <https://archive.discoverociety.org/2017/06/06/on-the-frontline-residency-rights-and-non-eu-parents-of-british-citizens/> > accessed 23 April 2024

Solanke I, 'Who Speaks for the Zambrano Families? Multi-level Abandonment in the UK and the EU' in M Dustin, N Ferreira and S Millins (eds), *Gender and Queer Perspectives on Brexit* (Palgrave Macmillan 2019)

Solanke I, 'The Impact of Brexit on Black Women, Children and Citizenship' (2020) 58(S1) JCMS 147

Solanke I, 'Race, gender and discrimination – learning from Zambrano' in M Adler (ed), *A Research Agenda for Social Welfare Law, Policy and Practice* (Edward Elgar Publishing 2022)

Spaventa E, 'From Gebhard to Carpenter: Towards a (non-)economic European constitution' (2004) 41(3) CML Rev 743

Spaventa E, 'Case C-109/01, Secretary of State for the Home Department v H. Akrich, judgment of the Full Court of 23 September 2003' (2005) 42(1) CML Rev 225

Spaventa E, 'Seeing the wood for the trees? On the scope of Union citizenship and its constitutional effect' (2008) 45(1) CML Rev 13

Spaventa E, 'Mice or Horses? British Citizens in the EU 27 after Brexit as "Former EU Citizens"' (2019) 44(5) EL Rev 193

Spaventa E, 'The rights of citizens under the Withdrawal Agreement: a critical analysis' (2020) 45(2) EL Rev 193

Spaventa E, N Rennuy and P Minderhoud, 'The legal status and rights of the family members of EU mobile workers', European Commission, Directorate-General for Employment Social Affairs and Inclusion [2021]

Spaventa E, 'Brexit and the Free Movement of Persons: What is EU Citizenship Really About?' in Nic Shuibhne N (ed), *Revisiting the Fundamentals of the Free Movement of Persons in EU Law* (OUP 2023)

Spencer M, 'Derivative residence rights and the EU Settlement Scheme' (Doughty Street Chambers, 28 August 2024), <<https://insights.doughtystreet.co.uk/post/102jhov/derivative-residence-rights-and-the-eu-settlement-scheme>>, accessed 3 September 2024

Staiano F, 'Derivative rights of residence for parents of Union citizen children under Article 20 TFEU: Chavez-Vilchez' (2018) 55(1) CML Rev 225

Stalford H, 'Concepts of family under EU law – lessons from the ECHR' (2002) 16(3) International Journal of Law, Policy and the Family 410

Stalford H, 'Benefits, babies and the insignificance of being British' (2018) 40(3) J Soc Wel & Fam L 370

Strumia F and M-E Hughes, 'A momentary blip or a step forward in revisionist free movement? Case C-308/14 European Commission v United Kingdom of Great Britain and Northern Ireland' (2016) 23(4) EPL 23, 723

Strumia F, 'European Citizenship and Transnational Rights: Chronicles of a Troubled Narrative' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Oxford: Hart Publishing 2017)

Strumia F, 'Brexitting European Citizenship through the Voice of Others' (2019) 17(S1) GLJ 109

Strumia F, 'Supranational Citizenship's Enablers: Free Movement from the Part of the Home Member State' (2020) 45(4) EL Rev 507

Štrus J and N Peršak, 'The Charter of Fundamental Rights and EU Citizenship: The Link with EU Law Re-Examined' in E Guild, C Gortázar Rotaèche, and D Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Publishing 2014)

Sumption M and D Kierans, 'Integration in the UK and the post-Brexit immigration system' (The Migration Observatory, 23 March 2021),
<<https://migrationobservatory.ox.ac.uk/resources/commentaries/integration-in-the-uk-and-the-post-brexit-immigration-system/>> accessed 12 June 2024

Sumption M and M Cuibus 'Outstanding issues facing the EU Settlement Scheme' (18 October 2023, The Migration Observatory),
<<https://migrationobservatory.ox.ac.uk/resources/commentaries/outstanding-issues-facing-the-eu-settlement-scheme/>> accessed 10 June 2024

Swider K, 'Legitimizing precarity of EU citizenship: Tjebbes' (2020) 57(4) CML Rev 1163

Syrpis P, 'The relationship between primary and secondary law in the EU' (2015) 52(2) CML Rev 461

Szpunar J and N Persak, 'Some Reflections on Member State Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment' in D Kochenov (ed), *EU Citizenship and Federalism* (CUP 2017)

Tavares Lanceiro R, 'Brexit and EU Citizen's Social Rights – the Commission v United Kingdom and the CJEU case law on social rights' in I Pernice and A Guerra Martins (eds), *Brexit and the Future of EU Politics: A Constitutional Law Perspective* (Nomos 2019)

Tecqmenne M, 'Migrant jobseekers, right of residence and access to welfare benefits: one step forward, two steps backward?' (2021) 46(6) EL Rev 765

Thym D, 'The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens' (2015) 52(1) CML Rev 17

Thym D, 'Introduction: The Judicial Deconstruction of Union Citizenship' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Oxford: Hart Publishing 2017)

Thym D, 'The Evolution of Citizens' Rights in Light of the European Union's Constitutional Development' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Bloomsbury Publishing 2017)

Thym D, 'Between "administrative mindset" and "constitutional imagination": the role of the Court of Justice in immigration, asylum and border control policy' (2019) 44(2) EL Rev 139

Tilly C, 'A Primer On Citizenship' [1997] 26 Theory and Society

Tomlinson J and A Welsh, 'Digital Immigration Status: A Monitoring Framework' (Public Law Project) <<https://publiclawproject.org.uk/content/uploads/2020/10/PLP-Report-Digital-Immigration-Status.pdf>> accessed 13 April 2023

Toner H, 'New Regulations implementing Directive 2004/38' (2006) 20(3) JIANL 158

Torres Pérez A, 'The federalizing force of the EU Charter of Fundamental Rights' (2017) 15(4) ICON 1080

Torres Pérez A, 'Right to family life as a bar to expulsion' in M Pascual and A Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge 2017)

Tridimas T, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012)

Tryfonidou A, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (2009) 15(5) ELJ 634

Tryfonidou A, 'The impact of EU law on nationality laws and migration control in the EU's member states' (2011) 25(4) JIANL 358

Valcke A, 'Five years of the Citizens Directive in the UK – Part 1' (2011) 25(3) JIANL 217

Valcke A, 'Five years of the Citizens Directive in the UK – Part 2' (2011) 25(3) JIANL 331

Valcke A, 'EU Citizens' Rights in Practice: Exploring the Implementation Gap in Free Movement Law' (2019) 21(3) EJML 289

Van den Brink M, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?' (2012) 39(2) LIEI 273

Van den Brink M and D Kochenov, 'Against Associate EU Citizenship' (2019) 57(6) JCMS 1366

Van den Brink M, 'EU citizenship and (fundamental) rights: Empirical, normative, and conceptual problems' (2019) 25(1) ELJ 21

Van den Brink M, 'The Problem with Market Citizenship and the Beauty of Free Movement' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (CUP 2019)

Van den Brink M, 'Is It Time to Abolish the Substance of EU Citizenship Rights Test?' (2021) 23(1) EJML 13

Van den Brink M, 'A typology of reverse discrimination in EU citizenship law' (2023) 2(1) European Law Open 57

Van der Mei AP, 'Overview of recent cases before the Court of Justice of the European Union (April-September 2017)' (2017) 19(4) EJSS 353

Van der Mei AP, 'Member State Nationality, EU Citizenship and Associate European Citizenship' in N Cambien, D Kochenov and E Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill Publishing 2020)

Van Eijken H, 'European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals' (2010) 27(72) Utrecht Journal of International and European Law 65

Van Eijken H and S de Vries 'A new route into the promised land? Being a European citizen after Ruiz Zambrano' (2011) 36(5) EL Rev 704

Van Eijken H, *EU Citizenship and the Constitutionalisation of the European Union* (Europa Law Publishing 2015)

Van Eijken H and S de Vries 'Deepening and widening of the protection of fundamental rights of European citizens vis-à-vis non-state, private actors' in R Buikema, Antoine Buyse, A Robben (eds), *Cultures, Citizenship and Human Rights* (Routledge 2019)

Van Eijken H and P Phoa, 'The scope of Article 20 TFEU clarified in Chavez-Vilchez: Are the fundamental rights of EU citizens coming of age?' (2018) 43(6) EL Rev 949

Van Eijken H, 'Tjebbes in Wonderland: on European citizenship, nationality and fundamental rights' (2019) 15(4) ECL Rev 714

Van Eijken H, 'Connecting the Dots Backwards, what did Ruiz Zambrano Mean for EU Citizenship and Fundamental Rights in EU Law?' (2021) 23(1) EJML 48

Van Elsuwege P and D Kochenov 'On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13(4) EJML 443

Várnay E, 'Judicial Passivism at the European Court of Justice?' (2019) 20 Hungarian Journal of Legal Studies 127

Varuhas J, 'Mapping doctrinal methods' in P Daly and J Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar 2023)

Vasilopoulou S and L Talving, 'Opportunity or threat? Public attitudes towards EU freedom of movement' (2018) 26(6) JEPP 805

Verschueren H, 'Preventing benefit tourism in the EU: a narrow or broad interpretation of the possibilities offered by the ECJ in Dano?' (2015) 52(2) CML Rev 363

Verschueren H, 'Recent case before the Court of Justice of the European Union' (2017) 19(1) EJSS 71

Verschueren H, 'The complex social security provisions of the Brexit Withdrawal Agreement' (2020) 23(1) EJSS 7

Verschueren H, 'The Right to Social Assistance for Migrating Union Citizens: A Step Forward in the Case Law of the Court of Justice This Time' (2021) 23(2) EJML 202

Verschueren H, 'Equal treatment as an instrument of integration: The CJEU's case law on social rights for third-country nationals under the EU migration directives' (2023) 25(3) EJSS 243

Vignon J, 'The hasty return of Syrian refugees would not serve European interests' (Jacques Delors Institute, 17 December 2024) < <https://institutdelors.eu/en/publications/the-hasty-return-of-syrian-refugees-would-not-serve-european-interests/#:~:text=It%20is%20estimated%20that%20a,also%20taken%20in%20Syrian%20refugees.> > accessed 3 October 2025

Vink M, 'The Brexit Naturalisation Effect: An Update Eight Years After the Referendum' (EUI Global Citizenship Observatory, 6 March 2025) < <https://globalcit.eu/the-brex-it-naturalisation-effect-an-update-eight-years-after-the-referendum/> > accessed 4 August 2025

Vlieks C, 'Tjebbes and Others v Minister van Buitenlandse Zaken: A Next Step in European Union Case Law on Nationality Matters?' (2019) 24(2) Tilburg Law Review 142

Wagner LJ, 'Member State nationality under EU Law – To be or not to be a Union citizen?' (2021) 28(3) MJ 304

Wagner LJ, 'The disruptive influence of EU law in nationality matters: the genuine link trajectory and judicial engineering in Uddaendings- og Integrationsministeriet' (2024) 20(4) ECL Rev 615

Wallace Goodman S, 'EU Citizenship: A Tool for Integration?' in R Barbulescu, S Wallace Goodman, and L Pedroza (eds), *Revising the Integration-Citizenship Nexus in Europe: Sites, Policies, and Bureaucracies of Belonging* (Springer Cham 2023)

Walsh P, 'Q&A: The UK's new points-based immigration system after Brexit' (The Migration Observatory, 27 April 2020), < <https://migrationobservatory.ox.ac.uk/resources/commentaries/qa-the-uks-new-points-based-immigration-system-after-brex-it/> > accessed on 13 June 2024

Welsh A, 'Permission to discriminate – EU nationals, pre-settled status and access to social assistance' (2022) 44(1) J Soc Wel & Fam L 133

Welsh A, 'Secretary of State for Work and Pensions v AT' (2023) 37(2) JIANL 195

Welsh A, *The Market Citizenship Illusion: Free Movement Rights for Atypical Workers* (Bloomsbury Publishing 2025)

Welsh A and C O'Brien, 'Side-stepping international law on the sly: The secret severing of the EU Settlement Scheme from the Withdrawal Agreement' (2026) JIANL, forthcoming publication

Wesemann A, *Citizenship in the European Union* (Edward Elgar Publishing 2020)

Wesemann A, 'The power of the norm: EU as a constitutional right' in D Kostakopoulou and D Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar Publishing 2022)

White R, 'Free movement, equal treatment and citizenship of the Union' (2005) 54(4) ICLQ 885

White R, 'Conflicting competences: free movement rules and immigration laws' (2000) 29(3) EL Rev 385

Wiesbrock A, 'Disentangling the 'Union citizenship puzzle'? The McCarthy case' (2011) 35(4) EL Rev 861

Wiesbrock A, 'Union Citizenship and the Redefinition of the 'Internal Situations' Rule: The Implications of Zambrano' (2011) 12(11) GLJ 2077

Wiesbrock A, 'The self-perpetuation of EU constitutionalism in the area of free movement of persons: Virtuous or vicious cycle?' (2013) 2(1) GlobCon 125

William Walsh P, 'Q&A: The UK's new points-based immigration system after Brexit' (Migration Observatory, 27 April 2020) <<https://migrationobservatory.ox.ac.uk/resources/commentaries/qa-the-uks-new-points-based-immigration-system-after-brexits/>> accessed 13 June 2024

Williams J, "Retained EU law: A guide for the perplexed" (UK-EU Relations Law, December 28th 2020) <<https://eurelationslaw.com/blog/retained-eu-law-a-guide-for-the-perplexed>> accessed on 12 October 2024

Williams J, "Relevant separation agreement law: a guide for the perplexed" (UK-EU Relations Law Blog, 29 December 2020, available at <<https://eurelationslaw.com/blog/relevant-separation-agreement-law-a-guide-for-the-perplexed>> accessed on 12 October 2024

Wollenschläger F, 'The judiciary, the legislature and the evolution of Union citizenship' in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012)

Wollenschläger F, 'Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the Post-Dano Era' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Bloomsbury Publishing 2017)

Wollenschläger F, 'An EU Fundamental Right to Social Assistance in the Host Member State? The CJEU's Ambivalent Approach to the Free Movement of Economically Inactive Union Citizens Post Dano' (2022) 24(1) EJML 151

Wooton V, 'A tale of two citizens: The Brey-Dano proportionality gap in UK courts and tribunals' (2021) 23(2) EJSS 144

Wooton V, 'Is article 14 the new article 18? Social welfare access, fundamental rights, and non-discrimination in Europe' (2022) 29(3) JSSL 172

Wray H, *Article 8 ECHR, Family Reunification and the UK's Supreme Court: Family Matters?* (Bloomsbury Publishing 2023)

Yeo C, 'Court of Appeal grapples with Zambrano' (Electronic Immigration Network, 17 January 2023) <<https://www.ein.org.uk/blog/court-appeal-grapples-zambrano>> accessed 29 May 2024

Yong A, 'Driving a wedge between friends?: The Court of Justice of the EU and its citizens in the case of welfare benefits' (2016) 6 EHRLR 664

Yong A, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Hart Publishing 2019)

Yong A, 'Free movement or fundamental rights? EU citizenship as a legal gateway to fundamental rights protection' in D Kostakopoulou and D Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar Publishing 2022)

Zambelli E, M Benson, and N Sigona 'Brexit Rebordering, Sticky Relationships and the Production of Mixed-Status Families' (2024) 58(3) Sociology 605

Ziegler R, 'UK Citizens as Former EU Citizens: Predicaments and Remedies' in R Baubock (ed), *Debating EU Citizenship* (IMISCOE Research Series 2019)

Zahn R, '“Common Sense” or a Threat to EU Integration? The Court, Economically Inactive EU Citizens and Social Benefits' (2015) 44(4) ILJ 573

Zglinski J, 'The new judicial federalism: the evolving relationship between EU and Member State courts' (2023) 21(1) European Law Open 345

Comparative study on the application of Directive 2004/38/EC 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 (study), Directorate General for Internal Policies, Citizens' Rights and Constitutional Affairs [2009]

Decision of the Heads of State of Government meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, Annex 1 to the Conclusions of the European Council Meeting (18/19 February 2016), Brussels, 19 February 2016, EUCO 1/16 [2016]

EU Settlement Scheme: person with a Zambrano right to reside; government guidance; version 8.0. Updated on 26 September 2024

'EU Migration to and from the UK' (Migration Observatory, 20 November 2023) <<https://migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk/>> accessed 12 May 2024

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strategy to strengthen the application of the Charter of Fundamental Rights in the EU, COM(2020) 711 Final, Brussels 2.12.2020 [2020]

‘How many people have been granted settlement via the EU Settlement Scheme?’; official government statistics, published 22 August 2024

‘How many British citizens live in the EU?’, UK in a Changing Europe, last updated 21 September 2020: <<https://ukandeu.ac.uk/the-facts/how-many-british-citizens-live-in-the-eu/#:~:text=In%202019%2C%20according%20to%20UN,Italy%20was%20fifth%20with%2066%2C000.>> accessed on 11 April 2025

JHL (2018) 21(1) 2

The Migration Observatory at the University of Oxford ‘EU Migration to and from the UK’, published online on 20 November 2023, accessed on May 12 2024

<https://migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk/>

OPEN Summary of EMN Ad-Hoc Query No. 2018.1326 Impact of 2017 Chavez-Vilchez ruling [2019]

‘Reforming the EU Settlement Scheme: The Way Forward for the EUSS’, JUSTICE report, published 13 March 2024, accessed on 12 June 2024, available at

<https://files.justice.org.uk/wp-content/uploads/2024/03/12150659/Reforming-the-EU-Settlement-Scheme-JUSTICE-Report-March-2024.pdf>