The effect of the EU Charter of Fundamental Rights on the ERT doctrine

A case study of citizenship

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This thesis provides an analysis of the effect of the Charter of Fundamental Rights on the jurisprudence of the CJEU. It analyses disputes about the compatibility of Member State measures that limit the exercise of rights conferred on individuals by the provisions of EU citizenship. The aim is to compare first the jurisprudence of the CJEU under the ERT doctrine which formed the legal basis for review of MS derogations from EU law on the basis of Fundamental Rights. Since the legal basis of ERT was replaced by Article 51 of the Charter, the jurisprudence under the new legal basis will be compared to the old legal basis of ERT. The aim is to identify a hypothesised federalisation, which is an extension of the amount of situations regulated by EU law through an ultra vires approach to Fundamental Rights application by the CJEU.

List of Abbreviations

EU	European Union
EU FR	Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
MS	Member State
TFEU	Consolidated Version of the Treaty on the Functioning of the European Union
UK	United Kingdom
TCN	third-country national

Table of Contents

Chapter One: Introduction

The general problem

In the European Union legal order, there exists a long standing problem to define in which circumstances the fundamental rights of the EU (EU FR) have a binding effect on member states (MSs). The Court of Justice of the European Union (CJEU) has through its case law tried to resolve this issue, leading to the *ERT* doctrine, which established that MS measures that do fall "within the scope of the treaties" are bound to respect fundamental rights when restricting the four freedoms of the EC treaty.[1] But *ERT* was decided in a time when a political union in Europe was not yet part of the European law regime, it was only a few years later when the European integration project concerned more than the establishment of a common market. One of the new political integration projects was EU citizenship. Introduced by the Maastricht treaty this new type of citizenship granted every national of a MS has a right to free movement of residence in the entire territory of the EU, albeit "subject to the limitations and conditions laid down in the treaties and by the measures adopted to give them effect".[2] The free movement provision of citizenship was later considered by the CJEU as directly effective and also subject to the General Principles including Fundamental Rights in *Baumbast and R* which constituted an extension of the *ERT* doctrine to EU citizenship without specification to the singularity of that provision.[3]

The last step in the development of the European integration project however – the Lisbon treaty - , which brings one to the current state of affairs, seriously challenges that approach followed by the CJEU. The treaty updated the EU Charter of Fundamental Rights (the Charter) to binding legal status.[4] The new binding source for EU FR includes provisions determining their scope of application at national level – Article 51 - , by which this provision succeeds the *ERT* doctrine *ERT*.[5] However the new definition of the scope of EU FR establishes that fundamental rights are binding on the MS when implementing EU law, which has the potential of exempting situations considered within the scope of EU law, depending on the interpretation of the CJEU.

The scope of EU law depends on the scope of the treaties' provisions. Within the field of EU citizenship, it has been argued that the *ERT* doctrine would lead to a binding effect of EU fundamental rights on the

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[1] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Others v Dimotiki Etairia Pliroforissis* (*ERT*) [1991] ECR I-2925 paras 42,43

[2] Treaty on European Union [1992] OJ C 191/4.

[3] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* ECR I- 7091

[4] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1

[5] Charter of Fundamental Rights of the European Union [2010] OJ C83/389

MS in areas formerly exempt from EU law, if the CJEU would not properly define the conditions on which EU citizens can claim EU FR.[6] The grounds for that contemplation is the less conditional, more inclusive grant of citizenship rights as compared to the economic freedoms. This would constitute a unitarisation or federalisation (hereafter federalisation) on the basis of fundamental rights. The literature has argued the more limited formulation of the scope of fundamental rights in Article 51 of the Charter would have the adverse effect. Before one can address the scholarly discourse it makes sense to further expand on the problem of federalisation in an EU FR context.

The problem of Federalisation as an effect of a binding fundamental rights catalogue

Federalisation is a process of harmonization of Fundamental Rights at the EU level irrespective of the constitutional boundaries of the treaties.[7] These boundaries are entailed by the principle of conferral. Fundamental Rights are by their very nature all-encompassing and general. If their effect isn't constrained to the jurisdiction of EU law, the CJEU could overrule national acts not envisaged by the MS to fall under scrutiny of EU judicial review. The effect would then be a harmonization based solely on the existence of a Fundamental Right without a competence conferred on the EU by a treaty signed by MS and ratified by national parliaments. This conferral is the only legitimate process that respects the sovereignty of MS and is the only democratic process that respects the will of the peoples of Europe. This form of judicial activism would therefore subordinate the MS legal order entirely under the EU legal order, as the generality leaves interpretative leeway to the CJEU to review any national act for their validity, including those that have no factual fundamental rights dimension.

Since its judgment in *Internationale Handelsgesellschaft*[8], the CJEU has affirmed that the EU legal order includes autonomous (EU) fundamental rights. Their source are those rights protected by the national constitutions and International fundamental rights treaties to which the MSs are signatories such as the European Convention for Human rights. The CJEU elaborated fundamental rights of the EU by drawing inspiration from these sources in its case law, by which they became general principles of EU law or, as de Burca phrases it, "a kind of unwritten bill of rights"[9]. A contested legal question is the binding force of fundamental rights of the EU on acts by MSs. In *ERT* the CJEU moved the derogations from treaty provisions by MSs from the scrutiny of sovereign national fundamental rights interpretation under the

[6] Piet Eeckhout, 'The EU Charter of Fundamental Rights and the federal question' 39 Common Market Law Review 945

[7] Peter M. Huber, 'Auslegung und Anwendung der Charta der Grundrechte' (2011) 64 Neue Juristische Wochenzeitschrift 2385 pt 2

[8] Case *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540

[9] Paul Craig and Gráinne De Búrca, *EU law: text, cases, and materials* (OUP Oxford 2011)

scrutiny of the General principles, including fundamental rights. To recapture, *ERT* has now been replaced by the Art. 51 of the Charter.

Art. 51 of the Charter currently lies down that MS are bound by its provisions "only when they are implementing Union law". The scope of the actual "Union law", say the interpretation of the specific treaty provisions, is therefore the first factor that determines the scope of a fundamental right. Amongst the treaty provisions EU citizenship has a special significance for MS acts. Since *Baumbast and R,* the CJEU has established that Article 20 TFEU which confers upon the citizen a right to move and reside freely in the territory of the MSs, has direct effect and that the limits and conditions (imposed by MSs) must be interpreted in the light of the general principles of EU law, including the fundamental rights of the EU. Thereby the CJEU extended the logic of *ERT* to the legal basis of citizenship un-amended. Whether the CJEU remains on this path under Art. 51 is therefore an important observation for the detection of federalisation in the CJEU's jurisprudence. One will now provide a first look at the scholarly discourse, which will lead one to the overall research question.

Literature Overview

Within the literature first of all it has been discussed whether the change of the legal basis of the EU's Fundamental Rights has also changed the extent of the binding force of EU fundamental rights on MSs, because the Charter limits its binding force on MSs on their implementation of EU law. Of course, for any measure to be tested against its respect for EU fundamental rights there must be a link to an EU norm. The study will focus on the norms of EU citizenship laid down in Art 20 – 24 TFEU . The function of EU FR, as in any legal system, is to confer upon the citizen rights that may not be violated by the EU to regulate the relationship between the EU and its citizens. The literature argues that the *ERT* doctrine has established an abstract definition of measures which constitute acts falling into the scope of EU law. In the period before the introduction of non-economic provisions the interpretation of the scope of EU law was still highly conditional so that the potential to bring MS measures under judicial review by the CJEU was also limited. The more pressing problem concerning the binding effect of EU fundamental rights lies with the meaning for the EU citizen, because citizenship of the EU is only dependent on national citizenship and the exercise of free movement and not on any kind of economic activity by the citizen, which has the potential of bringing every MS act affecting a citizen within the scope of EU law which complicates the exercise to draw the line between EU and MS jurisdiction. What defines then the scope of Union law of the legal basis of citizenship and the subsequent binding effect of Fundamental Rights of the EU? And does the change in the legal basis since Lisbon alter the scope? Corresponding to that problem is the degree of specificity that the CJEUCJEU provides to the national courts through the preliminary reference procedure, as it may limit the MSs possibilities to derogate from EU law with more or less discretion. In the light of the foregoing, the next paragraph will pose the research question that this study aims to answer.

Research Question and Subquestions

This study aims to adress the following research question:

To what extent has Article 51 changed the scope of application of fundamental rights as compared to the ERT doctrine in cases concerning acts of MSs within the area of citizenship of the EU?

This question involves three sub-questions.

Sub-Question 1:

How did the CJEUCJEU define the scope of application of EU fundamental rights in cases concerning acts of MSs in the field of citizenship of the EU under the *ERT* doctrine?

Sub-Question 2:

How does the Article 51 EUCFR define the scope of application of EU fundamental rights in general?

Sub-Question 3:

How does the CJEU define the scope of application of EU fundamental rights under the current regime of Charter Art. 51 in a case concerning an act of a MS in the field of EU citizenship?

Literature Review

The following part of this introduction describes the functioning of fundamental rights protection in the EU legal order with regard to the cause for their incorporation. It leads to the specific role EU FR play in the review of MS measures by the CJEU.

Fundamental Rights of the European Union and their position within the EU's legal system

What is the role of Fundamental Rights in the EU legal order in general? The task of the CJEU is to ensure the coherence and unity of application of EU law through the preliminary reference procedure.[10] For that purpose, the primacy of EU law has been established. To preserve the primacy of EU law, the EU legal order must respect Fundamental Rights to avoid a situation in which a Fundamental Right, which is protected by a/the national constitution(s) and/or international treaties, is not protected under EU law, because that would have the effect that – due to the primacy of EU law – Fundamental Rights protection enjoyed within the legal orders just mentioned would be undermined, or on the other hand primacy would have to be called into question to preserve Fundamental Rights protection under national constitutional law vice versa.[11]National courts at the highest level have repeatedly called into question the primacy of EU law in a conflict of national constitutional norms with EU acts, which illustrates that the preservation of an autonomous EU jurisdiction rests on its compliance with fundamental rights as

[10] Takis Tridimas, 'Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction' 9 International Journal of Constitutional Law 737 ; infra The Preliminary Reference Procedure: Between Interpretation and Application of the Law ; Craig and De Búrca ch. 13

[11] Internationale Handelsgesellschaft para 3

they are protected under national law. [12] It should be emphasized that this form of protection does not make the EU legal order dedicated to the political promotion of Fundamental Rights.

What is the role of Fundamental Rights in the EU legal order regarding measures by MSs and why are MSs bound by EU FR? The CJEUCJEU has established that the MSs are bound by them when they act within the scope of EU law. The conditionality of the binding force of EU Fundamental Rights on MS acts is the central concept of this study. There is no unified test under which conditions a MS measure falls within the scope of EU law, it is rather an open concept which is constantly under re-evaluation by the CJEU through its case law. The unifying feature of the concept is the aim of the CJEU to review any impediment or mere interference with the treaties, justified by the task to ensure a coherent application of EU law amongst the MSs, as described in the previous section. The evaluation used by the CJEU is to analyse the subject-matter of the legal dispute and the national measure to identify whether an extraneous element or a cross-border situation is apparent. This test follows the line of logic of the Case-law from the freedom of movement of workers provision, in which the CJEU has exempted internal situations, that is to say disputes confined to one MS, from its jurisdiction.[13] Whether a MS measure falls within the scope of Union law is therefore depending on the interpretation of the scope of the treaties. EU law involves two categories of MS measures in principle, measures implementing EU law and derogations from EU law.

The Residual Discretionary Powers of MSs as a subject of Fundamental Rights review

The majority of EU law is legislated through directives, which are implemented by MS into their legal orders. Furthermore, MS are the ones that apply European law on part of the EU, which makes them effectively the "executive branch of the EU"[14]. When MSs act as the "agents of EU law", they implement EU law and act on behalf of the EU. This constitutes the first category of situations when MSs are bound by EU law. The CJEUCJEU has ruled that these actions fall under EU FR scrutiny in *Wachauf*[15].

The treaties and the case law allow exceptions for the MSs to the duty to observe and apply EU law. The CJEU ruled that these derogations don't exempt MSs from their duty to respect EU FR in *ERT*. The legal basis of *ERT*, which concerned the derogations based on "public policy, health and security" of Art.52(1), does not limit the MSs duty. Rather all derogations from EU law, including derogations based on reasons of public interest, which allow for mandatory requirements to be enacted in conflict with the freedoms

[12] eg *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225, 265

[13] Craig and De Búrca, 732

[14] Xavier Groussot, Pech, Laurent and Petursson, Gunnar Thor , 'The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication ' (2011) < http://ssrn.com/abstract=1936473 > accessed March 12 2013,

[15] Case C-5/88 *Wachauf* v *Germany* [1989] ECR 2609

laid out in the treaties based on a legitimate aim[16], are bound to respect EU FR whose "observance the Court ensures"[17].

The Scope of EU law and EU citizenship

While the *ERT* doctrine applied to MSs' measures relevant for the creation of the internal market, the demarcation line between the legal orders of the EU and the MSs after Maastricht became increasingly complex to draw. Before this point the sovereignty of the legal orders of the MSs was kept untouched by EU jurisdiction for cases that were not hindering the creation of the internal market as before Maastricht, ratione personae and ratione materiae of free movement and residence rights of EU law were limited by the strictly economic addressee of the four freedoms, dividing the subjects, the people, of the legal order of the EU by limiting its scope on those involved in the creation of the internal market, from all other persons. With the introduction of Citizenship of the EU following the treaty of Maastricht, this situation changed dramatically regarding the scope of EU law ratione materiae and ratione personae. First of all the scope ratione personae of EU law was extended by the new legal staus of citizen of the EU to all MS nationals.Under the newsituation both legal orders were further intertwined as more MS nationals were in principle also subject to EU law. What became more important than ever to determine the competent jurisdiction was a clear demarcation of subject matter of a dispute that triggered the applicability of EU law. For this purpose the CJEUCJEU continued to employ identification of a cross border situation, an approach under criticism from the scholarly world for its uncertain results.[18] The uncertainty about the scope of EU law due to the encompassing scope ratione personae and the uncertain method in determining the scope ratione materiae of EU citizenship enhanced the problem of determining the scope of EU fundamental rights. This uncertainty sourrounding the conditions for EU citizenship to take effect, allows for the emergence of the problem termed "unitarisation" or federalization of fundamental rights in the literature, most prominently suggested by Piet Eeckhout.

The Federalising Effect of the Charter of Fundamental Rights in a Time of Undetermined Scope of EU law

According to Eeckhout[19], EU law and national law are therefore mutually integrated, because MSs act as agents of the EU, a fact that arises out of the general nature of EU rules. In an analysis of the case law he finds that the CJEU had reflected the agent situation in its case law: First, by the Wachauf case that demands that MSs must respect EU FR when implementing EU law and secondly in the *ERT* case that demands that MS must respect the EU FR when derogating from EU law provisions.

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[16] Case C-120/78 *Rewe-Zentrale AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649
[17] Case C-29/69 *Stauder* v *City of Ulm* ECR 419
[18] Dimitry Kochenov, 'A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe' (2011) 18 Columbia Journal of European Law 56
[19] see n6

Furthermore, according to the literal meaning of Article 51, the Charter is supposed to be taking over this view on the binding force of EU FR on MS. As regards freedom of movement within the internal market, the implementation by the MSs of EU law is governed by the Charter. This includes derogations as defined in these treaty provisions (based on public policy etc.) as an aspect of implementations. But according to him, the situation is more complicated due to the interpretation of Citizenship of the EU, which entails rights conferred on individuals that don't fall under any other free movement provision of the treaties. Therefore according to Eeckhout the co-existence of citizenship and the Charter within the EU legal system go beyond the scope of Wachauf and *ERT* and pose new questions.

For instance, Eeckhout makes the example of the non-discrimination principle. By taking non-discrimination under closer consideration, he argues that said interpretation of citizenship has the potential to draw the entirety of Charter rights within its scope. First, because if non-discrimination has become a core right of EU citizenship as it has been established by the treaties, it has fundamental rights status as it is enshrined in the Charter, on what logical grounds could the other fundamental rights not be invoked by EU citizens as compared to the non-discrimination right? Secondly, the Charters primary aim is to confer rights upon individuals by establishing citizenship of the EU. Lastly, Citizenship is supposed to be more than the market freedoms already established. [20]

The problem he sees with this argumentation is the following: The wider the reach of the Charter rights for citizens, he argues, the weaker the actual link with free movement would be. Furthermore, if a weak link with movement would be sufficient to invoke Charter rights, Citizens that didn't move across the EU could be worse off.If their own nation state wouldn't protect the rights entailed in the Charter, the problem of reverse discrimination would expand.

The opposing argument then would be that a conferral of all Charter rights on citizens of the EU is not possible because it would be against the principle of conferred powers, which is responsible for the limitation of the CJEU not to judge outside the scope of the treaties. He argues that the Charter itself respects this principle through Article 51(2), which denies the Charter any force beyond the scope of application of EU law. The unclear definition of the scope of EU law however still poses a problem in that respect.

To further elaborate on Eeckhouts argument, it is therefore necessary to research the scope of application of the Citizenship provisions on MS actions.

To shed light on the possibility of the CJEU to expand the EU fundamental rights regime further into the legal orders of the MSs, one must take a closer look at the functioning of the preliminary reference procedure as the mode of interaction between the national courts and the CJEU.

[20] Ibid 952 - 954

The Preliminary Reference Procedure: Between Interpretation and Application of the Law

The preliminary reference procedure has developed over time from its original envisioned function to establish a division of labour between interpretation of EU legislation (the role of the CJEU) and application to specific cases (the national courts) to a blurred mode of interaction.

Tridimas identified that the more specific the ruling of the CJEU is formulated, the more it becomes an application of the law rather than an interpretation. The lesser the national court is left with discretion in deciding the case the firmer the CJEU frames the possible outcomes of the cases pending before the court. In between these extremes the CJEU may specify using 'guidance' for the national court.[21] This forms a threefold typology that will be used for the purpose of this study. If the CJEU tends to provide guidance or is even specific on how the national court should apply the EU fundamental rights this shows that the CJEU is less influenced by the principle of conferred powers, which Eeckhout identified as an opposing force towards application of the EU fundamental rights on MS measures, and further inclined towards a uniform EU FR regime for EU citizens.

Chapter 2: The Application of the *ERT* doctrine in Citizenship cases

The ERT doctrine

In the *ERT* case the CJEU established that MSs were bound by the general principles of EU law when derogating from EU rules.

In its judgement the CJEU held that:

> *"42 As the Court has held (see the judgment in Joined Cases C-60 and C-61/84 Cinéthèque v Fédération Nationale des Cinémas Français [1985] ECR 2605, paragraph 25, and the judgment in Case C-12/86 Demirel v Stadt Schwaebisch Gmund [1987] ECR 3719, paragraph 28), it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.*
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> *44 It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court."*

[21] Takis Tridimas, 'Constitutional review of MS action: The virtues and vices of an incomplete jurisdiction' (2011) 9 International Journal of Constitutional Law 737

The CJEU established the first general condition by which a national measure derogating from EU law comes under the scrutiny of EU FR evaluation by the CJEU: That MS measures within the scope of EU law are bound by EU FR. The procedure that must be followed is thus that the CJEU must provide the necessary criteria to the national court for him to examine the compliance of such measure with EU FR. This general conditionality left open the important question, which link with EU law was necessary for a case to fall within the scope of EU law and thus within the reach of EU FR, due to the abstract guidance the CJEU presented to the national Court. The problem is that the scope of EU law is under re-evaluation due to the role of precedence given by the CJEU for the legal system.[22] Furthermore it left open the question of what discretion the CJEU would give the national court to interpret the compliance with the general principles when submitting the criteria in its responses. To answer these questions it follows that a closer look at the application of the *ERT* doctrine is necessary. Concentrating on cases on EU citizenship, this Chapter will proceed by a closer analysis of a selection of cases from the period between *ERT* and the Charter's legal status change.

The Orphanopoulos Case

The joined cases *Orphanopoulos* and *Olivieri*[23] concerning the expulsion decisions of the *Regierungspräsidium* (regional administration) against a Greek and an Italian national from Germany on grounds of their criminal conduct were amongst the first cases concerning the interpretation of the scope of citizenship including EU FR attached to it. The MS measures (the expulsion decisions) were based on Directive 64/22/EEC[24], which regulated the MS measures limiting the exercise of freedom of movement of persons. The plaintiffs argued that the expulsion measures were in violation with EU law as they didn't take into account the change in their personal situation.[25] The decisions were based on national law which demanded expulsion of aliens (including nationals from other MSs) convicted of certain crimes, which was claimed to be incompatible with the directive stating that expulsion from MS territory must be "based exclusively on the conduct of the person concerned".[26] Essential for the purpose of this study were two aspects. First it was unclear whether Mr. Oliveri could claim free movement rights, because of uncertainty sourrounding his employment status, which led the CJEU to the question of his rights of EU citizenship seen independently from other free movement provisions. Secondly the effect of Mr. Orphanopoulos fundamental right to family life[27] was relevant for the

[22] A.G. Toth, "Human Rights as General Principles of Law, Past and Future" in U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law* (Kluwer, 2000), p. 84.
[23] Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* v *Land Baden-Württemberg* ECR I -5295
[24] Directive 64/22/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ L56/850
[25] Mr. Oliveri had contracted AIDS and was about to die in the foreseeable future and argued that his expulsion to Italy would prohibit him from receiving the neccessary treatment; Mr. Orphanopoulos had been released from prison on probation.
[26] Dir 64/22/EEC [1964] OJ L56/850, art 3
[27] Art. 8 ECHR

judgement.[28] While the German law did take into account the family situation of those being expelled, Mr. Orfanopoulos argues that the evaluation under German law was insufficient and that EU law demands for a more extensive protection.[29] Therefore the scope of EU citizenship and a corresponding fundamental right were part of the proceedings.

Opinion of AG Stix-Hackl

First of all, the AG doesn't concern the relevance of EU citizenship for this case. He sees it as given that both plaintiffs are within in the scope of freedom of movement of workers. In his opinion, the AG confirms that the national authorities have to respect the rights of the ECHR as they are protected by the EU legal order.[30] He then examines whether Art. 8 ECHR has been protected sufficiently by the German measure. One should recall here that the German law takes into account the family situation of the prosecuted individual.[31] The crucial point therefore is whether the protection under German law is sufficient from the perspective of EU law.The CJEU interpretation offers a more strict definition of interference in the protection of the family. By making reference to the case of *Carpenter*[32] the AG argues that under the CJEU's case law, the scope of the right is wider. It suffices for an expulsion decision to have been taken, irrespective of the actual consequence of said measure, to fall within the scope of EU FR protection.[33]

To examine whether the German measure does sufficiently take into account the family situation of Mr. Orfanopoulos the AG analyses the personal conduct and the seriousness of the offences he committed on the one hand and the consequences that his expulsion would have on his family, that is to say, whether they can be expected to follow him so that his family relations would remain intact. [34]

As a final point the AG emphasises that the way in which MS law respects EU FR must be based on individual conduct and personal situation and mustn't be implemented in general and abstract terms. Only if the circumstances of each individual are taken into account can a sufficient protection of EU FR be safeguarded. The demand for a coherent and uniform protection demands implicitly that national laws and their application mustn't "superficially", that means in abstract terms, include fundamental rights protection, such as in the case of expulsion as a rule as a consequence of marital relations of Mr. Orfanopoulos with a German national.[35]

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[28] Mr Orphanopoulos was married to a German national, with whom he had three children.
[29] *Orfanopoulos* Opinion of AG Stix-Hackl para 31
[30] cf The ERT doctrine
[31] Ibid, Opinion of AG Stix-Hackl para 11
[32] Case C-60/00 *Carpenter* [2002] ECR I-6279
[33] *Orfanopoulos*, Opinion of AG Stix-Hackl para 56
[34] Ibid, Opinion pf AG Stix-Hackl paras 60 - 64
[35] Ibid, Opinion of AG Stix – Hackl paras 65 - 67

Judgement of the Court

The CJEU confirms that both plaintiffs do fall within the scope of EU law as they enjoy a right to move and reside under Art. 18 TEC (now Art. 21 TFEU). It confirms that Art. 18 TEC is directly effective, which means that EU citizenship is not limited by the individuals' status of worker, or any other economic activity relevant in the case. [36]

In principle, the CJEU sides with the AG's argument. First of all, the German government claims that it is "not for the Court to review, on a reference for a preliminary ruling, the lawfulness or the proportionality of a national measure".[37] It holds moreover that "the applicable national law has taken sufficient account" of the principle of proportionality. It should be restated once again here that the law involved in the decision of the *Regierungspräsidium* provides for special protection of the spouse and family members. [38] According to the German government, since national law takes family circumstances into account, there would be no basis for review by the CJEU.

The CJEU nevertheless has a different conception. It examines in depth the national law and the measure taken on the basis of that law for its proportionality and finds that Community law prohibits any expulsion of MS nationals that is enacted as a general rule without consideration of the personal conduct. By reference to its EU FR case law including *ERT*, it reaffirms the necessity of MS measures to adhere to a (common) EU FR code. It points out that this is only possible if individual circumstances are taken into account, because otherwise obstacles to the freedom of movement of persons couldn't be effectively avoided. [39] For this purpose the CJEU establishes that sufficient protection of the right to family life in this case must be judged on the basis of the following criteria. The expulsion decision must take into account "the nature and seriousness of the offences committed by the person concerned, the length of his residence in the host Member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country of origin of the person concerned."[40]The CJEU therefore sees the demand for a much more detailed analysis of the individual and the consequences of the MS measure for him/her than the national law envisions.

Assessment of Orfanopoulos

The Orfanopoulos case exemplifies first of all the relationship between EU citizenship and other free movement rights. The CJEU holds that a person's right to move and reside freely within the territory of the Member States is no longer conditional on his status as worker, because the right of freedom of movement of workers[41] is reinforced by the right of freedom of movement of citizens[42]. If any of the

[36] Ibid, para 46
[37] Ibid para 87
[38] See no 31
[39] Ibid, paras 97, 98
[40] Ibid para 99
[41] Art. 39 TEC (now Art. 45 TFEU)
[42] Art. 18(1) TEC (now Art. 21 TFEU)

other provisions of free movement fail to apply to the case, EU citizenship remains directly effective. EU citizenship is thus less conditional than other free movement provisions; therefore the view taken in the literature is confirmed. [43] Furthermore this case exemplifies what the limitations and conditions envisioned in the citizenship provision refer to: The CJEU follows the logic it has previously applied to the MSs's residual discretionary powers as described in the literature section of this study.[44]

Secondly the analysis the judgement provides insight on the relationship between EU FR and national fundamental rights application. The national governments discretion is constricted by the CJEU. The fundamental point relevant in EU FR protection is the situation of the individual. Due to the fact that the national law provided general abstract conditions for the residence of EU citizens, not all fundamental rights considerations could be taken into account. As the CJEU points out such legislation could allow for MS measures hindering the exercise of free movement, which is the basis for such strict guidance as presented in this case to the national court.

The Garcia Avello Case

The *Garcia Avello* case provides insight into the scope of the provisions on EU Citizenship.[45] The case concerned the interpretation of the reach of the prohibition of non-discrimination. The relevance of the case for the purpose of this study is the concluding expansion of the scope of citizenship provisions. Despite the absence of an EU FR dimension, it provides the logical basis for the subsequently analysed case law.

The facts of the case referred were as follows. The children of Mr Garcia Avello were born and registered under the name of the father (Garcia) in Belgium; however, the children were also registered as Spanish nationals. Under Spanish law they bear the surnames of both parents (Garcia Weber). The request to the Belgian authorities by Mr. Garcia Avello to register his children as Garcia Weber was denied. He subsequently claimed that the denial constituted a breach of the community prohibition of non-discrimination on grounds of nationality[46], invoked on the basis of the children's EU citizenship.

The central issue was whether the law of surnames was within the scope of EU citizenship. The Belgian state claimed that this subject matter was an exclusive MS competence, because the children were Belgian nationals and that the dispute was entirely internal to Belgian jurisdiction.

Secondly, if the CJEU's jurisdiction was in the affirmative, the question was whether the kids could rely on the prohibition of discrimination and thirdly whether the MS's decision was in fact a breach that provision.

[43] See infra The Scope of EU law and EU citizenship
[44] See infra The Residual Discretionary Powers of MSs as a subject of Fundamental Rights review
[45] C-148/02 *Carlos Garcia Avello* and *Ètat belge* [2003] ECR I-11635
[46] Art. 12 TEC (now Art. 18 TFEU)

Opinion of AG Jacobs

From the outset AG Jacobs confirmed that the case fell within the scope of EU law. He argued that the dispute was a consequence of Mr. Garcia Avello's exercise of free movement. Furthermore, the children's Spanish nationality sufficed to make the situation not entirely internal to Belgium because of the personal situation of the children.[47] As the Spanish nationality of the children would be rendered ineffective if the children would be treated solely as Belgian nationals, the Spanish nationality should suffice to bring the children within the reach of the citizenship provisions. This logic was a manifestation of the cross - border test, with a view to the *effet utile* of non-discrimination, to confirm that the dispute falls within the scope of EU law.[48]

Referring to *Konstantinides* [49], the AG argued that the CJEU should extend its logic to the present case, because the law on surnames could effectively hinder freedom of movement of persons.[50] This would have constituted a practice in which the test applied for interpretation of the four freedoms would be continued to the interpretation of the citizenship of the EU provision of the treaty with the important amendment that a link to an economic activity would be ignored.

Secondly the question had to be addressed whether the MS practice indeed constituted a form of discrimination based on nationality. He argued in the affirmative, proposing the rule that in a case in which an objective difference is apparent, namely the dual nationality of the kids and their subsequent different names under Spanish law, the national practice did ignore the difference. Whether this was reasonable and justified he examined in the third part of his argument, which was straightforwardly denied.[51]

Judgement of the Court

The CJEU sided almost entirely with the position taken by the AG. It went even further than the AG regarding the question of competence: It defined the scope of EU citizenship as limited to situations that have a link to EU law. Because EU citizenship regulates situations in which a MS national is resident in another MS, it concluded that this situation is apparent in the case due to the Spanish nationality of the children. Unlike AG Jacobs who relied upon the father's free movement first, the condition for a link to EU law was satisfied already by their Spanish nationality, because focusing on their Belgian nationality would deprive their Spanish nationality of its meaning.[52] This was a re-assessment of the purely internal rule that redefined the meaning of the protection of free movement: It is protected even in situations in which no free movement has actually taken place, it is rather the protection of equality of different

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[47] Ibid, Opinion of AG Jacobs para 52
[48] Ibid, Opinion of AG Jacobs paras 52,53
[49] C-168/91 *Konstantinidis* [1993] ECR I-1191, The CJEU argued that clients would confuse Mr. Konstantinidis with someone else when seeking his service. One can thus argue that in *Konstantinidis* the CJEU ruled that laws on surnames are relevant for freedom of establishment if they bear relevance for the exercise of an economic activity
[50] ibid Opinion of AG para 61
[51] Ibid, Opinion of AG Jacobs para 75
[52] Ibid paras 27, 28

nationalities and associated treatment by MSs that is constitutive of citizenship of the EU. Furthermore, it reconfirmed direct effect of free movement of citizenship of the EU.

Assessment of Garcia Avello

Since *Garcia Avello*, the scope of citizenship provisions (and the corresponding respect for EU FR) reaches now to MS measures within their jurisdiction affecting their own nationals, on the condition that the freedom to move or reside is affected by the involvement of another MS nationality. As the focus of this case lay on the non-discrimination principle, unlike in *Baumbast and R*, the appropriate application of limitations and restrictions of free movement could be ignored. Rather the proportionality of the MS measure with regard to non-discrimination was under inquiry. The central point of the case was the logic of the CJEU that the scope of Union law applies to every citizen of the Union unequivocally or "as the fundamental status"[53]: As long as the freedom to move and reside was affected, even if it had not actually been exercised, a matter falls within the scope of EU law.

Comparable to *Konstantinidis* , in which the AG proposed that Mr. Konstantinidis should be able to invoke unconditionally all fundamental rights of the ECHR as a consequence of his use of freedom of movement and was completely ignored in the CJEU's judgement[54], the CJEU remained to exclude EU FR arguments and remained with its approach to only examine whether the national practice forms an instance of discrimination.[55]

Since the case of *Garcia Avello* it was established that for a national measure to come within the scope of citizenship of the EU, a negative effect on the spouse or children of the person that exercised his/her free movement by the national measure was sufficient. In this case the mere holding of another nationality than that of the MS conducting the measure affecting cross-border movement, irrespective of already exercised or possibly exercised in the future, was sufficient.[56] The question of the consequences of EU FR involvement in similar circumstances remained unanswered until the ruling in Zhu and Chen. For this purpose an analysis of this case follows now.

The Zhu and Chen case

The case concerned a mother of Chinese nationality living in the United Kingdom (UK) with her infant Irish daughter Catherine. She claimed a right of residence under EU law.[57] The relevance of the case for the study lies in the fact that the scope of citizenship of the Union as laid out in the previously discussed case of Garcia Avello arises again in conjunction with a question about the scope of EU FR, specifically the right to family life.

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[53] C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain*-la— *Neuve* [2001] ECR I-6193, para. 31
[54] Rick **Lawson** [1994] 31 CMLR 395, 406 (note)
[55] Ibis paras 41 – 45
[56] Thomas Ackermann, 'Case C-148/02, *Carlos Garcia Avello* v. *Ètat belge'* (2007) CMLR 141, 145 (case note)
[57] Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I - 9951

The central issue in *Zhu and Chen* was the interpretation of the freedom of movement and residence enshrined in EU citizenship. While it was rather obvious that the Catherine had a right of residence under EU law due to her Irish citizenship, her mother was a third-country national (TCN) and under secondary law[58] only TCN family members dependent on an EU citizen can claim a derivative right of residence in a MS.

Opinion of AG Tizzano

Before he addressed the central issue of the case, AG Tizzano concerned the argument whether Catherine could claim her EU citizenship status in the proceedings. Due to the fact that she acquired Irish nationality without leaving the territory of the UK, there was no element of cross-border movement from a strict reading. But reaffirming *Garcia Avello*, the AG argued that a nationality other than that of the MS in which residence is sought suffices to bring it within the scope of EU citizenship.[59]

Addressing the issue of Catherine's right to residence in the UK, the AG concluded that she enjoys a right of residence by Dir. 90/364/EEC because the conditions[60] were met through the support of her mother; and that the objections raised, which are essentially that this type of support did fall outside the definitions of the Directive, could not be sustained.[61]

Regarding the more controversial issue of the mother's right to residence, from the outset it was clear that she did not fall under any of the provisions of secondary law conferring a right of residence, because she was not a dependent relative.[62]However, the central fact enabling the mother's right to residence is that any contravening measure would have the effect that the mother would be separated from her daughter, which would undeniably be in breach of her right to family life. Therefore respect for family life is the necessary condition for the effective exercise of Catherine's rights under EU citizenship.[63]

Judgement of the Court

The CJEU sided with the AG's argument and extended its interpretation in *Garcia Avello* to the present case. Catherine's Irish nationality sufficed to bring the matter within the jurisdiction of the CJEU, and seizes to be a purely internal situation.[64]

It also sided with the AG with regard to her right to residence of Catherine as she clearly enjoyed the directly effective right of residence of EU citizenship.[65] The limitations and conditions existing under

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[58] Council Directive 90/364/EEC of 28 June 1990 on the right of residence OJ L180/26; Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services OJ L172/14

[59] Ibid, Opinion of AG Tizzano para 33

[60] Being „covered by sickness insurance in respect of all risks in the host Member State and […] sufficient resources to avoid becoming a burden on the social assistance scheme of the host Member State", Art 1

[61] *Zhu and Chen*, Opinion of AG Tizzano para 78

[62] Ibid, Opinion of AG Tizzano para 80

[63] Ibid, Opinion of AG Tizzano para 90

[64] Ibid, para 19

secondary law[66] couldn't restrict that right merely by the fact that she receives the necessary resources through the support of her mother.[67] This reasoning stems from the proportionality principle. To demand a specific origin of the resources to grant residence rights to EU citizens is an unnecessary condition for the attainment of aims of public interest.[68]

Regarding the right of residence of the mother, the CJEU again agreed with the AG. It was obvious that the denial of residence to her mother "would deprive the child's right of residence of any useful effect."[69] Therefore a residence right, to the extent that it was necessary for the enjoyment of Catherine's right of residence, had to be issued to the mother.

Assessment of Zhu and Chen

If one compares this judgement to the findings of the preceding case law analysed in this chapter two concluding remarks can be made. The first remark considers the scope of EU citizenship, which has indeed expanded. The limitations and conditions that can be applied legally by MSs to constrain the free movement of citizens have been reduced, this means that less and less situations concerning movement and residence of MSs' nationals fall within the exclusive competence of MSs. The underlying logic becomes apparent: Whereas previously the right to move and reside of an individual was dependent on the additional value he represented for the economy of a MS, the new limitations and conditions, under which a MS justifiably can limit the rights of EU citizenship, are the absence of consequences an individual may have on (1) the public resources of the host MS, (2) public order, public security and public health and (3) public interest. MSs are however more and more constrained to decide for themselves what these lastly mentioned concepts entail as their interpretation is under the scrutiny of the CJEU. [70]

The central determining factor to decide whether a MS lawfully derogates from free movement provisions remains the situation of the individual.[71] This has been the "intersection" where EU FR perform their role in the determination of the rights entailed in Citizenship of the EU. The crucial question the CJEU is engaged with, to ensure that itself doesn't act *ultra vires* , has been illustrated by *Zhu and Chen*: The *effet utile* principle applied in this case confers a right of residence to the mother *to the extent* that it is necessary for Catherine's right of residence under EU law.[72]

The *Rottmann* case[73] however concerned a rather different issue of the scope of EU citizenship. While the previous case law considered questions about the extent to which fundamental rights are entailed in

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[65] Ibid, para 26
[66] See no 67
[67] Ibid, para 28
[68] Ibid, para 33
[69] Ibid para 45
[70] cf Assessment of Orfanopoulos para 1
[71] cf Assessment of Orfanopoulos para 2
[72] See n80
[73] Case C-135/08 *Janko Rottmann v Freistaat Bayern* [2010] ECR I-1467

the movement and residence of EU citizens, in the Rottmann case a MS measure was under scrutiny by the CJEU that lay at the core of citizenship: the withdrawal of a naturalisation decision of an EU citizen by a MS that could result in statelessness.

The Rottmann Case and the Emergence of the Substance of Rights Doctrine

Mr. Rottmann was an Austrian national who used his freedom of movement right of EU citizenship to move to Germany and subsequently ask to acquire the German nationality. At the time of presenting his request to become a German citizen Mr Rottmann failed to declare that he was under criminal investigation in Austria. The procedural irregularity committed by Mr Rottmann emerged after his request was accepted and lead the German authorities to withdraw the German citizenship of Mr Rottmann. However, while Mr Rottmann had become German, the Austrian authorities had withdrawn the Austrian citizenship of Mr Rottmann: this is because Austria does not allow double nationality.

Mr Rottmann appealed against the German decision withdrawing his German nationality and as a result of his pleadings a number of questions were put forward by the German courts to the CJEU: what is the extent of the discretionary and autonomous powers of MSs in relation to the conferral and withdrawal of nationality to MS nationals if the consequence is the loss of EU citizenship? Can MSs withdraw nationality from an individual so as to make that person third country national or even an alien without nationality? Underlying this hierarchical question of the relationship of national citizenship and EU citizenship lays the question whether EU citizenship's scope can also extend to measures regulating the conferral or refusal of MS nationality.

Opinion of AG Maduro

AG Maduro first considered whether the matter fell within the scope of EU citizenship. As Mr. Rottmann was a German who claimed against a German decision to revoke his citizenship it is not surprising that the matter before the CJEU was considered to fall outside the scope of EU citizenship by Austria and Germany.[74] The decision taken by the German authorities did not negatively affect his movement to Germany. Neither was he in possession of a nationality other than that of the state in which he was resident.[75] The AG nevertheless argued that *Garcia Avello* could be extended to the present circumstance. The point he made was that the decision under question for its compliance with EU law had no direct connection to EU citizenship, but the involvement of another nationality. As Mr. Rottmann's Austrian nationality would be ignored, even though it was withdrawn, it remains of relevance to the proceedings and brings a "foreign element" to the case. The meaning of *Garcia Avello* according to the AG was therefore that the involvement of a second nationality, irrespective of its relevance to the decision under review by the CJEU, suffices for a MS measure to come within the scope of EU citizenship, which he argued was also valid in the present case.[76]

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[74] Ibid para 38
[75] Cf *Garcia Avello*
[76] Ibid, Opinion of AG Maduro para 11

The AG however did not support the view that the German decision was incompatible with EU law. The remaining question was whether the German decision was *proportionate* to the legitimate aim of the MS. The AG took the view that the German decision took due account of EU law, as neither EU law or international prohibit the withdrawal of nationality in the case of fraud; and that prohibiting fraudulently acquiry of nationality of a MS can't be considered an illegitimate aim of the MS.[77]

The Judgement of the Court

The CJEU argued differently. According to the Court in this judgement, any national measure negatively affecting the rights conferred upon MS nationals must be subject to the principle of proportionality as laid down by the CJEU. Therefore the CJEU deviates here from the logic of its previous case law, because before the judgement in *Rottmann* it was a minimum requirement for a MS measure to negatively affect the rights derived from EU citizenship that were conferred upon an individual due to her MS nationality other than that which issued the measure, in other words that the dispute involved a kind of 'movement' in the widest sense. To recapitulate, this constituted the essence of the concept of 'movement' to the CJEU. It has also been used by AG Maduro by stating that it is the essence of EU citizenship to regulate "legal and political status conferred on the nationals of a State beyond their State body politic".[78] This was a condition to the enjoyment of citizenship rights taken from the interpretation of Article 18 TEC (now Article 21 TFEU, and also referenced in Article 20(2) TFEU). Since *Rottmann* however,it suffices for a MS measure to have the 'nature' and 'consequence' to deny the individual the rights conferred by EU citizenship to fall within the scope of EU law and EU citizenship provisions. [79]

Conclusion of Chapter 2

All in all it emerges from the foregoing analysis that we can distinguish two categories of rights that individuals may claim on the basis of EU law against MSs: the first category[80] derives from the effectiveness of *freedom of movement and residence* of EU citizens[81], i.e. EU FR perform the role of preventing unnecessary conditions imposed by MS to the extent that it is demanded for the effective exercise of freedom of movement and residence. The second category derives from the conferral of EU

[77] Ibid, Opinion of AG Maduro para 33
[78] Ibid Opinion of AG Maduro para 16
[79] Ibid para 42
[80] Rights derived under Art. 21 TFEU
[81] Cf Assessment of Zhu and Chen

citizenship.[82] This right constitutes that MS measures that have the effect of depriving a MS national of his status as citizen of the EU must take "due regard" of that status and are therefore bound by the principle of proportionality as enshrined in EU law.

While the function and extent of EU FR within EU citizenship is prescribed by the principle of *effet utile* for individuals since *Zhu and Chen*[83], the question is left open about the function of EU FR within the second category. One can however infer on the basis of *Rottmann* that the CJEU could remain with its established approach that can be based in a combined reading of *Garcia Avello* and *Zhu and Chen*, by which an extension of the scope of citizenship (*Garcia Avello*) led to the emergence of new EU FR claims (*Zhu and Chen*). The inference is based on the following grounds.

As the CJEU had defined that a measure depriving a national of his status as citizen of his MS nationality on the ground of deception constitutes a derogation from EU law on the basis of public interest,[84] this established that the MS must respect in its decision to withdraw nationality respect the principle of proportionality. [85]As previously discussed in this study this includes EU FR.[86] How the CJEU draws the demarcation line between EU and MS jurisdiction in this respect will be the primary focus of Chapter 4, but beforehand attention must be paid to Art. 51 of the Charter, which will be subject of inquiry of Chapter 3.

Chapter 3: The Scope of EU Fundamental Rights under Article 51 of the Charter of Fundamental Rights

The Charter takes over the role to provide a collection of rights for individuals that acts of the EU must respect from the general principles of EU law. The equivalent of the *ERT* doctrine's scope of EU law condition for the rights to take effect is prescribed in Article 51. It has two parts, the first paragraph addressing the effect of the Charter on the institutions of the Union and the MSs when they are implementing Union law. The second paragraph establishes that the charter doesn't change the competences of the union. Both are parts of the wider issue of the delineation of competences within the federal system of law of the EU.

The intention of the Charter was to provide a definition of the scope of application of EU FR to ensure that the scope of EU law wouldn't be widened through judicial activism by the CJEU. It is therefore intended to move the point of reference for the CJEU from the search for a legal basis in the treaties to define the scope of Union law through case law, to the unified conception of the scope of Union law

[82] Art. 20 TFEU
[83] See preceding paragraph, Assessment of Zhu and Chen
[84] Ibid para 51
[85] Ibid para 55
[86] Cf The ERT doctrine

under Article 51(1).The unified conception is in its literal interpretation of Article 51(1) presented in the following paragraph.

The Charter deviates from the *ERT* doctrine in an important aspect that should be viewed from the perspective of international law. The wording of Article 51(1) defines that the MS are bound by the Charter when they *implement* EU law. This conforms to the dualist approach of International law. It furthermore lays more emphasis on the principle of conferral, because acts by the MSs not strictly contained in a Treaty provision fall outside the scope of Art. 51. The Charter rights become accessible to the EU citizen through the implementation by national parliaments of EU law. The effect of the Charter rights is prescribed to the legislation by the EU institutions. They present the MSs with directives which they incorporate, say implement, into their national legal orders. After they have become part of national law, the effect of the Charter seizes to exist for the sake of the national fundamental rights jurisdiction to take over the role of regulating the relationship between state and individual. This view is the literal interpretation of Article 51(1)'s binding force on MS action and it is considerably more restrictive about the scope of application of EU FR than set forth in the case law of the CJEU. [87]

In practice the literal approach would differentiate the scope of the Charter between the binding force on institutions of the EU, which would be entirely and the binding force on MS, which would be limited to the implementation process of directives and the execution of EU law (e.g. by public bodies). Acts by MSs that are not an execution of implemented EU law would then no longer be under the scrutiny of the CJEU, but under the scrutiny of the highest Courts of the MSs, even when they affect Charter rights and EU law combined. However, the CJEU did not limit its interpretation of the scope of Union law to this narrow definition. As chapter 2 has illustrated, the *puntus saliens* of an act of a MS to fall within the scope of Union law is the preservation of the effectiveness of EU law provisions.

In the case that the CJEU interprets the meaning of Article 51(1) to encompass the entirety of acts by MS that affect EU law, the corresponding problem of the delineation of the powers of the EU gains in gravity. This problem is addressed in Article 51(2) and defines that the effect of the Charter doesn't allow for an extension of the powers of the EU. An extension of powers of the EU is in principle possible as the general nature of fundamental rights constitutes a legal basis that allows to legislate in virtually every area of life on grounds of fundamental rights protection, even those areas which have no relevance to European Integration, as it has been defined by the concept of unitarisation or federalisation. [88]

The Charter therefore appears to be more restrictive than *ERT* in its literal readingof the scope of EU FR on MS action and entails an explicit prohibition of unitarisation. Whether the CJEU will conform to this interpretation will be the subject of the following Chapter. By making reference to the *Zambrano* case,

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[87] Marta Cartabia, 'Article 51 - Scope' in W.B.T. Mock and G. Demuro (eds), *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union* (Carolina Academic Press 2010) <http://books.google.de/books?id=L6dsPQAACAAJ> 319, 320

[88] Ibid 321

which directly follows in the footsteps of *Zhu and Chen* and *Rottmann*, the next chapter will analyse whether the scope of Union law must be read in the stricter sense of article 51 (2) or whether the broader interpretation developed by the CJEU can be still maintained.

Chapter 4: The Fundamental Rights jurisprudence in the field of Citizenship after the Charter of Fundamental Rights – The Case of Ruiz Zambrano

While in *Zhu and Chen* an extraneous element was identifiable due to Catherine Zhu's Irish nationality, the *Zambrano* case recasts the scope of Citizenship law and corresponding EU FR in absence of a cross-border situation. It is the first case that involved a possible breach of a Charter right after the ratification of the Lisbon treaty and the new legal status of the Charter.

The Facts of the Case

Mr. Zambrano was a TCN established in Belgium with his family on exceptional leave to remain. His family was dependent on his income, which he lost after being fired due to the lack of a working permit. His request to obtain a working permit was denied due to his status of asylum applicant. He claimed a right of residence[89] on the basis of his children's status of EU citizenship[90]. He argued that he needed his residence status to be regularised to provide for his children. The Belgian authorities denied his request based on the claim that the status of EU citizenship was the result of 'legal engineering'.

The issue of the scope of EU citizenship was resting on the fact that his children were Belgian nationals resident in Belgium. [91]However neither a previous cross border movement was identifiable nor the existence of the involvement of a second MS.

The questions referred

The question referred asked whether the provisions of EU citizenship could confer a right of residence to the children of Mr. Zambrano, in the absence of an extraneous or transnational element. [92]

The second point raised in the dispute was whether the right of residence of the children entail a right of residence and a subsequent right to a work permit for Mr. Zambrano, as in *Zhu and Chen* on the basis of the rights entailed in the Charter[9394]

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[89] Which would also entitle him to a working permit neccessary for the support of his children
[90] Due to their Belgian nationality
[91] Cf *Garcia Avello*
[92] Case C-34/09 *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I - 01177, Opinion of AG Sharpston para 33(1)
[93] Art. 21,24, 34 Charter of Fundamental Rights of the EU
[94] Ibid Opinion of AG Sharpston para 33(2)(3)

The Opinion of AG Sharpston

In her analysis of the dispute the AG recalled that, as one has seen in Chapter 2 of this study, the condition for claiming rights on the basis of EU citizenship is the existence of a cross-border element, except for the case of *Rottmann.* Therefore the AG considered whether the right to reside could be invoked separately from the right to movement, which would reframe the concept of the scope of Article 21 as a consequence. [95] The AG argued that the principle aim of the right of movement and residence is to reduce obstacles to the movement of MS nationals. On this ground, she argued, it would make no sense to deny the children to claim their EU Citizenship rights. Since they reached the age to decide on their own where to move and reside freely, the connected claim of their father brought them within the scope of EU citizenship. [96]

The AG continued with the question whether the denial of a right of residence would be incompatible with the principle of proportionality and specifically with a proportionate protection with the Children's right to family life. First, the AG considered whether the children's EU FR would be breached in the same sense as in *Zhu and Chen.* Arguing on the basis of the dependency of the Children on their father's income, it became apparent to the AG that the consequences of not granting a derivative right of residence would be disproportionate. [97]

Confronting the issue whether Mr.Zambrano could invoke a right of residence solely on the basis of his right of family life led the AG to consider the possibility of the Charter as an independent source of law. This would constitute a new function of EU fundamental rights: EU FR would no longer be limited to the exercise of free movement or residence. Because of the crucial relevance to the subject of one's inquiry the next section is devoted to the AG's reasoning on this matter.

The Charter as a Source for Independent Fundamental Rights Claims

AG Sharpston considered how the appropriate balance between the adequate respect for fundamental rights could be safeguarded at the EU level while respecting the principle of conferral and proposed an innovative approach. [98] Instead of connecting a fundamental right application on the exercise of a treaty right, she proposed to limit the effect of the Charter to the exclusive and shared competences of the EU.

In the context of this study this constitutes a third approach. While the literal reading of Art 51 of the Charter would grant the widest discretion to MSs in the application of Fundamental rights and the *ERT* doctrine couples it to the *effet utile* principle, AG Sharpstons approach would include abolish the discretion of MSs in all fields governed by EU law.

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[95] Ibid Opinion of AG Sharpston paras 46, 50
[96] Ibid Opinion of AG Sharpston paras 93 - 96
[97] Ibid para 117
[98] Ibid Opinion of AG Sharpston para 161

The AG was well aware of the fact that such an application of the Charter would constitute a federalisation of fundamental rights, as it would harmonize fundamental rights interpretation in relation to the different types of legislative comeptences. Therefore she proposed that MSs must explicitly call for the CJEU to pursue such an approach as they are the "constituent powers".[99]

The Judgment of the CJEU and the Establishment of the 'Substance of Rights Doctrine'

Regarding first the issue of the applicability of EU citizenship in the absence of a cross border element, the CJEU applied directly the assessment of AG Sharpston. The national measure did fall within the scope of citizenship, because of its nature and consequence as defined in *Rottmann*.[100] Because of the status as minors the MS measure has the potential to remove them from EU territory which would deprive them effectively of their EU citizenship rights.[101]

That includes a right of residence and a right to a work permit to the father to the extent, and this is most important, that it is necessary for the safeguarding of his children's Union citizenship "substance of rights".[102]

Conclusion – Ruiz Zambrano

On the basis of these findings, one can state that in *Zambrano* the CJEU has not been significantly innovative. The CJEU delibaretely didn't pick up on AG Sharpston's discussion of an independent Fundamental Rights Regime and decided to apply the same logic established in the preceding case law(Chapter 2) to the case of *Zambrano*. It however also opted not to follow the literal approach to Art. 51 of the Charter (Chapter 3).

It merely codified the already existing scheme of rights derived from citizenship and the extent to which fundamental rights manipulate these into binding precedent. Most notably the CJEU specifies the function of the proportionality principle that it has established in *Rottmann* to include the EU FR protection established in the pre-Lisbon case law.

The *Zambrano* case however illustrates the consequences of the approach that the CJEU now has followed since *ERT*. While it established that EU FR have to be respected when they are necessary for the exercise of EU citizenship, the question was left open to what extent the respect for EU FR was necessary. Comparable to *ERT*, the *Zambrano* case remained a deference case[103]and left it for

[99] Ibid Opinion of AG Sharpston paras 172 - 175
[100] Ibid para 42
[101] Ibid para 44
[102] Ibid para 45
[103] See The Preliminary Reference Procedure: Between Interpretation and Application of the Law

subsequent claims by individuals to fill the void of legal uncertainty implicit in the "substance of rights" doctrine.[104]

General Conclusion

This study aimed to verify whether the CJEU applied fundamental rights within the reach of the provisions of EU citizenship in a manner that would constitute a federalisation on the basis of fundamental rights. In this respect this study has analysed the following issues (1) whether the CJEU has extended the reach of citizenship of the EU and the rights entailed therein without properly limiting their effect where MS remain ultimately sovereign, (2) whether fundamental rights of the EU had the consecutive effect of limiting the MS actions in a way that also was not taking their sovereignty properly into account.

Because academic writings hypothesise the Charter as either (1) limiting the application of fundamental rights of the EU to the institutions of the EU and the implementation of EU law by MS or (2) extending the reach of fundamental rights by being applied by the CJEU irrespective of a connection to a directly effective right in the treaties, this study has compared the case law of citizenship before and after the entry into force of the Charter.

Chapter 2 has shown that the CJEU applied the logic of *ERT* to limit the discretion of MSs when restricting the freedom of movement of EU citizens. The EU FR had the role of a supplementary function: The extent to which an EU citizen can claim EU FR against MSs in these case was judged on the basis of the consequences for the individual's ability to exercise his/her freedom of movement. During this period the scope of citizenship had been constantly widened, which also moved more situations within the scope of EU FR, but due to the limitations imposed by the *effet utile* principle one cannot speak of a federalisation on the basis of fundamental rights.

If one compares this approach to the legal basis of the freedom of movement of goods, the *ERT* approach mirrors the approach the CJEU took in *Dassonville*.[105] As it would be insufficient that only quantitative restrictions on the freedom of movement of goods were covered by the treaty, any derogation from EU citizenship must also be viewed in the light of its necessity under EU law. It is perceived as necessary by the CJEU to reserve the interpretation of legal limitations of treaty freedoms to preserve the possibility of the actual exercise of these freedoms.

The development after the entry into force of the Lisbon treaty does not suggest that the CJEU had constrained itself to the implementation of EU law as described in Chapter 3. The *Zambrano* case shows that the father indeed gains a right of residence and a work permit through his children status as EU

[104] The Right to Have What Rights? EU Citizenship in Need of Clarification
[105] C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 1974/837

citizens, it is however only for the effect that his children are actually able to enjoy the status of citizen of the EU.

The ruling of *Zambrano* therefore highlights after all that the effect of the Charter should not constitute a legal basis that would lead to a federalisation. While the CJEU has not applied the Charter rights in the literal way as had been described in Ch. 3, it also remained with its established approach in a way that does enable an independent application of the rights of the Charter. However as the conclusions of *Zambrano* have shown, this approach leaves much to wish for in terms of legal certainty: The CJEU had the possibility to include in this new 'substance of rights' doctrine furthermore a specification of what the substance of rights of citizenship entail, especially the extent (and limitations) of fundamental rights protection envisioned in EU law.

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