

Does recent case-law suggest that the Court of Justice has lost its way on the issue of EU citizens' rights?

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Scolasticus Europaeus: Excuse me, madam — have you lost your way?

Curia: No, my dear! Whatever gave you that impression?

S: It's just that you took a few steps down Full Citizenship path.¹ Now, you seem to have returned to Crossborder Street, trampling established case-law on the way.²

C: Not at all. I may occasionally visit Full Citizenship path, and I may traverse Crossborder Street's edges³, but I know where I am going.

S: I find that hard to believe. I think you missed the sign pointing you to Full Citizenship over 20 years ago.⁴

C: Well then — why don't you start with how you think I got here?

S: Around sixty years ago, you set off on Economic Boulevard. Directives pushed you from the path, progressively weakening the economic link required.⁵ With Maastricht, the Treaties caught up, firmly pointing you on to Crossborder Street.

C: Yes, they did; on to Crossborder Street, as you say, not Full Citizenship path. I distinctly recall a fervent Spaniard wanting the latter, and being expressly silenced.⁶

S: Regardless, from then you yearned to tread on Full Citizenship. Citizenship was destined to be the fundamental status of all EU nationals, you said — not merely those who cross a border.⁷

C: In the very next paragraph, I pointed out that this could only apply within the scope of EU law. And that is why I stay on Crossborder Street: with no cross-border situation, I have no jurisdiction. It marks the limits of my jurisdiction.

S: Let us begin there. Why do you think Full Citizenship path is beyond your jurisdiction?

Full Citizenship path

C: Because the law is plain. Citizenship is not intended to expand the material scope of EU law.⁸

S: Nonsense. Nothing in TFEU 20 says so.⁹

C: How quaintly literal. Let us consider the context. First, as you yourself note, citizenship was partly intended to codify the abandonment of Economic Boulevard. The old case-law, including the wholly internal rule, was intended to remain.¹⁰ Second, the citizenship articles are laconic for a reason.¹¹ Third,

¹ C-148/02 *Garcia Avello*; C-135/08 *Rottmann*; C-34/09 *Ruiz Zambrano*.

² C-434/09 *McCarthy*, C-256/11 *Dereci*, C-40/11 *Iida*, C-356/11 *C*, C-86/12 *Alpoka*; Nic Shubine, 2012 49 CMLR 349, 375.

³ C-370/90 *Singh*, C-200/02 *Chen*.

⁴ Kochenov and Plender (2012) 37 ELRev 369.

⁵ *Ibid.*, 373.

⁶ Sharpston in Cardonnel et al., *Constitutionalising the EU judicial system* (Oxford, Hart, 2012), 247.

⁷ C-184/99 *Grzelczyk*, §31

⁸ C-64/96 *Uecker*.

⁹ Kochenov and Plender, 370.

¹⁰ *Uecker*, §23; Chalmers, *European Union Law* (CUP, 2011), 463.

European institutions have consistently interpreted citizenship in this way: in making 2013 the Year of Citizens, the Commission noted that ‘Freedom of movement is virtually synonymous with Union citizenship’.¹²

S: True. But where the underlying text is silent and the other institutions paralysed, you have not hesitated to do what is necessary.¹³

C: Yes, despite *Zambrano* I have refused to undertake a constitutional revolution this time, extending general Union protection to wholly internal situations. There is a reason for...look out!

The two duck, narrowly missing a flung brick. In the distance, near Full Citizenship path, is the culprit: a man in a general's uniform. There is something strangely plastic about his medals.

Lord Northcliffe: ‘and the immigrants and the Bulgarians and the benefits! You! Lady Court, you are responsible for this! After *Metock*, to think you would have the gall to do worse. Thousands of *Zambrano* couples, now! And all because...’

C: That’s the third time this week. This is the reason. Wander too close to Full Citizenship path, and I am playing with my life.

S: But why give in to this bully? He is just a newspaper. Only hated, fringe parties stand with him.

C: No; he is much more than that. He is the nationalist current in European politics: the Tory backbenchers and their crash-caused counterparts across Europe. The political reality is that extending citizenship too far could undo not only Union citizenship and free movement — already endangered¹⁴ — but the Union itself.

S: But these are, as you say, the *back*benchers. Whilst wavering, the political mainstream is holding behind the Union’s core law.¹⁵

C: Yes, and this is the crux. The mainstream holds because Union citizenship remains confined to cross-border situations. What you want is for the court to abandon any pretence of sticking to free movement, and shamelessly extend its jurisdiction to *all* Union citizens for a sufficiently grave breach of certain rights.¹⁶ But this simply cannot happen.

S: Why ever not? Justice must be the Court’s primary concern.

C: For three reasons. First, that mainstream support would dissolve. Member States do not wish to surrender their sovereignty on this, just like the Charter of Fundamental Rights (‘Charter’). Second, as European constitutional complexity continues to grow, the last thing it needs now is a second rights court.

¹¹ Barnard in CJEU, *The Court of Justice and the Construction of Europe* (Asser Press, 2012), 506.

¹² http://ec.europa.eu/citizenship/pdf/1_en_act_part1_v5.11.08.11.pdf; cf <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:325:0001:0008:EN:PDF> A2(1) and http://ec.europa.eu/commission_2010-2014/president/pdf/press_20090903_en.pdf

¹³ E.g. 26/62 *Van Gend*; Sharpston, “‘The AFSJ’ in the EU”, Thomas Moore Lecture 2008.

¹⁴ http://internacional.elpais.com/internacional/2014/02/17/actualidad/1392627364_714749.html;

<http://www.ft.com/cms/s/0/add36222-56be-11e3-ab12-00144feabdc0.html>

¹⁵ <http://www.bbc.co.uk/news/uk-politics-25398612>

¹⁶ Kochenov and Plender.

S: And the third?

C: Third, and most critically, the constitutional revolution this would entail is not for the court.¹⁷ This would make *Van Gend* look minor: the court would de facto become a federal court. The principle of conferral would wither. One day, that might be possible; but it is not for this court, and it is certainly not for this time.

Reverse discrimination

S: Yet the current approach is intolerable. Reverse discrimination occurs in ever more absurd situations. Union citizens from every nation can attend Scottish university for free; but when an Englishwoman attends St Andrews, she must pay.

C: She has not crossed a border; I cannot help her.

S: But you have not merely neglected the Englishwoman; in protecting others, you have *worsened* her relative permission. The effect of your current case-law is to penalise those who do not, or *cannot* move¹⁸ to activate EU law. When foreigners gain rights that natives lack, does that not make nationals resent EU law in precisely the way you fear?

C: I do find this troubling; AG Sharpston, in particular, is keen on allowing EU law to intervene in this situation, combining TFEU 18 and 21.¹⁹ But there is no substantial reason for me to intervene: far from hindering inter-state movement, it encourages it.²⁰ And unlike migrants, a country's nationals can challenge reverse discrimination through their political process; they do not need my protection.

S: Your point on encouraging movement is clever; but AG Sharpston recently, and rightly, rejected its arid construction: free movement is about freedom to choose where you live in the Union.²¹ And whilst protecting migrants is one purpose of EU law, another is to abolish internal frontiers. Isn't it ironic that your case-law actually *increases* the importance of having crossed those frontiers, often entirely artificially?²²

C: The Court is yet to support AG Sharpston's view. And yes, it is ironic. But there is no way to soundly limit citizenship law except on this cross-border basis.²³ This reflects a deeper point: the Union is a tottering and experimental constitutional construction. Ironies and tensions of this sort, between the member state's sovereignty, the Union's competences, and legal coherence must exist at the edges.

Inconsistency

S: There may be reason behind it, but the inconsistency this tension has caused is intolerable. You tease us with *Carpenter*; you extend 'cross-border' beyond all meaning in *Chen* and *Singh*; and you step towards Full Citizenship path in *Ruiz Zambrano* before confining it, almost ashamedly, to its facts.

¹⁷ *Zambrano* Opinion, §§163-177.

¹⁸ *McCarthy*

¹⁹ *Zambrano* opinion, §§139-150.

²⁰ <http://uaces.org/documents/papers/1201/tryfonidou.pdf>, 520.

²¹ C-456/12 Opinion §§132-134.

²² *Singh vs McCarthy*.

²³ Kochenov, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374901.

C: This is not inconsistent. Starting with the post-*Zambrano* case-law: yes, there was initial ambiguity.²⁴ Given its importance, this is unsurprising. But its scope is now clear: *Zambrano* applies only in the ‘very specific situation’ where, by reason of dependency, a citizen would be forced to leave Union territory entirely.²⁵

S: But the basis for this is unclear. You claim that the *Zambrano* rule is intrinsically connected with free movement, and therefore cross-border situations.²⁶ Because of this, you have corrupted your strong case-law on *actual* cross-border situations, wrongly applying *Zambrano*’s much higher hurdle to show an interference.²⁷

C: That appears to have been a mistake: I have dropped, without renouncing, the claim that *Zambrano* is about free movement.²⁸ And I have been careful to separate this from the cross-border test since.²⁹ *Zambrano* is now clear and confined.

S: Let’s move to your approach to facts. You assumed, without evidence, that the *Zambrano* kids would be forced to leave; yet you concluded, without evidence, that the *McCarthy* ones would not, so that *Zambrano* was inapplicable.³⁰ How can you make such important distinctions as a court without fact-finding powers?

C: A fair criticism. This is why I have been subsequently careful to ensure that the *Zambrano* test is for the national court to apply.³¹

S: But this test determines *whether the dispute is within Union law*; you are surrendering the ability to determine your jurisdiction to national courts!³²

C: Ha! So whether I assess the facts or not, I am wrong. Please — this is how the preliminary reference has always worked. I have established the principle; the facts and application are for the national court. That is not a surrender of my jurisdiction.

S: Fine. But what of *Chen*? What of your torture of the term ‘cross-border’ in 24 languages to bring some cases within EU law, leaving us bereft of legal consistency?

C: There is some merit to that. But the principles behind such cases are now sufficiently coherent that they can be set out concisely.³³

S: Concisely, perhaps; but still more lottery than logic.³⁴

²⁴ *Dereci* Opinion, §49

²⁵ *Dereci*

²⁶ *Iida*, §72; Reynolds 2013 *EuLR* 376.

²⁷ Reynolds, 386f, citing *Iida* at 66ff.

²⁸ C-86/12 *Alpoka*, §32; cf mistaken copy-pasting of *Iida* in C-87/12 *Ymeraga*, §35-6

²⁹ *Alpoka*, §§31-32.

³⁰ Nic Shuibhne (2012) 49 *CMLR* 349, 367; Kochenov, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171454, 11.

³¹ *Alpoka*, §35

³² Kochenov, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171454, 11.

³³ C-456/12, §91; *Iida*, §§68-70

³⁴ RZ opinion, §88.

C: There is some arbitrariness. But consider the context: we have the great tectonic pressures mentioned before. Stray too far from Crossborder Street and not only Northcliffe, but also the political mainstream threatens to collapse the whole system. Yet I am a Court of *Justice*. These cases represent my best attempt to approximate justice without undermining the Treaties.

S: Similar to the *Marshall* case-law?³⁵

C: Correct. I dislike this path, but I have not lost my way.

Postscript

S: Your citizenship law itself is, I suppose, defensible if frustrating.

C: As I said, I am not lost.

S: But you are lost in another sense. In *AMS*, you have left the Charter's direct effect entirely unclear, ignoring a systematic suggestion by AG Villalón.³⁶ In *Radu* you ignored AG Sharpston and failed to address the relationship between rights and the European Arrest Warrant.³⁷ Worse, in *Melloni* you have *lowered* procedural rights under the Spanish constitution.³⁸ Your importance as a court of both substantial and, particularly, procedural rights is about to explode upon gaining full jurisdiction over criminal measures; but your ability to deliver coherent, never mind correct, decisions on such rights is doubtful.³⁹

C: My case-law on procedural rights in competition cases⁴⁰ and sanctions⁴¹ suggests I am entirely competent. And the Charter incoherence is a result of the Charter's ambiguous Article 51 compromise; just as with Citizenship, what more can I do?

S: Well I...look out!

Another brick lands.

C: It appears Lord Northcliffe wants us to stay on topic, not just on Crossborder Street.

S: Quite. We will discuss this another time. For now: I was wrong. Your citizenship law, whilst disappointingly confined, discriminatory against natives and sometimes incoherent, is not lost; it is the result of you treading warily between justice and political reality.

C: Yes; we may come to Full Citizenship path, but now is not the time.⁴²

³⁵ Dashwood, 9 *CYELS* 81.

³⁶ <http://eutopialaw.com/2014/01/29/after-ams-remaining-uncertainty-about-the-role-of-the-eu-charters-principles/>

³⁷ <http://eutopialaw.com/2013/02/05/radu-a-case-of-failed-dialogue/>

³⁸ <http://ukconstitutionallaw.org/2013/05/22/dorota-leczykiewicz-melloni-and-the-future-of-constitutional-conflict-in-the-eu/>

³⁹ See esp. Barnard, 517.

⁴⁰ Wyatt, *EU Law* (Hart, 2011), 814-826.

⁴¹ C-584/10 P, *Kadi II*

⁴² *Zambrano* opinion, §177.