

The ‘Person of Northern Ireland’: A Vestigial Form of EU Citizenship?

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Northern Ireland – United Kingdom – Republic of Ireland – Divergent development of Irish and British nationality law – Citizenship of the European Union – Good Friday Agreement – Brexit – Emma DeSouza – Family unity as a source of constitutional conflict – Reverse discrimination – Cross-border equality as a means of representation reinforcement – Richard Plender

Dedicated to the memory of Sir Richard Plender QC (1945–2020)¹

INTRODUCTION

One of the most nettlesome problems presented by the withdrawal of the United Kingdom from the European Union was how to maintain the fragile peace in Northern Ireland, which had been concluded with the 1998 Good Friday Agreement between the UK and (the Republic of) Ireland (as well as among

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¹Sir Richard Plender Obituary; Specialist in International and EU Law Who First Coined the Phrase “European Citizenship”, *The Times*, 26 November 2020, (www.thetimes.co.uk/article/sir-richard-plender-obituary-8fkvsf66j), visited 26 May 2021.

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the parties representing the communities of Northern Ireland) after the decades of violent conflict known as 'The Troubles'. One of the inherent assumptions of the Agreement, after all, was that the UK and Ireland would remain 'partners in the European Union' (the third consideration in the preamble), so after Brexit, the key functionalities of that larger partnership for peace would have to be simulated. It seemed, at first, that the UK had finally chosen a goal to discard in the 'Brexit trilemma'² (in order to avoid a 'hard' border between Northern Ireland and Ireland) by committing to keeping Northern Ireland within the EU customs area and single market and to impose checks on goods travelling from Great Britain to Northern Ireland. Indeed, this solution would simulate one of the historical 'four freedoms' – free movement of goods – that Ireland and the UK had signed up to when they both acceded to the European Economic Community in 1973.

But a case that had already been pending in the British courts revealed an additional, less prominent piece of the Brexit puzzle that still strained at the seam of the Irish border – citizens' rights – that would require an additional concession from the British government. Until Brexit, Irish and British citizens were all, by virtue of their respective nationalities, also citizens of the EU. The cross-border rights entailed in that status were largely built on the foundation of the classic Community freedom of movement of workers. But the UK and Ireland, to unparalleled extent for any two member states, already accorded a great number of reciprocal rights to each other's citizens. This was an expression of how intimately bound up their fates are, as co-occupants of one island with a long common history, separated by only a narrow strait from the UK's main island and (mostly) speakers of the same language.³ What difference could Brexit possibly make in citizens' rights if one of those member states left the EU, and why would it be necessary to endow, in particular, 'the person of Northern Ireland' with a vestige of the rights entailed in EU citizenship?

Emma DeSouza is a citizen of Ireland born in Northern Ireland, who had only ever resided in the territory of the UK (or, to be precise: out of all the EU member states at the time, that was apparently the only one she had ever resided in). While the UK was still a member state of the EU, she claimed the applicability of the British immigration regulation implementing Directive 2004/38/EU (the Citizenship Directive) to her rights of residence and those of her third-country

²As drawn in a famous Venn diagram by R. Daniel Kelemen (3 May 2018), <twitter.com/rdanielkelemen/status/992044307904389120?s=20>, visited 26 May 2021.

³G. Butler and G. Barrett, 'Europe's "Other" Open-Border Zone: The Common Travel Area under the Shadow of Brexit', 20 *The Cambridge Yearbook of European Legal Studies* (2018) p. 256-57, <doi.org/10.1017/cel.2018.10>, visited 26 May 2021.

national husband Jake (a citizen of the United States), considering that she was a citizen of another EU member state living in the UK.

The contentious part of this claim, as far as the British government was concerned, was whether Ms DeSouza was indeed residing in a member state other than that of which she is a national: by British law, she happened also to be a British citizen by birth. This meant that Ms DeSouza would have to file an application for a family reunification visa for her husband, with a restrictive income requirement that she might have been unable to satisfy with her job managing a café. But Ms DeSouza does not identify as British, nor did she wish to renounce a citizenship she did not acknowledge possessing in the first place. She claimed, based on the following passage of the Good Friday Agreement, that the British government was obliged to recognise her as solely an Irish citizen.

The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will:

...

(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

The DeSouzas' claim was rejected by the Upper Tribunal on 14 October 2019;⁴ they appealed this decision to the Court of Appeal, but then were forced to withdraw their claim because the British government effectively satisfied it.⁵ Specifically, on 14 May 2020, the British government published a change to its immigration policy,⁶ on the heels of a deal announced by the British and

⁴Upper Tribunal (Immigration and Asylum Chamber) (UK), *SSHD v Jake Parker DeSouza*, Appeal Number: EA/06667/2016

⁵F. McClements, 'Emma DeSouza Withdraws Immigration Case after British Government Concession', *The Irish Times*, 21 May 2020, (www.irishtimes.com/news/ireland/irish-news/emma-desouza-withdraws-immigration-case-after-british-government-concession-1.4259245), visited 26 May 2021. The British government, it must be noted, never conceded the merits of the DeSouzas' claims, which meant that the claimants still had to use crowdfunding to cover the legal costs they incurred: F. McClements, 'DeSouzas Receive Donations of over £25,000 towards Legal Costs', *The Irish Times*, 7 September 2020, (www.irishtimes.com/news/ireland/irish-news/desouzas-receive-donations-of-over-25-000-towards-legal-costs-1.4348881), visited 26 May 2021.

⁶Secretary of State of the Home Department, Statement of changes in Immigration Rules, 14 May 2020.

Irish governments immediately prior to the UK's withdrawal from the EU.⁷ According to this new policy 'persons of Northern Ireland'⁸ living in the UK would be treated as if they were EU citizens for purposes of their qualifying family members (including Jake DeSouza) being able to get a right to stay in the UK based on the EU Settlement Scheme.

Why was this a remarkable concession on the part of the British government? It is not the goal of this article to comment on the legal merits of the DeSouzas' claim in British court or that of their opponent, the British government: much ink has already been spilled (or many pixels have been illuminated and dimmed) on that subject.⁹

The aim of this article is primarily to explore the complex legal history of this conflict and its resolution in three parts: first of all, how the nationality laws of Ireland and the UK developed at apparent odds with each other. Irish citizenship developed expansively, as an expression of Irish independence and irredentism and in response to Irish emigration. British citizenship developed restrictively, in an attempt to restrict the rights of immigration to the UK of Commonwealth citizens (i.e. the erstwhile subjects of the erstwhile British Empire and their descendants). Both states made overlapping grants of citizenship to the people of Northern Ireland; nevertheless, this would not at first be a significant source of conflict.

The second legal-historical phenomenon to be explored, however, is the fact that by the time Ireland and the UK acceded to the European Economic Community, the Community freedom of movement of *workers*, in which an 'incipient form of citizenship' of the Community could be discerned, had already effectively come to be defined as a freedom to be enjoyed exclusively by the *nationals* of the member states. This definition was by no means an inevitability

⁷'New Decade, New Approach', January 2020, (assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf), visited 26 May 2021.

⁸That is 'a person who:

- (a) is:
 - (i) a British citizen; or
 - (ii) an Irish citizen; or
 - (iii) a British citizen and an Irish citizen; and
- (b) was born in Northern Ireland and, at the time of the person's birth, at least one of their parents was:
 - (i) a British citizen; or
 - (ii) an Irish citizen; or
 - (iii) a British citizen and an Irish citizen; or
 - (iv) otherwise entitled to reside in Northern Ireland without any restriction on their period of residence'.

⁹A good summary of the case and the commentary on it can be found in J. Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press 2020) p. 92-94.

of the Treaty, yet it would mean that any one member state's nationality laws would soon become the business of all of the other member states, since the possession of one member state's nationality entailed rights of migration to all the other member states. In fact, it was pressure from existing member states which led the UK, before its accession, already to further restrict Commonwealth citizens' entitlement to a newly defined British nationality. One particularly formative decision on EU citizenship from the Court of Justice of the European Union arose from a baby's birth in Northern Ireland, out of the overlap between Irish nationality law, British territoriality and Union citizenship law. The rights derived from Union citizenship, combined with the exigencies of the Good Friday Agreement, would ultimately put pressure on Ireland to make its nationality law more restrictive, as well.

And then there is a final constitutional conflict¹⁰ to be explored, which has played out in the case law of the Court arising from several other references from British and Irish courts. This is the conflict between on the one hand EU law, which provides for near-automatic rights of family unity for 'mobile' EU citizens, and on the other hand the laws of member states that increasingly seek to restrict their own 'static' citizens' right to family unification with third-country nationals.

As a farewell to the UK as a member state of the EU, and as a nod to the British contributions to EU scholarship,¹¹ I intend to honour the memory of one of the greatest contributors, not only as a legal scholar, but as a practitioner as well (representing both individual citizens and the British government before the European Court of Justice as a barrister): Sir Richard Plender. He was one of the British scholars who, subsequent to the accession of the UK to the European Economic Community in 1973, are credited¹² as being of key importance to the development of a pragmatic understanding of 'European citizenship' *avant la lettre* of the express introduction of EU citizenship with the Maastricht Treaty. Plender took up the challenge¹³ posed by erstwhile vice president of the European Commission Lionello Levi-Sandri, who wrote in 1968 of 'an incipient form [...] of European citizenship',¹⁴ to work out a set of legal criteria for this

¹⁰S. Peers, 'Free Movement, Immigration Control and Constitutional Conflict', 5(2) *EuConst* (2009) p. 173, (doi.org/10.1017/S1574019609001734), visited 26 May 2021.

¹¹K. Groenendijk, 'The Considerable Contribution of British Lawyers to EU (Migration) Law', *EU Law Analysis: Expert Insight into EU Law Developments* (blog), (eulawanalysis.blogspot.com/2020/10/the-considerable-contribution-of.html), visited 26 May 2021.

¹²C. Schönberger, *Unionsbürger : Europas Föderales Bürgerrecht in Vergleichender Sicht* (Mohr Siebeck 2005) p. 4.

¹³R. Plender, 'An Incipient Form of European Citizenship', in F.G. Jacobs (ed.), *European Law and the Individual* (North-Holland Publishing Co 1976) p. 39.

¹⁴L. Levi-Sandri, 'Free Movement of Workers in the European Community', 11 *Bulletin of the European Communities* (1968) p. 6.

attribution in order to test it as it applied to the expansion of rights entailed in the freedom of movement of workers.

I will conclude by applying a reversed version of Plender's undertaking to the *unwinding* of the legal effectiveness of EU citizenship in the UK: how can we describe the functionality of the 'person of Northern Ireland', as defined in British immigration law, as a *vestigial* form of EU citizenship? What does this entail, and what does it say for the future of the 'person of Northern Ireland' as the constituent citizen¹⁵ of the quasi-constitutional order of Northern Ireland established by the Good Friday Agreement?

THE DIVERGENT DEVELOPMENT OF IRISH AND BRITISH CITIZENSHIP

The concept in international law of 'nationality', as a personal status of belonging to a political community, is largely bound up with the Westphalian concept of the 'state', or the polity that is presumed to have exclusive sovereignty over a given territory and/or over the population of a given territory. (In turn, the concept of 'nationality' is influenced by the romantic notion of a 'nation' that ought to have its own state, and the idea that all the persons of the world should be allocated to various states by nationality.¹⁶) All of these concepts were already inherently fraught as they applied to Irish citizenship and the at least *de facto* independence of Ireland with the Anglo-Irish Treaty signed in 1921. By that Treaty, the Irish Free State (*Saorstát Eireann*) was to be a self-governing dominion, comparable to Canada, within the 'British Commonwealth of Nations' (a name coined at that very moment, as a successor concept to the British Empire), with the British monarch as head of state.¹⁷ The 1922 Constitution of the Irish Free State defined Irish citizenship by reference to domicile in the area of the jurisdiction of the Free State (in addition to having been born on the island of Ireland or being descended from a parent born on the island of Ireland). But from the British perspective, Irish citizenship had no international dimension, being a mere 'local citizenship' carved out by a dominion legislature for a subset of British subjects: and by the

¹⁵See the text incorporated in the UK's Northern Ireland Act from Annex A of the Good Friday Agreement: 'It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1'.

¹⁶Shaw, *supra* n. 9, p. 20.

¹⁷W.D. McIntyre, "A Formula May Have to Be Found": Ireland, India, and the Headship of the Commonwealth, 91(365) *The Round Table* (2002) p. 392, (doi.org/10.1080/00358530220138578), visited 26 May 2021.

same token, such a local citizenship, if granted to an outright alien by the legislation of a dominion, was incapable of entailing British subjecthood.¹⁸

Unsurprisingly, these compromises in the Treaty were perceived by Irish republicans as a betrayal on the part of the Irish negotiators, and the disagreement between the pro-Treaty and anti-Treaty factions erupted into the Irish Civil War. Despite the fact that the pro-Treaty faction won the civil war, the unresolved matter of the external dimension of Irish citizenship, predictably, simmered for many decades to come. The first of many visible disputes between Ireland and the UK concerning citizenship was the matter of passports: whether they would identify the holder as ‘Citizen of the Irish Free State and of the British Commonwealth of Nations’ or as a British subject.¹⁹

It was not until 1948 that the UK formally recognised Irish citizenship as a separate nationality, with the passage of the British Nationality Act on 30 July 1948, due to go into effect on 1 January 1949. After assuring the UK that British and Irish citizens would continue to enjoy reciprocal rights,²⁰ Ireland was subsequently able to declare itself a republic with the signing into law on 21 December 1948 of the Republic of Ireland Act, which entered into force on 18 April 1949 and erased any remaining traces of the role of the British monarch and/or the Crown²¹ in Irish law and external relations.

It could already be said that Ireland had a clearly delineated constitutional citizenship:²² Ireland had a written constitution (the original 1922 one, replaced by plebiscite in 1937 with the constitution still in force to this day, by which ‘Éire/Ireland’ succeeded the Irish Free State), whose article 9 provided for the citizenship of Ireland for all who had been citizens of the *Saorstát*. With the severance of any remaining formal ties to Britain, British subjecthood and the monarchy, it could be said that the external dimension of Irish citizenship now also more neatly conformed to the received definition of nationality in international law,²³ ensuring near-universal recognition of the attachment of that status to the right to diplomatic protection abroad (by Ireland) and the right of unconditional return to the state territory.

¹⁸M.E. Daly, ‘Irish Nationality and Citizenship since 1922’, 32(127) *Irish Historical Studies* (2001) p. 377. For a review of the vigorous legal conflicts on this subject between British dominions – with Canada prominently at the forefront – and the UK, see J.B. Bierbach, *Frontiers of Equality in the Development of EU and US Citizenship* (TMC Asser Press 2017) p. 263-271.

¹⁹Daly, *supra* n. 18, p. 380-382.

²⁰Daly, *supra* n. 18, p. 390.

²¹J.M. Kelly, *The Irish Constitution*, 2nd edn. (Jurist Publishing Co 1984) p. 692-93.

²²For a definition of ‘constitutional citizenship’, see Shaw, *supra* n. 9, p. 35-60.

²³K. Hailbronner, ‘Nationality in Public International Law and European Law’, in *Acquisition and Loss of Nationality, Volume 1: Comparative Analyses* (Amsterdam University Press 2006) p. 71-81.

The UK, on the other hand, maintained a highly idiosyncratic relationship in its unwritten constitution²⁴ with the international law concept of 'nationality', in its efforts to maintain a legal relationship to the people of the countries of its former Empire, now the Commonwealth. The 1948 British Nationality Act did at least formally break with drawing on ancient common law definitions of subjecthood as based on allegiance to the British monarch: a commentator writing at the time of the applicability of that Act wrote:

Today British nationality rests upon a purely statutory basis, and this basis consists of a variety of legislative texts. Allegiance has become a consequence, or a concomitant, not a source, of British nationality.²⁵

But at the same time, it appeared that that Act in some ways did little more than put old wine in new bottles, for instance by declaring the 'Commonwealth citizen' to have a status equivalent to that of the 'British subject' in the UK.²⁶ In light of this sort of possibly only cosmetic rebranding, it should therefore be unsurprising that Ireland left the Commonwealth at the same time as it declared a republic, in order to avoid any illusion of compromising its sovereign constitutional identity.²⁷ Nevertheless, for the time being, it seemed that the UK, at least internally, maintained an expansive definition of British nationality, extending a right of entry and residence and electoral rights²⁸ to all Commonwealth citizens (and Irish citizens, as a distinctly appended category of non-citizens yet non-alien), subject to no immigration controls.²⁹ The UK's own 'local citizenship' status carved out of Commonwealth citizenship by the British Nationality Act 1948 became the

²⁴In which 'the constitutional principles of citizenship [are] scattered across a wide range of documents, including common law and case law': Shaw, *supra* n. 9, p. 43.

²⁵J.M. Jones, *British Nationality Law*, Revised, British Nationality Law and Practice (Clarendon Press 1956) p. v.

²⁶Jones, *supra* n. 25, p. 96.

²⁷Eoin Daly writes that republican political principles, as such, are not very strongly expressed in the Irish constitutional tradition, although I would argue that Irish constitutional republicanism, as an expression of independence, finds one of its strongest expressions in the desire to clearly distinguish Irish citizenship from British notions of allegiance to a King (or a King-in-Parliament): E. Daly, 'Republican Themes in the Irish Constitutional Tradition', 41(2) *Études Irlandaises* (2016) p. 163, <doi.org/10.4000/etudesirlandaises.5047>, visited 26 May 2021.

²⁸Even to this day, the UK accords full electoral rights to legally resident Commonwealth and Irish citizens. See F. Fabbrini, 'Voting Rights for Non-Citizens: The European Multilevel and the US Federal Constitutional Systems Compared', 7(3) *EuConst* (2011) p. 395, <doi.org/10.1017/S157401961130003X>, visited 26 May 2021. Ireland grants active suffrage, but not passive suffrage, in parliamentary elections to British citizens residing in Ireland, but no suffrage in presidential elections or constitutional referenda: B. Ryan, 'The Common Travel Area between Britain and Ireland', 64(2) *Modern Law Review* (2001) p. 861, <doi.org/10.1111/1468-2230.00356>, visited 26 May 2021.

²⁹L. Fransman, *British Nationality Law*, 3rd rev. (Tottel Publishing 2007) p. 282.

‘Citizens of the United Kingdom and Colonies’ to whom the UK issued passports (and who could be said to more properly represent the external dimension of British nationality). Ireland, for its part, expanded the set of Irish citizens in 1956 by a statute (the Irish Nationality and Citizenship Act, which provided that ‘every person born in Ireland is an Irish citizen from birth’) on the basis of Article 9 of the Constitution as then in force: ‘The national territory consists of the whole island of Ireland, its islands and its territorial seas’. This effectively automatically conferred Irish citizenship on most of the population of Northern Ireland.³⁰ The passage of this Act (of which the primary aim was admittedly more to bestow Irish citizenship *iure sanguinis* on the worldwide diaspora of persons descended from a grandparent born on the island of Ireland, to lure them ‘home’³¹) predictably resulted in angry reactions from the Northern Ireland government.³²

Yet it seems that in the years to follow, this unparalleled extraterritorial conferral of Irish citizenship *iure soli* was fairly uncontroversial in the relationship between Ireland and the UK. This probably had much to do with the fact that it was of little practical relevance to most of the people of Northern Ireland whether they claimed one nationality or the other, due to the extensive reciprocal rights that Irish citizens enjoy on British soil and vice versa. Moreover, the territories of Ireland and the UK (in addition to the UK-associated territories of the Isle of Man and the Channel Islands) constitute an area of free travel without systematic border controls (comparable to the Schengen area), as they have since time immemorial but which has only relatively recently (since 1972) become known as the ‘Common Travel Area’.³³ In this context, the Common Travel Area is meant to render the border between Northern Ireland and the Republic as invisible as possible (at least for British and Irish citizens³⁴).

³⁰Kelly, *supra* n. 21, p. 40. See also, for an extensive legal analysis of the relevant provisions of the 1956 Act, B. Ryan, ‘The Ian Paisley Question: Irish Citizenship and Northern Ireland’, 25 *Dublin University Law Journal* (2003) p. 158.

³¹B. Ó Caoidealbháin, *Citizenship and Borders : Irish Nationality Law and Northern Ireland* (IBIS Working Paper No. 68, 2006) p. 12-13.

³²Daly, *supra* n. 18, p. 402; Ryan, *supra* n. 30, p. 162-164.

³³Butler and Barrett, *supra* n. 3, p. 258-260.

³⁴Indeed, this *territorial* arrangement leans heavily on the reciprocal *personal* rights of British and Irish citizens, catalogued extensively in Ryan, *supra* n. 28. See also S. De Mars et al., ‘Continuing EU Citizenship “Rights, Opportunities and Benefits” in Northern Ireland after Brexit’ (Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission, March 2020) p. 15-16, (www.nihrc.org/publication/detail/continuing-eu-citizenship-rights-opportunities-and-benefits-in-northern-ireland-after-brexite?), visited 26 May 2021. This means that for non-citizens, or for persons of colour targeted by spot checks, the border was ‘hard’ even before Brexit: L. Butterly, ‘Migrants Are Always at Risk of Crossing a Line’, *Irish Examiner*, 23 August 2019, (www.irishexaminer.com/opinion/commentanalysis/arid-30945668.html), visited 26 May 2021.

British nationality law, by contrast, developed in a considerably more restrictionist direction. By the time Enoch Powell made his 'Rivers of Blood' speech in 1968, notorious for articulating an anti-immigrant turn in British political discourse that openly equated 'Britishness' with whiteness, the British Parliament had already restricted immigration and citizenship rights of Commonwealth citizens in the UK, including Citizens of the United Kingdom and Colonies, with the Commonwealth Immigrants Act of 1962. The core of what could be called an 'incipient form of British citizenship',³⁵ in terms of the Commonwealth Immigrants Act 1962 granting them unconditional rights of entry and residence in the UK and immunity from deportation, was formed by Commonwealth citizens who were either born in the UK, had become Citizens of the United Kingdom and Colonies by naturalisation or registration in the UK, or who were born abroad as the child of a UK-born father. Tellingly, it was the pressure induced by this legislative restriction, and the further restrictions of the subsequent Commonwealth Immigrants Act 1968 and the Immigration Act 1971, that led to the first significant numbers of members of the overseas Irish diaspora claiming Irish citizenship. These were, most prominently, Citizens of the United Kingdom and Colonies or citizens of other (often newly independent) Commonwealth countries who had otherwise lost their rights of settlement in the UK, who claimed Irish citizenship precisely to preserve their access to the UK.³⁶

THE INTERFACE OF NATIONALITY TO COMMUNITY LAW VIA THE UK AND IRELAND

In 1973, with the joint accession of the UK and Ireland to the European Economic Community, we arrive at the point at which the communicating vessels of citizenship rights in Ireland and the UK become connected to a third one, that of the Community. But to cinch this link, the UK had already had to make a further adjustment that Ireland did not need to make: establishing a clear external definition of who the 'British national' was to be for purposes of Community law. At the time of signing the accession treaty in 1972, the British government, apparently without consulting Parliament,³⁷ made a unilateral declaration³⁸ defining the 'British national' as 'persons who are citizens of the United

³⁵My term, by conscious reference to Plender, in Bierbach, *supra* n. 18, p. 276-278.

³⁶Daly, *supra* n. 18, p. 405-406.

³⁷R. Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (Frank Cass 2003) p. 166, <doi.org/10.4324/9780203485576>.

³⁸Declaration by the Government of the United Kingdom and Northern Ireland on the Definition of the Term "Nationals", *Official Journal of the European Communities*, no. 27.3.1972 (1972): 196.

Kingdom and Colonies or British subjects not possessing that citizenship or the citizenship of any other Commonwealth country or territory, who, in either case, have the right of abode in the United Kingdom, and are therefore exempt from United Kingdom immigration control' (as well as an additional provision relating to Gibraltarans).

The government was thus essentially defining the external dimension of 'British national', for the first time ever (but still not in domestic law), by reference to a subset of persons deemed by domestic immigration laws to be exempt from immigration controls and deportation. 'Right of abode' (a term of the Immigration Act 1971, which went into effect at the same moment that the UK acceded to the European Economic Community) was in turn defined in terms of 'patriality', or birth in the UK or descent from a UK-born parent. Without any doubt, this declaration was the result of direct pressure on the British government from the original six member states of the Community, in particular the Netherlands, who feared a flood of immigrants from the Commonwealth.³⁹ The definition of the 'British national' was clearly meant to limit the entitlement to freedom of movement largely to white Citizens of the United Kingdom and Colonies⁴⁰ living in Britain, to the exclusion of non-patrial Citizens of the United Kingdom and Colonies and Commonwealth citizens (even with a right of abode) who had not yet opted to become Citizens of the United Kingdom and Colonies by registration.⁴¹

³⁹W.R. Böhning, *The Migration of Workers in the United Kingdom and the European Community* (Oxford University Press for the Institute of Race Relations 1972) p. 132-33. In researching Böhning's sources, other contemporary press coverage and a joint declaration of the Six prior to the accession, I came to the conclusion that the fear of 'Commonwealth immigrants', certainly on the part of the Netherlands, was clearly based on a racialisation of Commonwealth citizens: Bierbach, *supra* n. 18, p. 390-391. See also, for a thorough review of the dynamics of colonialism and exclusion involved in the UK's pivot from the Commonwealth to the European Economic Community, N. El-Enany, *(B)Ordering Britain: Law, Race and Empire* (Manchester University Press 2020) p. 176-96.

⁴⁰In effect, almost all patrials were whites and non-patrials were people of color': D. Scott FitzGerald, 'The History of Racialized Citizenship', in A. Shachar et al., *The Oxford Handbook of Citizenship* (Oxford University Press 2017) p. 146.

⁴¹The victims of the Windrush scandal, who were suddenly threatened with deportation from the UK in the late 2010s despite having spent nearly all their lives there, nearly all hail from these categories, having moved to the UK as Citizens of the United Kingdom and Colonies or Commonwealth citizens from the Caribbean prior to the entry into force of the Immigration Act 1971, but who failed, due to inadequate information, limited resources, or missing records, to obtain documentary confirmation of a subsequent right of abode. See W. Williams, 'The Report of the Windrush Lessons Learned: Independent Review', 19 March 2020, p. 24, (www.gov.uk/government/publications/windrush-lessons-learned-review), visited 26 May 2021.

Plender criticised⁴² how Community law, starting from the earliest secondary legislation⁴³ implementing the Treaty freedom of movement of workers, already limited freedom of movement of workers to those possessing the nationality of a member state. Indeed, allowing member states to define the set of persons entitled to nationality limits the ability to make a broader definition, on the level of Community (later Union) law, of persons living in Europe entitled to (the incipient) European citizenship.⁴⁴ It could be said, in fact, that it fosters a left-behind class of persons in each of the member states, entitled to residence in that member state (typically) because of post-colonial relationships,⁴⁵ but unable to be 'Europeans' by making use of freedom of movement.

In any case, the final step of the closing-off of British nationality was concluded with the passage of the British Nationality Act 1981, which came into effect on 1 January 1983: the heretofore Community-law definition of the British national was imported into domestic law. The patrial Citizen of the United Kingdom and Colonies became the 'British citizen'.⁴⁶ However, a final, significant change was also made to domestic nationality law: the unconditional acquisition of British citizenship *iure soli* for all born on British soil (barring unusual situations such as children of diplomats) was abolished, in favour of *ius sanguinis* or conditional *ius soli*.⁴⁷ Henceforth, only children of British citizens, or children of persons with indefinite leave to remain in the UK, would be British citizens from birth if born on British soil.

⁴²*Supra* n. 13, p. 42-45.

⁴³Council of the European Economic Community, *Verordening No. 15 Met Betrekking Tot de Eerste Maatregelen Ter Verwezenlijking van Het Vrije Verkeer van Werknemers Binnen de Gemeenschap* [Regulation 15/61/EEC], *Publikatieblad van de Europese Gemeenschappen*, vol. 61, 1961, Art. 1(1).

⁴⁴D. Kochenov and R. Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text', 37(4) *European Law Review* (2012) p. 369 at p. 378-379.

⁴⁵Efforts in the European Community to restrict freedom of movement for former colonial subjects of member states preceded the accession of the UK: Art. 43(3) of Regulation 1612/68 (still in force as Art. 36(3) Regulation 492/2011) was an expression of an (ultimately unsuccessful) attempt to exclude Dutch nationals from Caribbean countries of the Kingdom of the Netherlands, and French nationals from Algeria and French overseas territories from freedom of movement. *See*, for the history of early efforts to introduce indirectly racial criteria for entitlement to freedom of movement, Bierbach, *supra* n. 18, p. 234-241.

⁴⁶Fransman, *supra* n. 29, p. 283. The UK also duly updated its Declaration by Community law to redefine the 'British national' by reference to (as the most prominent category) 'British citizens': 'NEW DECLARATION by the Government of the United Kingdom and Northern Ireland on the Definition of the Term "Nationals"', *Official Journal of the European Communities*, No C 23/1, no. 28.1.1983 (1983).

⁴⁷Fransman, *supra* n. 29, p. 284.

The scene has now been set for the first significant legal interaction between British, Irish and Union citizenship law.

Chen

Ms Man Chen, a Chinese citizen who had no long-term right of residence in the UK, entered the UK in May 2000 when she was six months pregnant, then went to Belfast to have her baby (Catherine Zhu) in September 2000.⁴⁸ Baby Catherine did not acquire British citizenship *iure soli*, due to the post-1983 restriction in British nationality law, but was, of course, entitled to have her mother declare her to be an Irish citizen based on the 1956 Irish Citizenship and Nationality Act.⁴⁹ Ms Chen subsequently moved to Wales with baby Catherine and applied to the British Home Office for a residence permit as the family member of a national of a European Economic Area state; the Home Office rejected the application.⁵⁰ Irish courts had already been dealing with questions of whether Irish law provided that the non-Irish parents of a child who was Irish *iure soli* had to have a right of residence in Ireland (based on a complex evaluation of each family member's links to Ireland, somewhat in the shadow of Article 8 of the European Convention on Human Rights, which was not yet incorporated into Irish law at the time)⁵¹ but this was the first time that the issue had been 'Europeanised' by the parent of an Irish child claiming a right of residence in the UK.⁵²

The first question to be answered was whether baby Catherine even derived a right of residence in the UK from Community law. The governments of the UK (represented by, among others, Richard Plender) and Ireland put forth, first of all, that Catherine had not made use of freedom of movement because she had not moved from one member state to another.⁵³ The Court rejected this argument,⁵⁴ simply stating that the fact that a national of one member state was born in a host

⁴⁸ECJ 19 October 2004, C-200/02, *Kunqian Catherine Zhu, Man Lavette Chen v Secretary of State for the Home Department*, para. 9.

⁴⁹See *supra* at n. 30.

⁵⁰J.-Y. Carlier, 'Case C-200/02, Kunqian Catherine Zhu, Man Lavette Chen v. Secretary of State for the Home Department', *Common Market Law Review* (2005) p. 1121.

⁵¹The Irish cases are reviewed in B. Ryan, 'The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland', 6(3) *European Journal of Migration and Law* (2004) p. 179. The most prominent of these was the Irish Supreme Court's *Lobe & Osayande v Minister for Justice, Equality and Law Reform*, 23 January 2003, [2003] IESC 3, in which the Court ruled that non-Irish parents of Irish children could in fact be deported if there were sufficiently grave and substantial reasons for doing so, even if this had the consequence of removing the Irish children as well.

⁵²Carlier, *supra* n. 50, p. 1122-1123.

⁵³*Chen*, *supra* n. 48, para. 18.

⁵⁴*Chen*, *supra* n. 48, para. 19.

member state and had not yet actually crossed a border did not mean that this was a 'purely internal situation'.⁵⁵

The British government further contended that because Ms Chen had clearly moved to Northern Ireland to give birth to Catherine, with the undisputed aim of having Catherine be born with Irish citizenship, her claim was an 'abuse' of Community law.⁵⁶ The Court rejected this argument as well, referring to what by now had become orthodoxy:⁵⁷ that it was up to member states to determine by their own laws who their nationals were,⁵⁸ and that by the same token, no member state could deny the applicability of Community law to a person who validly possessed the nationality of another member state.⁵⁹ And neither Ireland nor the UK disputed that Catherine was genuinely an Irish citizen.

Now that the Court had established that baby Catherine was indeed a beneficiary of Community law in the UK, the Court went on to significantly expand on the existing rights of residence for economically inactive mobile EU citizens that were codified in the secondary legislation then in force. Repeating the formula, first uttered in *Grzelczyk*,⁶⁰ that 'Union citizenship is destined to be the fundamental status of nationals of the Member States',⁶¹ the Court ruled that it would deprive Catherine's rights of residence as a Union citizen of 'useful effect' if her primary carer, who was also able to supply her with the sufficient resources and health insurance required for her to legally reside, were not also to be permitted to reside with her.⁶²

It cannot be overemphasised that *Chen* was a decision of great significance to the rights of residence and family life to be derived from mobility (i.e. residence in a 'foreign', host member state, even without actually crossing a border) as a Union citizen, which were not at all dependent on conducting the usual balancing of

⁵⁵ Cf ECJ 27 October 1982, Joined Cases C-35/82 and C-36/82, *Morson and Jhanjan v The State of the Netherlands*, in which the term 'purely internal situation' (in the Commission's submission) was used to describe a situation that did not fall within the ambit of Community law, because the member state national in question was residing in their own member state of nationality and had not made use of freedom of movement.

⁵⁶ *Chen*, *supra* n. 48, para. 34.

⁵⁷ See *supra* n. 42.

⁵⁸ In *Kaur*, the Court endorsed the UK's 1972 definition of its 'nationals' as the sole beneficiaries of Community law, to the exclusion of all the other categories of British subjects in British nationality law: ECJ 20 February 2001, C-192/99, *R v Secretary of State for the Home Department, ex p Manjit Kaur, Intervener: Justice*; critically: Kochenov and Plender, *supra* n. 44, p. 381-382.

⁵⁹ ECJ 7 July 1992, C-369/90, *Mario Vicente Micheletti and Others v Delegación Del Gobierno En Cantabria*.

⁶⁰ ECJ 20 September 2001, C-184/99, *Rudy Grzelczyk v Centre Public d'aide Sociale d'Ottignies-Louvain-La-Neuve*.

⁶¹ *Chen*, *supra* n. 48, para. 25.

⁶² *Chen*, *supra* n. 48, paras. 45-47.

member state interests allowed for by Article 8 of the ECHR against the enjoyment of the right to family life.⁶³ And given the now-rigid relationship between possession of the nationality of a member state and Union citizenship,⁶⁴ this would also mean, as Plender asserted in an interview with a Dutch newspaper immediately following the oral proceedings in *Chen* in 2003, that ‘people will look for the member states with the most generous nationality laws in order to gain access to the European Union’.⁶⁵

Indeed, the *Chen* case, even before the decision was handed down in October 2004, arguably catalysed the completion of a swift political revolution within Ireland to end unconditional Irish citizenship *iure soli*.

Irish citizenship takes a restrictive turn

In 1999, Ireland had already amended its Constitution and laws for compliance with the ‘birthright to identify’ provision of the Good Friday Agreement, to accommodate persons born in Northern Ireland who were not desirous of Irish citizenship. That amendment made Irish citizenship optional for Northern Ireland-born persons by making the acquisition *iure soli*, while now Constitutionally guaranteed,⁶⁶ no longer automatic for children born on the island of Ireland already in the possession of another nationality, but dependent on that child, or a person on their behalf, doing ‘any act which only an Irish citizen is entitled to do’,⁶⁷ usually by the act⁶⁸ of applying for an Irish passport.

But on 11 June 2004, a referendum was held to amend the Constitution once more, to outright deny birthright acquisition of citizenship as provided for in Article 9, ‘notwithstanding’ the aforementioned Constitutional guarantee (in Article 2), to those not having ‘at least one parent who is an Irish citizen or entitled to be an Irish citizen . . . unless provided for by law’, and it passed resoundingly as the Twenty-seventh Amendment to the Irish Constitution, with

⁶³Carlier, *supra* n. 50, p. 1125.

⁶⁴By now, since the Maastricht Treaty, the primacy of nationality of a member state as the only status guaranteeing its holder Union citizenship was codified in the primary legislation: Kochenov and Plender, *supra* n. 44, p. 381.

⁶⁵E. Jorritsma, ‘Europees recht voor een “Chinese” baby’, *NRC Handelsblad*, 18 November 2003, <www.nrc.nl/nieuws/2003/11/18/europees-recht-voor-een-chinese-baby-7662557-a1401191>, visited 26 May 2021, my translation from Dutch. The reporter additionally quotes Plender as arguing before the Court, again through my translation: ‘The right of freedom of migration is being invoked here precisely in order not to have to migrate’.

⁶⁶The Nineteenth Amendment to the Irish Constitution, passed in 1999, abolished any reference to the ‘island of Ireland’ as the national territory, and henceforth only referred to ‘island of Ireland’ as the territory on which birth established an entitlement ‘to be part of the Irish nation’.

⁶⁷Irish Nationality and Citizenship Act, 2001’, Pub. L. No. Number 15, 2001 (2001).

⁶⁸De Mars et al., *supra* n. 34, p. 12

nearly 80% of the vote. The referendum was held at extremely short notice,⁶⁹ having been announced by the government in March 2004 to end what the justice minister, Michael McDowell, dubbed 'citizenship tourism'.⁷⁰ Only three weeks before the referendum, on 18 May 2004, Advocate General Tizzano delivered his Opinion⁷¹ in the *Chen* case (which the Court would subsequently not diverge from), and the justice minister seized on it to provide support to a colleague's previous assertion that Ireland's citizenship law was 'a hole in our back fence' which should be fixed 'not only for our own good, but also for that of our neighbours'.⁷²

The statutory implementation⁷³ of the new Constitutional provision provided that acquisition of Irish citizenship by birth on the island of Ireland was to be contingent on having at least one parent, at the time of birth, who was:

- (i) an Irish citizen or entitled to be an Irish citizen,
- (ii) a British citizen,
- (iii) a person entitled to reside in the State without any restriction on his or her period of residence (including in accordance with a permission granted under section 4 of the Act of 2004), or
- (iv) a person entitled to reside in Northern Ireland without any restriction on his or her period of residence

Irish citizenship law hereby implemented essentially the same conditions for birthright citizenship as British citizenship law had done since 1983,⁷⁴ and perhaps most strikingly, now expressly defined one form of entitlement to Irish citizenship in terms of a parent's possession of British citizenship or an indefinite immigration status by British law. Irish nationality law had thereby abandoned formal self-referentiality for the first time since Ireland's independence and had moreover become just as 'paternal' as British nationality law.

⁶⁹Indeed, Shaw notes that this lightning-fast amendment procedure goes to show that it need not be exceptionally difficult to change a constitutionally regulated definition of citizenship: *supra* n. 9, p. 39-40.

⁷⁰B. Ní Chíosáin, 'Passports for the New Irish? The 2004 Citizenship Referendum', 32(2) *Études Irlandaises* (2007) p. 34-37, <www.persee.fr/doc/irlan_0183-973x_2007_num_32_2_1798>, visited 26 May 2021.

⁷¹Opinion of AG Tizzano in ECJ 18 May 2004, *Kunqian Catherine Zhu, Man Lavette Chen, v Secretary of State for the Home Department*.

⁷²Ní Chíosáin, *supra* n. 70, p. 38-39, quoting T. O'Malley, Minister of State at the Department of Health and Children. See also Ryan, *supra* n. 51, p. 186-187.

⁷³'Irish Nationality and Citizenship Act, 2004', Pub. L. No. Number 38, 2004 (2004).

⁷⁴*Supra* n. 47.

Annex 2 of the Good Friday Agreement did in fact provide:

The British and Irish Governments declare that it is their joint understanding that the term ‘the people of Northern Ireland’ in paragraph (vi) of Article 1 of this Agreement means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.

Of course, the Good Friday Agreement had never constrained Ireland from granting the option of Irish citizenship to persons like baby Catherine, born in Northern Ireland to a non-British, non-Irish, non-settled parent. But the new restriction in the Irish Constitution would have the added effect of preventing the birth of new Irish citizens in Northern Ireland who would not also belong to the Good Friday Agreement’s constituent ‘people of Northern Ireland’.

FAMILY UNITY: A THREAT OR A NECESSITY?

As we have seen, the UK and Ireland restricted entitlement to citizenship in the first place in order to exclude persons perceived as outsiders, with origins in either a former colonial relationship or a more recent immigration history. Additionally, both countries have been part of a trend (particularly in Northwest Europe) of increasingly restricting, in their immigration laws, the ability of their own citizens to be joined by immediate family members with non-European Economic Area nationalities. This is often with the more or less implicit goal of discouraging their own citizens of immigrant or post-colonial background from ‘importing’ family members (in particular, spouses) from their countries of (ancestral) origin, supposedly to foster the citizens’ ‘integration’ in society.⁷⁵

For Community law, on the other hand, the ‘integration’ of mobile workers into the society of host member states was precisely something to be fostered by allowing them more or less automatically to be joined or accompanied in the host

⁷⁵A. Staver, ‘Reverse Discrimination in European Family Reunification Policies’, in W. Maas (ed.), *Democratic Citizenship and the Free Movement of People* (Brill 2013) p. 75-79, identifies Denmark and the Netherlands as pioneers in these types of restrictions, introducing income and integration requirements for family reunification which inspired the introduction of similar requirements in other European countries, including the UK. See also E. Guild, ‘A Shared EU Fixation on Third Country National Family Members?’, *Nijmegen Migration Law Working Papers*, no. 4 (2018). As to the history of how the Netherlands, in particular, came to use restrictions on family reunification as a means of steering the integration of minority groups in Dutch society, see S. Van Walsum, *The Family and the Nation : Dutch Family Migration Policies in the Context of Changing Family Norms* (Cambridge Scholars Publishing 2008) p. 169-76 and generally.

member state by their immediate family members, regardless of nationality, starting with the 1961 Regulation⁷⁶ implementing the Treaty freedom of movement of workers. The final version of the secondary legislation establishing the basic framework that still applies to mobile Union citizens, Regulation 1612/68, expressly referred (in point 5 of the preamble) to the interest of the integration of the worker and their family.⁷⁷ At the time of the adoption of this secondary legislation, these rights of family unity were presumably uncontroversial; but as certain member states increased the restrictions on family reunification for their own, 'static' nationals, the phenomenon of 'reverse discrimination'⁷⁸ became more evident.

Bringing cross-border equality home

However, a decision of the Court⁷⁹ just before the entry into force of the Maastricht Treaty and the introduction of Union citizenship, on preliminary questions in which Richard Plender represented the Indian claimant, Surinder Singh, against the British government, would make use of the logic of the integration of mobile workers to create a significant exception to the heretofore 'purely internal' situation with regard to family reunification. The claimant's wife, the British citizen Rashpal Purewal, had moved with Singh to a host member state (Germany), making use of the freedom of movement of workers. Therefore, the Court ruled, her return to her own member state to establish a business was also a Treaty-guaranteed right, meaning that Singh had to have a right of residence in Purewal's own member state of nationality under conditions at least as favourable as those that applied in the host member state.⁸⁰

This decision opened up the possibility for member state nationals who were unable to be joined by their third-country national family members in their own member state to strategically make use of Treaty freedoms in what came to be called the 'Europe route' or the 'U-turn'. (The most recent expansion of this still-vigorous line of case law provides for rights of residence for same-sex spouses

⁷⁶*Supra* n. 43.

⁷⁷See also ECJ *Carmina di Leo v Land Berlin* (13 November 1990).

⁷⁸So called, originally in K.M. Mortelmans, 'Omgekeerde Discriminatie in Het Gemeenschapsrecht', *Sociaal-Economische Wetgeving: Tijdschrift Voor Europees En Economisch Recht*, no. 10/11 (1979) p. 654 in light of the fact that EU law, and its ban on discrimination based on nationality (currently Art. 18 TFEU), only applies within the ambit of EU law, whose guarantees of rights of movement and residence typically apply only to 'mobile' citizens crossing borders between member states. Cited in the claimants' submission in *Morson and Jhanjan*, *supra* n. 55.

⁷⁹ECJ 7 July 1992, C-370/90, *R v Immigration Appeal Tribunal and Surinder Singh, ex p Secretary of State for the Home Department*.

⁸⁰*Singh*, *supra* n. 79, paras. 20-23.

of member state nationals returning from use of freedom of movement, including in member states that do not recognise their marriage.⁸¹⁾

Richard Plender had himself supplied the Court with the legal logic needed to confirm that Mr Singh had a right of residence based on Community law in his wife's own member state of nationality. Yet this remained one of the 'very exceptional and few'⁸² cases in which the 'incipient form of citizenship', pre-Maastricht, would grant a citizen rights in her own member state of nationality, limited to situations in which cross-border movement was involved. And despite the facts that EU citizenship, introduced in the Maastricht Treaty, is not conceptually connected to cross-border situations or the market, and that the Treaty on the Functioning of the European Union refers to 'an area of freedom, security and justice without internal frontiers' which the Union 'shall offer its citizens', Plender and Kochenov critically note that for years after Maastricht, an increasingly stretched and unpredictable cross-border logic still reigned supreme when it came to citizens being able to derive rights from Union law.⁸³ (For those making use of the 'U-turn', the Court itself had significantly muddied the waters for a number of years. It first ruled, in a case referred from the UK, that although it was not 'abuse' for a British woman to intentionally move to Ireland for work to obtain legal residence for her Moroccan husband, that it might not be possible for a third-country national family member to obtain legal residence in the host member state if he had never had 'prior legal residence' in the Community.⁸⁴ After Ireland and the UK implemented Directive 2004/38 using that restrictive reading of Union law,⁸⁵ the Court then, in a decision on a preliminary reference from an Irish court,⁸⁶ resoundingly repudiated its previous consideration despite a number of member states intervening to protest that they had to maintain control over first admission of third-country national family members to the Union.⁸⁷)

⁸¹ECJ 5 June 2018, C-673/16, *Relu Adrian Coman et al. v Inspectoratul General Pentru Imigrări*. See J.J. Rijpma, 'You Gotta Let Love Move: ECJ 5 June 2018, Case C-673/16, Coman, Hamilton, Accept v Inspectoratul General Pentru Imigrări', 15(2) *EuConst* (2019) p. 324, (doi.org/10.1017/S1574019619000130), visited 26 May 2021.

⁸²Kochenov and Plender, *supra* n. 44, p. 380, referring to Plender, *supra* n. 13, p. 45.

⁸³Kochenov and Plender, *supra* n. 44, p. 383.

⁸⁴ECJ 23 September 2003, C-109/01, *Secretary of State for the Home Department v Hacene Akrih*; critically, Peers, *supra* n. 10, p. 178-182.

⁸⁵E. Fahey, 'Going Back to Basics: Re-Embracing the Fundamentals of the Free Movement of Persons in Metock (Case Overview)', 36(1) *Legal Issues of Economic Integration* (2009) p. 86-87.

⁸⁶ECJ 25 July 2008, C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, para. 58.

⁸⁷*Metock*, *supra* n. 86, para. 44.

EU citizenship tests the boundaries of the purely internal situation

The need to rely on the cross-border situation did change somewhat with the Court's ground-breaking *Rottmann*⁸⁸ decision, in which the Court for the first time challenged the previous assumption that EU law had nothing to say about the attribution of EU citizenship via nationality,⁸⁹ by ruling that the loss of a member state nationality, if it entailed the loss of EU citizenship, had to comply with the proportionality principle of EU law. Building on that decision, the Court subsequently ruled in *Ruiz Zambrano*⁹⁰ on the matter of young Union citizen children who were not in a cross-border situation: it provided for a right of residence to the third-country national parents of young Belgian children born in Belgium who had never lived in another member state, to preserve their 'genuine enjoyment of the rights attaching to the status of European Union citizen'.⁹¹ At last, write Kochenov and Plender, the Court had managed to 'disconnect [...] EU citizenship status from the internal market thinking'.⁹²

Yet if it seemed at first that the purely internal situation with regard to rights of residence of third-country national family members of Union citizens might continue to shrink, the Court soon dashed any such hopes by retreating, in a subsequent decision,⁹³ to its cross-border comfort zone. And it was yet another

⁸⁸ECJ 2 March 2010, C-135/08, *Janko Rottmann v Freistaat Bayern*, commented on in this journal in H.U. Jessurun d'Oliveira, 'Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, Janko Rottmann v. Freistaat Bayern Case Note 1 Decoupling Nationality and Union Citizenship?', 7(1) *EuConst* (2011) p. 138, <doi.org/10.1017/S157401961100073>, visited 26 May 2021, and G.R. de Groot and A. Seling, 'Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, Janko Rottmann v. Freistaat Bayern Case Note 2 The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters', 7(1) *EuConst* (2011) p. 150 <doi.org/10.1017/S157401961100073>, visited 26 May 2021.

⁸⁹Kochenov and Plender, *supra* n. 44, p. 385-386.

⁹⁰ECJ 8 March 2011, C-34/09, *Gerardo Ruiz Zambrano v Office National d'Emploi*, commented on in this journal in A. Lansbergen and N. Miller, 'Court of Justice of the European Union 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)', 7(2) *EuConst* (2011) p. 287, <doi.org/10.1017/S1574019611200087>, visited 26 May 2021.

⁹¹*Ruiz Zambrano*, *supra* n. 90, para. 45.

⁹²Kochenov and Plender, *supra* n. 44, p. 387.

⁹³ECJ 5 May 2011, C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, commented on in this journal in P. Van Elsuwege, 'Court of Justice of the European Union European Union Citizenship and the Purely Internal Rule Revisited Decision of 5 May 2011, Case C-434/09 Shirley McCarthy v. Secretary of State for the Home Department', 7(2) *EuConst* (2011) p. 308, <doi.org/10.1017/S1574019611200099>, visited 26 May 2021. Now usually dubbed '*McCarthy I*' by contrast to a subsequent citizenship decision of the Court with regard to an unrelated claimant named McCarthy, ECJ *Sean Ambrose McCarthy et al. v Secretary of State for the Home Department*, vol. C-202/13, n.d.

case that arose from the well-travelled borderlands between the citizenship laws of UK and Ireland. Shirley McCarthy was a British citizen, born in England to an Irish mother. She married a national of Jamaica, George McCarthy, who had no leave to remain in the UK, and applied for an Irish passport based on her entitlement to Irish citizenship by descent. Mr McCarthy applied for a residence card as the family member of an EU citizen, and his application was rejected, giving rise to his appeal in which the Supreme Court of the UK made a preliminary reference.

But unlike the Ruiz Zambrano children, the Court in Luxembourg ruled, Mrs McCarthy was not being forced to leave the territory of the Union if her husband was denied a right of residence.⁹⁴ Moreover, as long as McCarthy was not actually making use of freedom of movement by crossing a border between member states, the Court ruled, the fact of her possessing Irish nationality, in addition to the nationality of the member state where she lived, could not mean that the secondary legislation, Directive 2004/38, applied to her situation, considering Article 3(1)⁹⁵ of that Directive.⁹⁶

Kochenov and Plender were critical of this decision for many reasons, not least of which was the Court's failure to explore more of the personal dimensions of Mrs McCarthy's personal situation that in fact made her very dependent on the presence of her husband, and incapable, due to her reliance on social assistance, of making use of freedom of movement to another member state.⁹⁷

But the only comment I wish to make on this decision in the context of this article is that not only the British government, in defending its rejection of McCarthy's claim, but also the government of Ireland, McCarthy's other member state of nationality, appeared to be hostile to the prospect of 'static' citizens being able to claim the applicability of EU law. Advocate General Kokott, in her

⁹⁴*McCarthy I*, *supra* n. 93, para. 50.

⁹⁵'This Directive shall apply to all Union citizens who move to or reside in a Member State *other than that of which they are a national*, and to their family members as defined in point 2 of Article 2 who accompany or join them' (emphasis added).

⁹⁶*McCarthy I*, *supra* n. 93, paras. 37-38.

⁹⁷Kochenov and Plender, *supra* n. 44, p. 389-390. Equally critically: N. Nic Shuibhne, 'Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department, Judgment of the Court of Justice (Third Chamber) of 5 May 2011; Case C-256/11, Dereci and Others v. Bundesministerium Für Inneres, Judgment of the Court of Justice (Grand Chamber) of 15 November 2011', 49(1) *Common Market Law Review* (2012) p. 370-71. For additional, compelling, criticism of how EU law offered scant protection to the family life of adult British citizens, by essentially insisting that they have to follow a *Surinder Singh* U-turn to obtain rights of residence for their third-country national family members, considering that that following that route still requires quite a bit of wherewithal that many do not have, see H. Wray et al., 'Subversive Citizens: Using EU Free Movement Law to Bypass the UK's Rules on Marriage Migration', *Journal of Ethnic and Migration Studies* (2019) p. 1.

Opinion, reveals that the Irish government, in its written observations and/or contributions at the hearing, noted that 'Mrs McCarthy is not in any way prevented from exercising her right of free movement and settling in another Member State, for example in Ireland, accompanied by her spouse as a family member',⁹⁸ and furthermore that Union citizens should not be permitted to take an 'à la carte approach' as to which provisions of the Directive they should have to satisfy for it to apply, so as to get the 'best of both worlds'.⁹⁹

What's more: one did always have to wonder if there was a political elephant in the room that made the Court refrain from allowing Mrs McCarthy's Irish citizenship, out of consistency with *Micheletti*,¹⁰⁰ to subvert the traditional 'effective nationality' rule of international law¹⁰¹ and bring her within the ambit of EU law in the UK. After all, a great majority of persons born in Northern Ireland, as (potential) dual British-Irish nationals, would then have been exempt from UK immigration law when it came to being joined by their third-country national family members, while the majority of British citizens born in England, Scotland and Wales (i.e. with no Irish ancestry or any other additional member state nationality *iure soli*) would have been denied the same exemption, creating yet another swathe of reverse discrimination in the UK.

CONCLUSION: ENDOWING THE 'PERSON OF NORTHERN IRELAND' WITH A VESTIGE OF EU CITIZENSHIP

Yet now, the British government's policy change allows the 'person of Northern Ireland' to claim that very exemption, at least in the context of the citizenship

⁹⁸Opinion of AG Kokott in ECJ *Shirley McCarthy v Secretary of State for the Home Department* (25 November 2010), para. 38, fn 35. As welcoming as the Irish government may have wished to make itself sound to the McCarthy family, the Irish immigration authority's current published guidelines on EU Treaty Rights clearly say: 'Please note that we cannot accept applications under EU Treaty Rights provisions from non-EEA family members of Irish nationals. Directive 2004/38/EC on the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States applies only to Union citizens who move to or reside in a Member State other than that of which they are a national. *Exceptions to this apply only in cases where the non-EEA national family member has previously held a residence card of a family member of a Union citizen which has been issued by another Member State under Article 10 of the Directive*' (emphasis added), which would have of course implied the Catch-22 that Mr McCarthy, unable to obtain a residence card in the UK, would not have been able to obtain one in Ireland either: (www.inis.gov.ie/en/INIS/Pages/EU+Treaty+Rights) visited 26 May 2021.

⁹⁹Opinion in *McCarthy I*, *supra* n. 98, para. 56, fn. 60.

¹⁰⁰*Supra* n. 59; the Advocate General did at least pay lip service to it in para. 33 of her Opinion.

¹⁰¹*Nottebohm (Liechtenstein v. Guatemala) (second phase)*, 1955 ICJ Reports (International Court of Justice 1955).

provisions (Part Two, Articles 9–39) of the Withdrawal Agreement,¹⁰² which the EU Settlement Scheme is meant to implement in British immigration law. It is quite an artful dodge of Emma DeSouza's potentially incendiary claim raised in British court, i.e. that the British government was failing to comply with the Good Friday Agreement by not giving actual legal effect to her identification as Irish-not-British.

Admittedly, it is a concession that is extremely limited in its scope of beneficiaries: a person of Northern Ireland, just like any non-British EU citizen who resided in the UK at the time of the expiry of the transition period (midnight Central European Time on 31 December 2020), will still only be entitled to be joined on the same terms as under Directive 2004/38 by a third-country national (or EU citizen) family member who was not already residing in the UK, or (if a 'facilitated' family member in the sense of Article 3(2)(a) or (b) of the Directive) whose residence was not already facilitated in the UK before the end of the transition period, if the family relationship already existed prior to the end of the transition period (see Article 10(1)(e)(ii) Withdrawal Agreement), or if the descendant is born to or adopted by the person of Northern Ireland or their spouse after the end of the transition period (see Article 10(1)(e)(iii) Withdrawal Agreement).

In practice, this policy will probably benefit mainly spouses who were already married to persons of Northern Ireland before the end of the transition period (and their dependent ancestors and descendants who are under 21 or are dependent), since dependent ancestors of persons of Northern Ireland, due to the restrictive two-generation definition of the 'person of Northern Ireland', are likely to themselves be British, Irish, in possession of British indefinite leave to remain, or married to a person of Northern Ireland anyway; and newly born or adopted descendants are even more likely to be British or Irish by descent from the person of Northern Ireland. Future spouses and partners of persons of Northern Ireland (just like future spouses and partners of EU citizens in the UK with pre-settled or settled status) will presumably be subject to the usual restrictions of British immigration law.

Moreover, the restrictive two-generation definition of the 'person of Northern Ireland' (imported wholesale, just like the birthright citizenship conditions of the 2014 Irish Citizenship and Nationality Act,¹⁰³ from Annex 2 of the Good Friday

¹⁰²Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community', Pub. L. No. 2019/C 384 I/01 (2019). See, as a general reference on the citizenship provisions of the Withdrawal Agreement and their relationship to the Directive: E. Guild et al., *The EU Citizenship Directive: A Commentary*, 2nd ed. (Oxford University Press 2020), <dx.doi.org/10.1093/oso/9780198849384.001.0001>, visited 26 May 2021.

¹⁰³*Supra* n. 73.

Agreement) does mean that the person of Northern Ireland is quite 'patrial' to the island of Ireland, i.e. is more likely than not to be seen as white and not to come from a post-colonial or recent immigrant background. (A person in the situation of Mrs McCarthy, notably, would not be a beneficiary of this policy, being Irish and British and living in the UK, but not a person of Northern Ireland.)

What does 'the person of Northern Ireland' tell us about EU citizenship as a norm of equality?

But still, it is here that we see that EU citizenship, even in its pre-Maastricht genesis, added something to British and Irish citizenship that even the near-complete reciprocity and formal equality that the UK and Ireland accord each other's citizens cannot achieve. Ironically, this is due to an aspect of the 'incipient form' of European citizenship that precisely stands in the way of it fully satisfying one of Plender's original criteria:¹⁰⁴ consequential rights. If the equality entailed in the 'incipient form' of EU citizenship, starting with the freedom of movement of workers, had been construed purely in terms of formal non-discrimination by reference to the laws of the host member state, it would have meant that the national immigration laws of a host member state would have to apply equally to the family members of migrant workers and the family members of nationals of a host member state. This would have meant that for workers moving to member states with restrictive family reunification rules for their own nationals, these rules would have equally applied, thereby potentially creating a distortion in the freedom of movement of workers, dissuading workers from moving to those member states. Instead, the Community legislator chose to endow mobile workers with *substantive* equality to nationals of the host member state, to the extent that the family members of nationals of the host member state also shared the nationality of the host member state and therefore had an automatic right to reside there.¹⁰⁵ This is a substantially 'vertical' or supranational, autonomous norm of Community law, similar to the definition of the term 'worker' in *Unger*¹⁰⁶ that Plender saw as definitive for the 'incipient' European citizenship, that is not defined 'horizontally', i.e. by reference to the laws of a given host member state, but uniformly for all citizens who place themselves in a cross-border situation.¹⁰⁷

¹⁰⁴In Plender, *supra* n. 13, p. 40-41. These three criteria were: (1) a common definition of those entitled to the rights entailed in any citizenship; (2) consequential rights; and (3) the abolition of discrimination based on any other nationality against those seeking to assert those rights.

¹⁰⁵See Bierbach, *supra* n. 18, p. 243-244.

¹⁰⁶ECJ 19 March 1964, Case 75/63, *Unger v Bestuur Der Bedrijfsvereniging Voor Detailhandel En Ambachten* (sometimes known as '*Hoekstra*', by the married name of the claimant).

¹⁰⁷Bierbach, *supra* n. 18, p. 13.

The price of this form of equality turned out to be reverse discrimination of static host member state nationals whose family members did not share their nationality. But this, in turn, can arguably be ascribed to the aversion of the member states to abolishing reverse discrimination by creating a uniform norm for family reunification rules for their own nationals: the Family Reunification Directive (2003/86), for instance, now only applies to family members of third-country nationals residing in the Union,¹⁰⁸ but in its original conception was meant also to apply to family members of static Union citizens, until that provision was deleted by the Council in the legislative process.¹⁰⁹ And indeed, Ireland and the UK (and Denmark) opted out entirely from having to apply that Directive, as by default with all Union legislation in the area of freedom, security and justice.

One can certainly criticise this norm of equality for mobile Union citizens as lacking in strong ethical foundations and notions of justice.¹¹⁰ But since this norm of cross-border equality was already inherent in EU citizenship (and indeed in the pre-Maastricht freedom of movement of workers) prior to Brexit, what does its (limited) preservation say about its essential functionality to the Good Friday Agreement, and indeed to the interests of the British government?

'Representation reinforcement' in the UK for the constituent people of Northern Ireland

In the British and Irish governments' 'New Decade, New Approach' deal¹¹¹ that provides the broad justification for this policy change, it notes:

The [British] Government has reviewed the consistency of its family migration arrangements, taking into account the letter and spirit of the Belfast Agreement and recognising that the policy should not create incentives for renunciation of British citizenship by those citizens who may wish to retain it.

The British government is hereby agreeing to regard persons of Northern Ireland with British citizenship, whom it regards as its own 'static' nationals, in this regard

¹⁰⁸At least one member state, however, the Netherlands, has opted to extend its applicability to its own static nationals out of apparent fear of reverse discrimination of its own nationals relative to third-country nationals. See A. Wiesbrock, 'Court of Justice of the European Union: The Right to Family Reunification of Third-Country Nationals under EU Law; Decision of 4 March 2010, Case C-578/08, Rhimou Chakroun v. Minister van Buitenlandse Zaken', 6(3) *EuConst* (2010) p. 479, <doi.org/10.1017/S157401961030006X>, visited 26 May 2021.

¹⁰⁹Peers, *supra* n. 10, p. 174, fn. 6.

¹¹⁰D. Kochenov, 'Equality Across the Legal Orders: Or Voiding EU Citizenship of Content', in E. Guild et al. (eds.), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014) p. 301.

¹¹¹*Supra* n. 7.

as (solely) Irish citizens effectively born into mobility like baby Catherine, in the interest of keeping them from renouncing their British citizenship.¹¹² This is a striking concession to what the Good Friday Agreement has established as the *de facto* constitutional order of Northern Ireland: one in which the British and Irish identities of the people of Northern Ireland exist in a state of superposition and the border between Northern Ireland and the Republic of Ireland is simultaneously there and not-there, just like the paradox in quantum physics that Schrödinger compared to a cat in a box that, as long as it is not observed, is alive and dead at the same time.

Moreover, on this one point the British government is effectively supplementing British citizenship, for the persons of Northern Ireland, with a form of compensatory democratic legitimacy that EU citizenship extends to mobile citizens, and that British citizenship has been revealed to lack, at least in the way that the Brexit referendum was conducted. One rationale for extending mobile EU citizens the benefit of family unity, writes Barnard, that can justify reverse discrimination¹¹³ is that mobile citizens are typically denied rights of political representation in the national parliament of the host member state, and have nothing to say about the host member state's legislation (e.g. on family reunification). Static member state nationals, on the other hand, do have political representation and can theoretically exercise influence on those laws.¹¹⁴ EU law must therefore intervene, on this view, to 'virtually represent' mobile EU citizens in their interests.¹¹⁵

In this case, the 'people of Northern Ireland', nearly all of them in fact, did actually have voting rights as British or Irish citizens and were able to cast their votes in the Brexit referendum. A majority of those voters (55.78%) voted to

¹¹²After all, widespread renunciation of British citizenship could lead to a crisis of legitimacy for the UK in Northern Ireland, at least from the internal British perspective, if the British government held sway over a population that to a large extent was made up of non-nationals.

¹¹³C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, 3rd edn. (Oxford University Press 2010) p. 231, referring to M. Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing 1998) p. 69, who in turn draws heavily on J. Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980). See also K. Lenaerts, "'Civis Europaeus Sum': From the Cross-Border Link to the Status of Citizen of the Union", *FMW: Online Journal on Free Movement of Workers within the European Union* December (2011) p. 9.

¹¹⁴Although, of course, as Lenaerts notes, if the affected static member state nationals are themselves a minority, they will have to seek alternate forms of equal representation within the national constitutional order.

¹¹⁵See also, for my own summary of Ely's doctrine of 'representation reinforcement' in the constitutional law of the USA and how it, ironically enough for this context, draws on precisely a theory of representation from afar by the Westminster Parliament that the American colonists had resisted, Bierbach, *supra* n. 18, p. 193-195, referring to Ely, *supra* n. 113, p. 82-83.

remain in the EU. But because the scope of the Brexit referendum was UK-wide, and did not account for the separate majority wills of the several countries of the UK, the influence of the barely more than a million voters in Northern Ireland was diluted into insignificance.

The 'people of Northern Ireland', as the constituent people of Northern Ireland defined by the Good Friday Agreement, have hereby been granted at least this vestige of EU citizenship by the British government, arguably as compensation for that democratic deficit. It remains to be seen, however, whether the simulation of only two aspects of Ireland's and the UK's once-common EU membership will be sufficient to keep Northern Ireland within the United Kingdom.

