Family Rights for Naturalized EU citizen : Lounes

Vincent Réveillère

▶ **To cite this version:**

Vincent Réveillère. Family Rights for Naturalized EU citizen : Lounes. Common Market Law Review, Kluwer Law International, 2018. hal-02310642

HAL Id: hal-02310642

https://hal.archives-ouvertes.fr/hal-02310642

Submitted on 10 Oct 2019

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

Family rights for naturalized EU citizens: *Lounes*

Case C-165/16, *Toufik Lounes* v. *Secretary of State for the Home Department*, EU:C:2017:862, Judgment of the Court of Justice (Grand Chamber) of 14 November 2017

1. Introduction

With *Commission* v. *UK*,[1] it has been said that the Court "has played politics and lost".[2] Decided nine days before the UK referendum on EU Membership, it followed a set of cases – *Dano, Alimanovic* and *Garcia Nieto*[3] – where the Court suddenly expressed great deference towards the EU legislature. As a result, part of its EU citizenship case law was dismantled and social rights for "inactive" EU citizens were limited. It may also be said that the Court has played politics in *Lounes*, released in the middle of Brexit talks. Answering a reference from a British Court, it decided that in some cases, EU citizens who acquire British citizenship can still rely on EU law to live with their third country national spouse in the UK. Notwithstanding that the situation of the case was not related to Brexit, the answer of the Court is of crucial importance for EU citizens living in the UK or British citizens living in another Member State.

The presence of emblematic cases such as *Martínez Sala*, *Garcia Avello* or *Metock*[4] could be read between the lines in *Lounes*. The case deals with family reunification for nationals residing in their State of nationality. In principle, EU citizens residing in their State of nationality cannot rely on EU law to obtain a derived right of residence for their family members. Nonetheless, the Court has long held that there are some exceptions to this rule. This is the case with situations having a "transnational element": when the citizen has exercised his freedom of movement and is returning to his Member State of nationality (*Singh* model)[5] or when the citizen is engaged in an economic activity in another Member State (*Carpenter* model).[6] In other situations, very exceptionally, a derived right of residence has been recognized when its absence would force the citizen to leave the EU territory as a whole (*Ruiz Zambrano* model).[7] In this last series of cases, the

---

[1]Case C-308/14, *European Commission* v. *United Kingdom of Great Britain and Northern Ireland*, EU:C:2016:436.

[2]O'Brien, "The ECJ sacrifices EU citizenship in vain: *Commission* v. *United Kingdom*", 54 CML Rev. (2017), 209-244.

[3]Case C-333/13, *Elisabeta Dano and Florin Dano* v. *Jobcenter Leipzig*, EU:C:2014:2358; Case-C-67/14, *Jobcenter Berlin Neukölln* v. *Nazifa Alimanovic and Others*, EU:C:2015:597; C-299/14, *Vestische Arbeit Jobcenter Kreis Recklinghausen* v. *Jovanna García-Nieto and Others*, EU:C:2016:114.

[4]Case C-85/96, *María Martínez Sala* v. *Freistaat Bayern*, EU:C:1998:217; Case C-148/02, *Carlos Garcia Avello* v. *Belgian State*, EU:C:2003:539; Case C-127/08, *Blaise Baheten Metock and Others* v. *Minister for Justice, Equality and Law Reform*, EU:C:2008:449.

[5]Case C-370/90, *The Queen* v. *Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, EU:C:1992:296.

[6]Case C-60/00, *Mary Carpenter* v. *Secretary of State for the Home Department*, EU:C:2002:434.

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

right of residence is directly based on the status of EU citizen conferred by Article 20 TFEU and not on Article 21 TFEU, stating that “every citizen of the Union shall have the right to move and reside freely within the territory of the Member States”.

The situation of dual nationals is less clear. In *McCarthy*[8] the Court refused to apply Article 21 TFEU in the case of a dual national residing in her State of nationality who had never exercised her freedom of movement.[9] In *Lounes*, Ms Oramzabal, a Spanish national who acquired British citizenship, had exercised her freedom of movement and had kept her Spanish nationality. The question of whether she was in a different situation to Ms McCarthy because she had moved was discussed before the referring Court. Unsurprisingly, the ECJ decided that the acquisition of British citizenship by Ms Ormazabal does not imply that she is in “a purely domestic situation”.

Nonetheless, this does not in itself justify a derived right of residence for her husband. In that respect, the ruling under examination is rather confusing. Numerous lines of reasoning are proposed but most of the time they are incomplete. They are superimposed and intertwined more than properly articulated. *Lounes* may be read as a further step in the development of EU citizenship. Indeed, it is the first time that the Court states so clearly that Article 21 TFEU entails a right to lead a normal family life. Moreover, the case arguably adds a new dimension to the naturalization of an EU citizen in her Member State of residence. Naturalization is seen as the prolongation of EU citizens’ integration in the host Member State, which is itself seen as the prolongation of free movement rights. Only future interpretation will determine whether *Lounes* will become one of the milestones of the Court’s citizenship case law.

2. Factual and legal background

Ms Ormazabal, a Spanish national, moved to the UK as a student in 1996. Since 2004, she has worked full-time for the Turkish Embassy in London. In 2009, after thirteen years of residence, she acquired British citizenship, while also retaining her Spanish nationality. She married Mr Lounes in 2014. The latter, a national of Algeria, entered the UK on a six-month visitor visa in 2010 and overstayed illegally. After their wedding, he applied to the Secretary of State for the Home Department for an EEA residence card as the family member of his wife, pursuant to the Immigration (European Economic Area) Regulation 2006, the UK legislation transposing Directive 2004/38 (the “EEA Regulation 2006”). This brought him to the attention of the immigration authorities and he was soon served with a notice informing him that he was liable to removal on the grounds that he had overstayed in the UK in breach of immigration control, and with notice of a decision to remove him from the UK. In addition, the Secretary of State for the Home Department answered negatively to his application for an EEA residence card. It took the view that Ms Ormazabal was no longer regarded as an “EEA national” because she had acquired British nationality, even though she was still a Spanish national.

---

[8] Case C-434/09, *Shirley McCarthy* v. *Secretary of State for the Home Department*, EU:C:2011:277.

[9] Ms McCarthy did not reach the threshold that is required for Art. 20 TFEU to apply directly.

The term "EEA national" has been preferred to "EU citizen" in the EEA Regulation 2006 – reminding us that Directive 2004/38 is not reserved to EU citizens but is a text with EEA relevance, and wiping away the symbolic baggage of the term "citizen". The Regulation's Part 1, 2(1), defining who counts as an "EEA national", has been amended two times. Originally, it stated that for the Regulation, "EEA national" meant a national of an "EEA State", the UK being excluded, and Switzerland being included. Therefore, UK citizens also having the nationality of another EEA State or Switzerland counted as EEA nationals. Following the amendment of 16 October 2012, it read "'EEA' national" means a national of an EEA State who is not also a United Kingdom national". It has since been re-amended: since 8 November 2012, the designation "United Kingdom national" has been replaced by "British citizen". The first change is presented in the Explanatory Note accompanying the amendment as reflecting the *McCarthy* judgment.[10] The second one is presented in the Explanatory Memorandum as correcting the previous one, because British citizens rather than UK nationals have the right of abode in the UK.[11]

After the amendments came into force, his sponsor not being an EEA national within the meaning of the national regulation transposing Directive 2004/38, Mr Lounes could not benefit from its provisions. He was thus invited to consider an application to remain in the UK on other grounds (Immigration rules and Art. 8 ECHR). Mr Lounes brought a claim before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) against this decision. This court had doubts as to the compatibility with EU law of this amendment of the EEA Regulation, and of the decision that Mrs Ormazabal could no longer rely on her rights as a Union citizen conferred by Directive 2004/38. It enquired as to the scope *ratione personae* of the Directive: can an EU citizen, having exercised her right of free movement and having subsequently acquired the nationality of the host Member State while keeping her former nationality, still rely, for her own benefit or for the benefit of her spouse, upon the rights conferred by Directive 2004/38?

3. Opinion of Advocate General Bot

Advocate General Bot began his analysis with "a preliminary remark" aiming to ensure that the situation should not be taken as a purely domestic one. First, he affirmed that there is an "inextricable link" between the exercise of the right conferred on the citizen by Directive 2004/38, and her acquisition of British citizenship: the exercise of her rights of free movement and residence entitled her to a right of permanent residence pursuant to EU law on the basis of which she acquired British citizenship.[12] "[T]he connecting factor with EU law, and with the

---

[10]Explanatory note to SI 2012/1547. See *Lounes, R* v. *Secretary of State for the Home Department* [2016] EWHC 436 (Admin), para 25.

[11]Explanatory memorandum to SI 2012/1547. See *Lounes, R* v. *Secretary of State for the Home Department*, para 26.

[12]It was disputed that Ms Ormazabal has resided in the UK under Art. 16 of Directive 2004/38 before the national court. The UK Government accepted it later. See Judgment, para 38.

provision of Directive 2004/38, is obvious".[13] Then, alluding to *Rottmann*,[14] he stated that "the situation of Union citizens who … are placed by reason of their naturalization in a situation liable to entail the loss of the rights conferred by Directive 2004/38, falls, because of its nature and its consequences, within the ambit of EU law".[15] Advocate General Bot then used the "retained power formula",[16] this time referring directly to *Rottmann*, to assert that while the conditions for the acquisition and loss of nationality fall within the competence of the Member States, they should have due regard to EU law when exercising their competences.

Coming to the High Court's question, the Advocate General dealt with the existence of a right of residence for third country national (TCN) spouses, first on the basis of Directive 2004/38, then on the basis of Article 21 TFEU. Concerning the Directive, he concluded that a citizen could not rely upon it in her own State of nationality, as expected. First, he recalled that the provisions of Directive 2004/38 do not confer any autonomous right on TCN who are family members of a Union citizen. Then, appealing to the sacred trilogy of EU law interpretative techniques, he stated that a "literal, systematic and teleological interpretation of the Directive" excludes a person such as Ms Ormazabal, and so her spouse, from its scope of application *ratione personae*. Provisions of the Directive, as stated by Article 3(1), govern the situation of a citizen and their family members "who move to or reside in a Member State other than that of which they are a national". So, the exercise of her freedom of movement is not sufficient to allow a citizen to fall within the scope of application *ratione personae* of the Directive when she resides in one of her States of nationality, even if she has another EU nationality.

As Mr Lounes could not benefit from any rights based on Directive 2004/38, Advocate General Bot enquired if he could benefit from a derived right of residence on the basis of the Treaty. Recalling that Article 21(1) TFEU has been given "an extremely dynamic interpretation" by the Court, he used mainly *O. and B.*[17] as "a framework for interpretation". In that case, specifying the *Singh* model, the Court decided that the provisions of Directive 2004/38 should apply by analogy to the spouse of a citizen returning to their Member State of nationality when they have genuinely resided in another Member State. As the Advocate General explained, derived rights in *O. and B.* are justified, as in *Singh* and *Eind*,[18] because granting less favourable treatment than was applicable to the family in the host Member State would deter the citizen or the worker from leaving his State of nationality.[19] The reasoning is rather sinuous, but could be seen as a typical figure of EU freedom of

[13] Opinion, para 36.

[14] Case C-135/08 *Janko Rottman* v. *Freistaat Bayern*, EU:C:2010:104.

[15] Ibid., para 39. Compare to para 42 of *Rottmann* : "the situation of a citizen of the Union … in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law".

[16] Azoulai, "The 'retained powers' formula in the case law of the European Court of Justice: EU law as total law?", 4 *European Journal of Legal Studies* (2011), 192-219.

[17] Case C-456/12, *O.* v. *Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel* v. *B.*, EU:C:2014:135.

[18] Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie* v. *R. N. G. Eind*, EU:C:2007:771.

[19] Opinion, para 77.

movement law: the obstacle experienced upon return is taken into account as an obstacle to leaving the Member State of nationality.[20]

This solution "seems to [Advocate General Bot] transposable" to the case at hand. Though "there has been no physical movement", "by choosing to be naturalized in the host Member State, Ms García Ormazábal expressed her wish to live in that State in the same way as she would be prompted to live in her Member State of origin, building strong, lasting ties with the host Member State and becoming permanently integrated in that State".[21] The Advocate General drew a parallel between the citizen who returns to his State of nationality and the citizen who makes the host State his State of nationality. He seemed to hold that the acquisition of British nationality by Ms Ormazabal should be treated as would her return to Spain. To develop the underlying logic of the Opinion, it could be said that in both cases an EU citizen is newly settling in his State of nationality; physically when he moves; metaphorically when he is naturalized.

Advocate General Bot then moved on to assert that the application by analogy of Directive 2004/38 "is even more necessary" because of the "inextricable link" between the exercise of the right conferred by the Directive and the naturalization. This link exists because the right of permanent residence permits her to meet the conditions to be naturalized, but also because the naturalization is seen as the "logical conclusion" of "her integration in the host State". To deprive her of her rights, especially her family rights, because "she has sought to become more deeply integrated in the host Member State, would annihilate the effectiveness of the rights which she derives from Article 21 (1) TFEU".[22] It would be, he insisted, "illogical and full of contradictions".[23] So, he held that an EU citizen who has been naturalized in the home State, "following and by reason" of her residence under Article 16 of the Directive, must be able to live with her spouse under the same conditions that applied before her naturalization or that she would face if she moved to another Member State.

Advocate General Bot insisted on the fact that, to obtain a derived right of residence for her spouse, the citizen must have created a family life during the period of residence of the citizen, pursuant to Article 16 of Directive 2004/38, and mentioned that this was the situation of Mr Lounes and Ms Ormazabal.[24] However,

---

[20]For a proposal to abandon these intricacies by recognizing "a right to go back to one's own country", see Spaventa, "Family rights for circular migrants and frontier workers: *O and B*, and *S and G*", 52 CML Rev. (2015), 753-777, at 775. For a discussion of the different interpretations that could be given to *Singh*, see Tryfonidou, "Family reunification rights of (migrant) Union citizens: Towards a more liberal approach", 15 ELJ (2009), 634-653, at 639 et seq.

[21]Opinion, para 83.

[22]Ibid., para 86.

[23]Ibid., para 87.

[24]See para 90 of the Opinion: "the effectiveness of the rights conferred by Article 21(1) TFEU demands that Union citizens, such as Ms García Ormazábal, who have acquired the nationality of the host Member State following and by reason of residence under and in conformity with the conditions set out in Article 16 of the Directive, should be able *to continue the family life they have until then led* in that State with their spouse, a third-country national" (my emphasis). See also the proposed operative part: "in situations such as that at issue, in which Union citizens have acquired the nationality of the Member State in which they have genuinely resided pursuant to and in conformity with the conditions set out in Article 16 of Directive 2004/38 and have *during that period*

nothing attests that they were in such a situation. On the contrary, the Advocate General himself stated that they began a relationship four years after the naturalization of Ms Ormazabal.[25] There is an important discrepancy between the factual situation and the abstract formula presented as typifying that situation.

4. The Judgment

The Court confirmed that an EU citizen residing in her State of nationality does not fall within the definition of a "beneficiary" within the meaning of Directive 2004/38, even if the citizen has another EU nationality and she has exercised her freedom of movement. Therefore, someone in the situation of Mr Lounes could not benefit from a derived right of residence on the basis of the Directive. On the interpretation of Article 21 of the TFEU, the Court concluded, like the Advocate General, that the conditions for granting a derived right of residence to someone in the situation of Mr Lounes must not be stricter than those provided for by Directive 2004/38. Nonetheless, both the justification of this solution and its delimitation contrast significantly with the Opinion.

Mentioning *O. and B.* and *Chavez-Vilchez and Others*, the Court stated that a TCN family member of an EU citizen may be accorded a right of residence based on Article 21(1), and that this right is not autonomous but derived from the rights enjoyed by the Union citizen. Such a right exists, "in principle, only when it is necessary in order to ensure that the Union citizen can exercise his freedom of movement effectively".[26] This focus on movement is surprising and was absent from the Opinion of the Advocate General.[27] Nevertheless, it may not be taken too seriously; we might simply be before a case of mechanical circulation of formulas. Indeed, this is not the first time that the Court uses the formula establishing a connection between the derived right to reside and free movement.[28] The Court has even used this formula to justify a derived right of residence in the absence of connection with freedom of movement.[29] Moreover, the Court immediately tempered this assertion by saying that "[t]he purpose and justification of a derived right of residence are therefore based on the fact that a refusal to allow such a right would be such as to interfere, in particular, with that freedom *and* with the exercise and the effectiveness of *the rights* which Article 21(1) TFEU affords the Union citizen concerned".[30]

Indeed, the Court then stated that the right to lead a normal family life is among

---

created a family life with a third-country national" (my emphasis). This is even clearer in the original French version, where the A.G. states that family life should be created "à cette occasion".

[25] Opinion, para 22.

[26] Judgment, para 48.

[27] By contrast, A.G. Bot mentioned "his rights to move *and reside* freely in the European Union" (Opinion, para 45, my emphasis). The same dissonance could be found between the Opinion of A.G. Sharpston and the Judgment in Case C-456/12, *O. and B.* (see, respectively, paras. 45 and 49; my emphasis).

[28] See e.g. Case C-456/12, *O. and B.,* para 45.

[29] See e.g. Case C-40/11, *Yoshikazu Iida* v. *Stadt Ulm*, EU:C:2012:691, paras. 68-72.

[30] Judgment, para 49.

the rights conferred by Article 21(1) TFEU.[31] More than freedom of movement, it is this right to lead a normal family life that appears central to the reasoning: "[a] national of one Member State who has moved to and resides in another Member State cannot be denied *that right* merely because he subsequently acquires the nationality of the second Member State in addition to his nationality of origin, otherwise the effectiveness of Article 21(1) TFEU would be undermined".[32] To support its statement, the Court resorts to two series of arguments.

It first states that denying a citizen in the position of Ms Ormazabal her right to lead a normal family life "would amount to treating him in the same way as a citizen of the host Member State who has never left that State, disregarding the fact that the national concerned has exercised his freedom of movement by settling in the host Member State and that he has retained his nationality of origin".[33] Although it is not adverted to, the presence of *Garcia Avello* is very palpable. This argument is also supported by another formula, secretly but obviously taken from *Micheletti*,[34] according to which "[a] Member State cannot restrict the effects that follow from holding the nationality of another Member State".[35] This will be discussed later.

The core of the reasoning to establish that the effectiveness of the rights (note the change to the plural, taken from the Court) conferred by Article 21(1) has been undermined is to be found in the second line of arguments. Adopting the reasoning of the Advocate General, the argument holds to the construction of Article 21(1) TFEU as being intended "to promote the gradual integration of the Union citizen concerned in the society of the host Member State"[36] and to a reading of naturalization in the host State as proceeding from the will "to become more deeply integrated in the society of [the State of naturalization]".[37] Forgoing rights destined to promote integration because one sought to integrate deeply would be "contrary to the underlying logic of gradual integration that informs Article 21(1) TFEU".[38]

Therefore, the effectiveness of the rights conferred on EU citizens by Article 21(1) TFEU implies that citizens in the situation of Ms Ormazabal are still able to enjoy the rights arising under that provision after they acquire the nationality of the host Member State, and in particular, that they "must be able to build a family life with their third-country-national spouse, by means of the grant of a derived right of residence to that spouse".[39] The Court concluded that conditions for granting that derived right of residence to a TCN, who is family member of a Union citizen having exercised his right of free movement by "settling in" a Member State other than that of which he is a national, should not be stricter than those provided for in Directive 2004/38. The Directive must apply by analogy.

In the operative part of the Judgment, the Court delimited the situation in which

---

[31]Ibid., para 52.

[32]Ibid., para 53.

[33]Ibid., para 54.

[34]Case C-369/90, *Mario Vicente Micheletti and others* v. *Delegación del Gobierno en Cantabria*, EU:C:1992:295.

[35]Ibid., para 55.

[36]Judgment, para 56.

[37]Ibid., para 58.

[38]Ibid.

[39]Ibid., para 60.

this solution prevails in the following way: the citizen "(i) has exercised his freedom of movement by moving to and residing in a Member State other than that of which he is a national, under Article 7(1) or Article 16(1) of that Directive, (ii) has then acquired the nationality of that Member State, while also retaining his nationality of origin, and (iii) several years later, has married a third-country national with whom he continues to reside in that Member State".[40] Differences with the Opinion of Advocate General Bot should be underlined. First, the Court, taking its definition of genuine residence from *O. and B.*, decided that residence pursuant to Article 7(1) of the Directive is sufficient. Then, as noted earlier, the Advocate General required that family life has been developed when that citizen was residing under EU law, while the Court underlined that the wedding took place several years after the naturalization. Finally, the Court mentioned that the sponsor should have kept their first nationality in the operative part, unlike the Advocate General.

5. Comments

This annotation will discuss various questions: the affirmation of a right to lead a normal family life (5.1); the respective role of dual nationality and free movement (5.2); how naturalization is linked to the right to move and reside by the intermediation of integration (5.3); and how Directive 2004/38 is used to avoid its own limitations (5.4).

5.1. *A right to lead a normal family life conferred by Article 21 TFEU*

For her spouse to obtain a derived right of residence, Advocate General Bot requires the citizen to have created a family life during the period of residence pursuant to Article 16 of Directive 2004/38. As mentioned earlier, he also noted that this was the situation of Mr Lounes and Ms Ormazabal, although it was clearly not the case. Had the Court adopted this formulation, it would have been difficult for the referring judge to determine if someone in the situation of Mr Lounes could benefit from a derived right of residence. It would have to choose between privileging the solution implied by the case and favoring its formulation. To take the opposition proposed by Komárek in a slightly different context, the referring court would have to choose between a "case-bound model" and a "legislative model" of reasoning.[41]

What might be taken as a misprint in the Opinion can be seen rather as a revealing confusion: it underlines why it is difficult to both take *O. and B.* as a "framework for interpretation" and conclude that, in a situation such as the one of Ms Ormazabal, the spouse may obtain a derived right of residence under EU law. Indeed, in cases following the *Singh* model, it is of a crucial importance that the citizen has developed her family life before coming back to her State of nationality.

---

[40] These conditions can be found in the first sentence of the operative part, interpreting Directive 2004/38. Nevertheless, the second sentence, interpreting Art. 21 TFEU, should be read as following the first one, as is clear in the French version where they form only one paragraph.

[41] Komárek, "Reasoning with previous decisions: Beyond the doctrine of precedent", 61 AJCL (2013), 149-173.

Otherwise, the justification based on the obstacle to movement appears difficult to maintain. Advocate General Bot makes an analogy between the acquisition of nationality and the return to the home State. Accepting this analogy, the logic underpinning *O. and B.* justifies requiring a family life during the residence of the citizen in the host Member State.[42]

However, this reference to *O. and B.* appears of little relevance for an EU citizen who had developed a family life when she was already a British citizen. If in 2009 Ms Ormazabal had returned to Spain instead of acquiring British citizenship, and several years after her return developed a family life there with Mr Lounes, it is difficult to imagine that her husband could obtain a derived right of residence following *O. and B.* In *O. and B.*, the Court recognized such a right for situations "where a Union citizen has created or strengthened a family life with a third-country national *during* genuine residence".[43] If the deterrent effect on movement is more assumed than established in most of the cases decided by the Court following *Singh*, it seems untenable to assume such an effect when family life starts after the return.[44]

It would have been possible for the Advocate General to choose another interpretation of *Singh* according to which the granting of family rights does not need to be directly linked to the exercise of free movement. This would correspond to the "liberal approach" according to Tryfonidou, where "the mere proof of the existence of the requisite family link, together with the exercise of some kind of inter-state movement, suffices for the bestowal by the Treaty free movement of persons provisions of automatic family reunifications rights on third-country nationals and their Member State national family members".[45] Nevertheless, this interpretation does not fit with *O. and B.* which clearly interprets *Singh* and *Eind* as justified by the deterrent effect on leaving. Far from contesting this reading, Advocate General Bot explains that "[t]he *ratio decidendi* for this approach was that if the third-country national had no such right, the worker, a Union citizen, could be deterred from leaving the Member State of which he is a national".[46]

The Court did not follow this reasoning based on the *Singh* model. It stated that the right to lead a normal family life is conferred by Article 21(1) TFEU, mentioning neither the Charter nor the ECHR.[47] One should note the originality of this statement; it strongly differs from *O. and B.* While the possibility of leading a family life when returning to the home State was crucial, the *right* to family life was significantly absent in the ruling. It also contrasts with *Metock*, even if the Court mentions this last case as a reference in paragraph 52 of *Lounes*. Although

---

[42]This is the reasoning followed by the A.G.; see para 90 of the Opinion and the operative part proposed by the A.G.

[43]Case C-456/12, *O. and B.*, operative part (my emphasis). The case of Mr B. led the Court to be extremely clear: to rely on Art. 21 TFEU, the TCN must have, "at least during part of his residence in the host Member State, the status of family member, within the meaning of Article 2(2) of Directive 2004/38" (para 63).

[44]Speaking of a presumption in *O. and B.*, see Spaventa, op. cit. *supra* note 20, at 770. Explaining that this reasoning could not hold as movement didn't have any impact on Mr Singh's right of residence in *Singh*, see Tryfonidou, op. cit. *supra* note 20, at 640.

[45]Tryfonidou, op. cit. *supra* note 20, at 639.

[46]Opinion, para 77.

[47]Judgment, para 52.

emblematic of the "liberal jurisprudence" of the Court, this case did not go as far as recognizing a self-standing right to lead a family life, but states that "if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed".[48] Finally, it is also different to stating that a provision should be interpreted in the light of the fundamental right to respect for family life (like in *Carpenter*),[49] or to deciding that the right to respect for family life, as enshrined in Article 7 of the Charter or Article 8 of the ECHR, should be taken into account by the Member State (as in *Dereci, Chavez-Vilchez and Others* or *Rendón Marín*).[50]

In the *Singh* model, at least under its interpretation in *O. and B.*, family life is not really presented as a right, but as a factual situation impeding free movement rights. Recognizing, as the Court does, that a TCN should benefit from a derived right of residence even if he has married the citizen several years after the latter has acquired the nationality of the State of residence entails a different vision of family life. It is no longer sufficient to consider the effect on free movement of not being able to continue a family life developed in another Member State, even in a very wide interpretation of what counts as an obstacle to movement. The question is not whether Ms Ormazabal could continue to enjoy the family life she was enjoying under the protection of EU law, it is whether she would lose the *right* to develop such a family life. One important question that is not answered is how long she should keep such a right. The Court only states that this is possible in the case of a wedding taking place "several years" after the naturalization.

5.2. *Dual nationality and/or the exercise of free movement rights?*

The respective roles of dual nationality and freedom of movement in the Opinion and in the Judgment are difficult to fathom. Dual nationality is not really considered by the Advocate General: in reasoning inspired by *O. and B.*, the change of status is important but not the conservation of the first one. On the contrary, dual nationality seems to play an important role in the justification given by the Court. It is mentioned in the operative part of the judgment. However, the reasoning of the Court is rather confusing and the relation between dual nationality and the exercise of free movement rights is far from clear. Dual nationality figures at two stages of the ruling: first to trigger EU law, then to establish that the effectiveness of the rights conferred by Article 21 (1) TFEU would be undermined.

Regarding the "connecting factor" that triggers the application of EU law, as already mentioned, the Advocate General refers to *Rottmann*. This reference is surprising. First, the situation in *Lounes* is rather different. What is to be lost is not the status of EU citizen, but the possibility of benefiting from rights deriving from this status in one Member State; and the cause of this loss is not the withdrawal of

---

[48] Case C-127/08, *Metock*, para 62.

[49] Case C-60/00, *Carpenter*, para 46.

[50] Case C-256/11, *Murat Dereci and Others* v. *Bundesministerium für Inneres*, EU:C:2011:734, paras. 70-74; Case C-133/15, *H.C. Chavez-Vilchez and Others* v. *Raad van bestuur van de Sociale verzekeringsbank and Others*, EU:C:2017:354, para 70; Case C-165/14, *Alfredo Rendón Marín* v. *Administración del Estado*, EU:C:2016:675, paras. 82-87.

a Member State nationality but the acquisition of a second one. Second, what was at stake were not the conditions of acquisition or loss of a nationality, but the consequences attached to it by a specific piece of legislation. Third, appealing to the nature and the consequence of the situation to establish the connection with EU law might not be necessary. As the Advocate General notes, it was not contested that the citizen used her freedom of movement. Choosing to reason using *Rottmann* is significant. It may be seen as an answer to *Pham*,[51] where the UK Supreme Court directly contested *Rottmann,* and which was mentioned before the national court.

The ECJ's reasoning is completely different from that followed by the Advocate General. It has recourse neither to *Rottmann* nor to previous movement pursuant to EU law, but, referring to *Freitag,* it states in paragraph 50 that "there is a link with EU law with regard to nationals of one Member State who are lawfully resident in the territory of another Member State of which they are also nationals". While *Freitag* has been decided recently, the Court appeals indirectly to highly emblematic rulings of citizenship case law. The first part of the formula comes directly from *Martínez Sala*.[52] The last words can be seen as the assertion, famously made in *Garcia Avello*, that the formula is not defeated by the fact that the citizen is also a national of the host Member State.[53]

The extremely wide formula of paragraph 50 may allow a dual national to trigger EU law as soon as he resides somewhere legally in an EU State, even in one of his States of nationality. It recalls the sentence of Advocate General Jacobs that "it cannot be acceptable that one nationality should eclipse the other depending on where they happen to be".[54] To take the expression coined by Steve Peers, a dual national could be seen as "Schrodinger's EU citizen",[55] being at the same time a national of the State where he resides and a national of another Member State. In relation to the second quality, the Court decided that he may rely on the rights provided for by Article 21(1) TFEU, including the right to lead a normal family life. As in *Garcia Avello*, the *Micheletti* formula entails that the status of national of the host State does not interfere with the rights enjoyed by the citizen as the national of another State.[56]

It may be said that the Court is attaching the right to lead a normal family life to Article 21 TFEU, as it has attached the right not to suffer discrimination on grounds of nationality to Article 20 TFEU in *Martínez Sala*[57]. In *Lounes*, the Court did not

---

[51] *Pham* v. *Secretary of State for the Home Department* [2015] UKSC 19.

[52] "[A]s a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship", Case C-85/96, *Martínez Sala*, para 61.

[53] Case C-148/02, *Garcia Avello*, para 28.

[54] Opinion of A.G. Jacobs in Case C-148/02, *Garcia Avello*, EU:C:2003:311, para 52.

[55] Peers, "Dual citizens and EU citizenship: Clarification from the ECJ" <eulawanalysis.blogspot.com/2017/11/dual-citizens-and-eu-citizenship.html>, accessed 6 Apr. 2018.

[56] "A Member State cannot restrict the effects that follow from holding the nationality of another Member State, *in particular the rights which are attendant thereon under EU law and which are triggered by a citizen exercising his freedom of movement*." Judgment, para 55. The second part of the sentence is an addition to Case C-369/90, *Micheletti* (my emphasis).

[57] Case C-85/96, *Martínez Sala*, para 62.

mention any provision recognizing a right to family life, whereas it could have said that this right resulted from Article 7 of the Charter. Obviously, this could be criticized: the right to move and reside freely provided for by Article 21 TFEU is subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect, whereas the Charter applies only when Member States are implementing Union law. Nevertheless, one should remember that *Martínez Sala* was subject to the same kind of criticism: the right laid down in Article 18 TFEU is also limited to the scope of application of the Treaties and Article 20 TFEU states that the citizen "shall enjoy the rights and be subject to the duties provided for in the Treaties".[58]

Nonetheless, the Court did not go as far as totally applying the logic followed for non-discrimination to family life. First, the right is not directly attached to the status of EU citizen but to the right to move and reside freely. Then, the Court also underlined that Ms Ormazabal has exercised her freedom to move and reside in a Member State other than her Member State of origin[59]. This would not be relevant following *Garcia Avello* logic, but this takes into account *McCarthy*, where the Court decided that Article 21 TFEU was not applicable to a dual national who had never exercised her right of free movement, except in the case of deprivation of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen (*Ruiz Zambrano* like situation) or in the case of impediment of the exercise of her right of free movement and residence within the territory of the Member States (*Grunkin and Paul* like situation).

As already noted, dual nationality is also present later in the ruling, when the Court asserts that refusing to grant a right to family life to Ms Ormazabal would be treating as similar a national who "has exercised his freedom of movement by settling in the host Member State" while "retain[ing] his nationality of origin" and "a citizen of the host Member State who has never left that State". [60] First, what is confusing is that the Court applies the Aristotelian conception of equality entailing that "different situations must not be treated in the same way", famously applied in *Garcia Avello*.[61] However, this conception of equality has been widely criticized and since then has not been used in citizenship case law.[62]

Then, a crucial difference is that the Court also takes into consideration the movement of Ms Ormazabal. At first sight, it even recalls *D'Hoop*: the Court is comparing citizens who have exercised their freedom of movement and citizens who have not. [63] Nonetheless, the Court is no longer sanctioning discrimination against the movers.[64] It is, on the contrary, sanctioning similar treatment of free movers and nationals where they are taken to be in different situations, thus

---

[58]Criticizing the circularity of the reasoning in *Martínez Sala*, see Somek, *Individualism: An Essay on the Authority of the European Union* (OUP, 2008), p. 211.
[59]Judgment, para 51.
[60]Judgment, para 54.
[61]Case C-148/02, *Garcia Avello*, para 31.
[62]To my knowledge. For a critique, see Ackermann, annotation of Case C-148/02, *Carlos Garcia Avello*, 44 CML Rev. (2007), 141-154, at 149.
[63]See Iliopoulou and Toner, "A new approach to discrimination against free movers?", 28 EL Rev. (2003), 389-398.
[64]Case C-224/98, *Marie-Nathalie D'Hoop* v. *Office national de l'emploi*, EU:C:2002:432.

justifying different treatment. In that part, the Court is comparing the situation of dual nationals who have moved, such as Ms Ormazabal, with British citizens who have never moved. It is difficult to assess the respective importance of movement and dual nationality in defining these two groups of British citizens which should be treated differently. Nevertheless, this part of the ruling justifies a reverse discrimination, allowing British free movers and/or dual nationals to be treated differently from settled British citizens.

Consequently, what dual nationality implies is far from clear. The Court uses some of its most famous and contested formulas in a new context and with important modifications, without referring to the original cases, let alone explaining why they could be used in the situation at hand.[65] This has important consequences in assessing the scope of the ruling. Considering the different situations resulting from the exercise of movement, dual nationality is not relevant, as in the reasoning proposed by the Advocate General. What is decisive is that a national of a Member State acquires the nationality of another Member State. One should recall that the Court has even recognized the right not to suffer discrimination on grounds of nationality for a naturalized citizen who did not keep his previous nationality – considering him an "honorary foreigner".[66] On the contrary, in a reasoning inspired by *Garcia Avello*, dual nationality could be important in triggering EU law when a citizen is living in one of his States of nationality.[67] In that case, even if one adopts *McCarthy*, a connection between movement and naturalization does not appear necessary. Dual nationals since birth or by wedding may be concerned by this solution, provided they have previously used their free movement rights.[68]

5.3. *Naturalization as "the logical conclusion" of the EU citizen's integration*

The Court, adopting the reasoning of Advocate General Bot, presents Article 21 (1) as promoting the "gradual integration" of the Union citizen in the society of the host Member State. Integration is seen as the prolongation of the exercise of free movement by a citizen who decides to settle in another State and can do so pursuant EU law. Naturalization is presented as the "logical conclusion" of integration, in the terms of the Advocate General,[69] or as a way to "become more deeply integrated in the society of that State", in the terms of the Court.[70] So, naturalization is conceived as the extension of integration, which is itself seen as the extension of

---

[65] This is an example of what has been criticized as "formulaic reasoning". See Šadl, "Case – case-law – law: *Ruiz Zambrano* as an illustration of how the Court of Justice of the European Union constructs its legal arguments", 9 EuConst (2013), 205-229.

[66] Case C-419/92, *Ingetraut Scholz* v. *Opera Universitaria di Cagliari and Cinzia Porcedda*, EU:C:1994:62. The expression is taken from Somek, op. cit. *supra* note 57, pp. 216–217.

[67] This situation is different from that in which a dual national is not living in his State of nationality, where triggering EU law is less problematic. This was the situation of Mr Collins, who was a US and Irish national living in the UK. See Case C-138/02, *Collins*, EU:C:2004:172.

[68] On this, see Peers, "Dual citizens and EU citizenship: Clarification from the ECJ" <eulawanalysis.blogspot.com/2017/11/dual-citizens-and-eu-citizenship.html>, accessed 6 Apr. 2018.

[69] Opinion, para 85.

[70] Judgment, para 58.

the right to move and reside in another Member State conferred by Article 21(1). Following this rationale, to speak in free movement terms, it could be said that deterring naturalization impedes the effectiveness of Article 21(1).

This is clear in paragraph 59 of the judgment. The Court notes that "Union citizens who have exercised their freedom of movement and acquired the nationality of the host Member State in addition to their nationality of origin would, in so far as their family life is concerned, be treated less favourably than Union citizens who have also exercised that freedom but who hold only their nationality of origin".[71] The Court is no longer comparing citizens who have physically moved and citizens who have not. It is comparing, among citizens who have moved, those who have acquired British citizenship and those who have not. Restricting the movement of status would be similar to restricting physical movement. The acquisition of another European nationality by an EU citizen should not be discouraged by the prospect of losing his rights to family life.

The relationship between integration and free movement in the ECJ case law could take different forms, which have changed over time, but which have arguably coexisted at the same time, in different cases or in different readings of the same cases.[72] The conception expressed in *Lounes* does not fit with a vision where integration is strictly instrumental to free movement, as in a case like *S and G*.[73] Integration and family life are conceived rather as the prolongation of movement. The Court is not trying to demonstrate that refusing a right to family life would deter the citizen from moving. It is defending the idea that movement in another society should not be detrimental to family life. Integration is seen as an objective if not as a right entailed by Article 21(1).[74] As the affirmation of a *right* to lead a normal family life already suggests, family life is protected in itself. The loss of the right to lead a normal family life is taken as impeding the effectiveness of Article 21(1), without any discussion of the effect of this loss on movement.

Considering naturalization, it seems at first glance that the Court is attaching great importance to nationality, traditionally suspect in the context of free movement. Looking closer, it is necessary to add that, though the Court considers naturalization, it has been reconstructed in EU terms and it has acquired a meaning specific to an EU perspective. Conceiving naturalization as the logical consequence of the EU citizen's integration, the Advocate General and the Court see the loss of rights stemming from EU citizenship as paradoxical and difficult to accept. On the contrary, before the national court, the Secretary of State for the Home Department defended a different conception of naturalization: "the acquisition of citizenship of a host Member State is a choice, to which advantages and disadvantages will attach".[75] In that national perspective, where nationality is a set of rights and duties,

---

[71]Judgment, para 59.

[72]One can think of the different readings of Case C-370/90, *Singh* or Case C-60/00, *Carpenter*.

[73]Case C-457/12, *S.* v. *Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel* v. *G*, EU:C:2014:136.

[74]See Azoulai, "La citoyenneté européenne, un statut d'intégration sociale" in Cohen-Jonathan, Constantinesco and Michel (Eds.), *Chemins d'Europe: mélanges en l'honneur de Jean-Paul Jacqué* (Dalloz, 2010), p. 19.

[75]*Lounes, R* v. *Secretary of State for the Home Department* [2016] EWHC 436 (Admin), para 51.

[76] it may be more understandable that acquiring a nationality entails the loss of certain rights stemming from EU law.

Nonetheless, what is considered as illogical from a national point of view is not only that some nationals are offered better treatment than other nationals, but the fact that, overall, nationals have less rights than EU citizens concerning family reunification. This is what is expressed in some Newspaper titles criticizing the ruling: “EU citizens don't have to face same tough rules as Britons when bringing non-EU family members to UK, ECJ rules”.[77] The heart of the matter, as is often the case in reverse discrimination cases, is to explain why a Member State treats its own nationals less favourably than EU citizens. As Advocate General Sharpston notes, “by denying residence, that Member State might be at risk of de facto ‘expelling’ its own nationals, forcing them either to move to another Member State where EU law will guarantee that they can reside with their family members or perhaps to leave the European Union altogether. Such a measure sits oddly with the solidarity that is presumed to underlie the relationship between a Member State and its own nationals”.[78]

In Directive 2004/38, rights conferred on EU citizens depend in part on the passage of time, a new situation in EU law.[79] For the first three months, the right to reside in another Member State is free of conditions, following Article 6. Then, before permanent residence, the right to move and reside and the equality promised to EU citizens depends on the fulfilment of the conditions provided for in Article 7 (i.e., for citizens without a specific quality, having sufficient resources and a comprehensive sickness insurance). The status of permanent residence frees the citizen from these requirements and gives enhanced protection against expulsion. If it sets a “gold standard”[80] for EU citizens and their family members, *Lounes* could be read as recognizing that the possession of this status is not enough to be integrated as a national could be. The Court states that acquiring the nationality of a Member State demonstrates the intent of the citizen “to become permanently integrated in that State”.[81] The link between nationality and integration could also be found in previous case law, when the Court took nationality as a sign of the integration of a national in his State of nationality.[82]

---

[76] Concerning duties and EU citizenship, see e.g. the debate between Kochenov and Bellamy. Kochenov, “EU citizenship without duties”, 20 ELJ (2014), 482-498; Bellamy, “A duty-free Europe? What’s wrong with Kochenov’s account of EU citizenship rights”, 21 ELJ (2015), 558-565.

[77] Crisp, “EU citizens don’t have to face same tough rules as Britons when bringing non-EU family members to UK, ECJ rules”, *The Telegraph* (14 Nov. 2017) <www.telegraph.co.uk/news/2017/11/14/eu-citizens-dont-have-face-tough-rules-britons-bringing-non/>, accessed 8 Apr. 2018.

[78] Opinion of A.G. Sharpston in Case C-456/12, *O. and B.*, para 86.

[79] Time is nonetheless mainly read in economic terms. See Mantu, “Concepts of time and European citizenship”, 15 *European Journal of Migration and Law* (2013), 447-464.

[80] Guild, Peers and Tomkin, *The EU Citizenship Directive: A Commentary* (OUP, 2014), p. 203.

[81] The Court had already mentioned the choice of being permanently integrated in the host Member State in a different context, talking of the long-term residence status of Turkish citizens pursuant to the EC-Turkey Association Council Decision 1/80. Case C-329/97, *Sezgin Ergat* v. *Stadt Ulm*, EU:C:2000:133, para 43.

[82] See e.g. Case C-359/13, *B. Martens* v. *Minister van Onderwijs, Cultuur en Wetenschap*, EU:C:2015:118, para 51.

In the logic underpinning the ruling, the acquisition of nationality is stemming from the exercise of EU citizenship rights. From that perspective, nationality could be seen, beyond merely a national status, as another European status that an EU citizen could possess, going further than the status of permanent resident. We should recall that a classic observation about EU citizenship status is that, like a "federal citizenship", its horizontal dimension is predominant. "The full integration of a Frenchman in the Italian society leads more to the 'Italianization' of this person than to the construction of 'Europeans' from French and Italians".[83] This statement is taken seriously in *Lounes*: EU citizenship is presented as allowing the Spanish citizen to be Britishized, or, more exactly, to be Britishized while keeping a specific status that distinguishes her from settled British citizens. The acquisition of the nationality of the host State falls within the ambit of EU citizenship law.

This Europeanization is nonetheless limited. The Court does not recognize a right to be naturalized, neither does the Advocate General despite him referring to *Rottmann*.[84] It only allows naturalization not to have an adverse effect in the enjoyment of rights stemming from Article 21(1), especially the right to lead a normal family life in the host Member State. Moreover, one should not forget that even if the facts of the case do not take place in a Brexit context, the ruling of the Court does. Acquiring British nationality for an EU citizen or acquiring another European nationality for a British citizen takes on a different meaning: more than expressing the feeling of being more integrated, it expresses the necessity to be naturalized to safeguard the rights enjoyed as an EU citizen in the absence of a withdrawal agreement securing these rights. If the judgment does not directly tackle this question, its conclusion may allow EU citizens who feel the need to adopt another nationality to avoid losing some of the rights they enjoy as EU citizens.

This line of justification, common to the Opinion and to the judgment, does not really clarify the reach of the solution. As in the justification transposing *O. and B.*, what is important is the acquisition of the new status – presented as the apex of the citizen's integration. From that perspective, it is difficult to affirm that dual nationality should be relevant. Even if the Court has recognized the possibility of being integrated in different European societies, renouncing one's nationality while acquiring the nationality of the host State could be hard to conceive as expressing a weaker desire to be integrated in the latter. Different from the reasoning transposing *O. and B.*, it does not seem to be relevant that naturalization occurred before the development of family life.

5.4. *Playing off the Directive against itself*

Lounes certainly will not figure as an act of deference towards the European legislature. As in *O. and B.*, the Court first states that Directive 2004/38 should not apply, but, later, that it should apply by analogy in virtue of the Treaty. This contrasts with the technique adopted in *Singh*, in the context of the freedom of

---

[83]See Schönberger, "La citoyenneté Européenne en tant que citoyenneté fédérale", 1 *Annuaire de l'Institut Michel Villey* (2009), 255-274, at 273.

[84]On this reference and the differences between the situation of Mr Rottmann and Ms Ormazabal, see *supra* (section 5.2.).

establishment, where the Court justified its solution by mentioning the Treaty and the Directive in question "properly construed".[85] What is new and striking in *Lounes* is that the Directive plays a crucial role in the interpretation of the Treaty itself. The Court is elliptical: it only talks of "the underlying logic of gradual integration that informs Article 21(1) TFEU".[86] This logic of gradual integration, essentially to be found in Directive 2004/38,[87] is assigned to Article 21(1) by the Court in order to escape the limitations set down in the Directive (and mentioned in Art. 21(1)). In that sense, the Directive is played off against itself. This instrumentalization of the Directive could also be seen in the way the Court uses its conceptual apparatus to determine when Article 21(1) applies and what follows from this application. By using the categories of the Directive, it escapes a case-by-case analysis, which could be found in other contexts.[88]

First, the Court uses the categories of the Directive to determine which situation can lead to the recognition of a derived right of residence. In the operative part, it requires residence under Articles 7(1) or 16(1). This technique has already been used in *O. and B.* to assert a "genuine residence" on the part of the citizen in the host State before his return – residence under Article 6 is excluded, probably so as not to cover nationals who go abroad in order to bypass national law.[89] In *Lounes*, the justification for this limitation is less clear – the Court mentions the citizen who "has exercised his freedom of movement by *settling* in the host Member State".[90] Nevertheless, there is no discussion about the different forms of movement, contrary to *O. and B.* and to the Opinion of the Advocate General. This requirement has the consequence of excluding citizens who do not meet the conditions of the Directive or dual nationals who have not resided in the host State in application of EU law (for instance dual nationals since birth). In the rhetoric used by the Advocate General and the Court, it allows the assertion of the link between EU law and the situation: naturalization is constructed as the prolongation of the exercise of the rights recognized by the Directive.

Further, as in *O. and B.*, what follows from the application of Article 21(1) is the application "by analogy" of Directive 2004/38. This permits the circumscription of the "right to lead a normal family life" found in Article 21 by the Court. So, this right has the same limitations: it concerns only family relations recognized by Articles 2 and 3 of the Directive. Beyond the critiques that could be addressed to

---

[85] Case C-370/90, *Singh*, para 25.

[86] Judgment, para 58. It nonetheless mentioned Recital 18 in the presentation of the legal context; ibid., para 3.

[87] Recital 18 considers that the right to permanent residence aims to be "a genuine vehicle for integration into the society of the host Member State". Recital 24 explains that "the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be".

[88] To determine if the situation led to a restriction to Art. 21 TFEU, see e.g. Case C-60/00, *Carpenter* or Case C-457/12, *S. and G.* To assess the integration of the citizen, see e.g. Case C-359/13, *Martens*.

[89] By doing so, the Court excludes situations that might have been included in a case-by-case consideration. It should be recalled that, unlike the Court, A.G. Sharpston proposed a case-by-case assessment; see Opinion in Case C-456/12, *O. and B.*, EU:C:2013:837, paras. 95-111.

[90] Judgment, para 54 and operative part (my emphasis).

this limitation, the application, "*mutadis mutandis*",[91] of the Directive to situations to which it is not supposed to apply, leads to some difficulties.[92] The Latin locution used by the Advocate General implies that something needs to be changed in the application of the rule. This results from the fact that the Court did not go as far as only viewing the dual national residing in one of his States of nationality as a national of one Member State residing in the territory of another Member State. If it had done so, it would have been possible to apply directly Directive 2004/38 without using Article 21(1) and its conditions and limitations would apply for a national. The Secretary of State defended this approach in *McCarthy*: it refused to grant Ms McCarthy a residence permit because she did not meet the conditions required by the Directive 2004/38 and not because she was also a British citizen.[93]

The Court did not follow this reasoning. In *Eind*, it already decided that the right of a national to go back and reside in his State of nationality cannot be refused or made conditional.[94] In *McCarthy*, it clearly stated that Directive 2004/38 could not apply directly to a dual national residing in one of his States of nationality as he "enjoys an unconditional right of residence due to the fact that he resides in the Member State of which he is a national".[95] So, contrary to what the Court is saying, the application by analogy does not necessarily equal the necessity that "the conditions for granting that derived right of residence must not be stricter than those provided for by Directive 2004/38".[96] The situation of someone like Ms Ormazabal can be more advantageous than that of a national of another Member State residing in the UK. Indeed, the latter would be subject to the conditions set down in the Directive whereas they do not apply to the naturalized citizen. True, this should be nuanced because the naturalized citizen should also have met these conditions in the past, as the Court required that they have been resident under Article 3 or 16 of the Directive. Nevertheless, it is no longer required of someone like Ms Ormazabal, whereas if she had not acquired British citizenship, she would still need to meet the conditions provided for by the Directive before acquiring a right to permanent residence.

6. Conclusion

The ruling under examination is far from clear. The difficulty is in part a classic one, and lies in the relationship between what is decided in a specific case – even a hypothetical case like in a preliminary reference – and the justification given for this decision. It is made more acute in *Lounes* because different lines of reasoning are used to justify someone in the situation of Mr Lounes benefiting from a derived right of residence. In the operative part, the Court circumscribed very closely what

---

[91] Opinion, para 84.

[92] For a critique of this application of the Directive "to situations which do not fit", see Spaventa, op. cit. *supra* note 20, at 774 et seq.

[93] Case C-434/09, *McCarthy*, para 17.

[94] Case C-291/05, *Eind*, para 31.

[95] Case C-434/09, *McCarthy*, para 34.

[96] Judgment, para 61.

the characteristics of this situation are. Nonetheless, depending on the reading of the judgment adopted, one could consider dual nationality, the exercise of free movement rights, or the moment when family life begins as being decisive in reaching that solution. All this might be seen as technicalities reserved to EU lawyers, but is crucial to determining the scope of application of the solution given in *Lounes*.

The difficulty is connected to the fact that in *Lounes* the Court uses well-known formulas of its citizenship case law, decided to solve specific cases, and transposes them to a different context, without always mentioning the original cases, let alone explaining why they could be used in the situation at hand. This is no particularity of the *Lounes* case. In fact, the ECJ case law is replete with such instances of "decontextualization" and circulation of formulas.[97] The formulas coined by the Court to decide this case might circulate in the future as well. Thus, even though the situation of Ms Ormazabal and Mr Lounes was not at all related to Brexit, the judgment might prove crucial in the Brexit context, especially in the absence of a withdrawal agreement securing the rights of EU citizens.

Indeed, *Lounes* might be read as a signal that the Court will protect British citizens living in another Member State and willing to acquire another EU nationality, and EU citizens living in the UK and willing to acquire British citizenship. From this point of view, one might say that in *Lounes*, like in *Commission* v. *UK*[98] mentioned in the introduction, the Court has played politics. Still, in contrast to that case, in *Lounes* the Court has not shown deference to avoid criticism. Through a daring interpretation of Article 21 TFEU, it protects an EU citizen against her own State. *Lounes* may rather be seen as an activist case and might even be used as an argument to limit the role of the Court after Brexit day, a question which will be part of the withdrawal agreement.

Beyond Brexit, the Court's justification and the formula it coined to decide *Lounes* may be used in the future to develop the status of EU citizen in different ways. The recognition of a right to lead a normal family life directly conferred by Article 21(1) TFEU may be used to develop the protection of EU citizens.

Further, *Lounes* in a way rearticulates the status of national of a Member State and the status of EU citizen. Being a Member State national is no longer only the condition for being an EU citizen. The status of national of a Member State is constructed as the logical conclusion of the EU citizen's integration in another Member State. At first this appears as a recognition of the limitation of the status of EU citizen: being treated as a national is not the same thing as being a national. In a gradual citizenship, nationality of the Member State of residence would be a higher status than that of permanent resident conferred by Directive 2004/38. However, another way to see things is to say that in *Lounes*, the status of national is, to some extent, Europeanized. Naturalization is seen as the prolongation of free movement and is subject to the Court's review. EU citizenship not only permits a

---

[97]On this point, see Réveillère, *Le juge et le travail des concepts juridiques: le cas de la citoyenneté de l'Union européenne* (European University Institute, 2017), at 296 et seq.

[98]Case C-308/14, *Commission* v. *United Kingdom*.

*Aix-Marseille University. I thank Afroditi Marketou and the anonymous reviewers for their very helpful comments.

Spaniard to be treated like a UK citizen, it also secures some of her rights if she decides to become a UK citizen.

Vincent Réveillère*