



IS *TOUFIK LOUNES* ANOTHER BRICK IN THE WALL? THE CJEU AND THE ON-GOING SHAPING OF THE EU CITIZENSHIP

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ABSTRACT: This *Insight* tackles a recent judgment of the CJEU, *Toufik Lounes* (Court of Justice, judgment of 14 November 2017, case C-165/16, *Toufik Lounes v. Secretary of State for the Home Department*), where the CJEU was asked to rule on the case of a EU national, Ms García Omazábal, who had exercised her free movement rights, later acquiring the citizenship of the host State while also retaining her nationality of origin. The Court has further investigated the scope *ratione personae* of Directive 2004/38 and Art. 21, para. 1, TFEU, so to clarify whether, in the scenario above, the EU national and her third-country national spouse could still be considered “beneficiaries” under Directive 2004/38. The CJEU answered as follows: while Directive 2004/38 is not applicable in the situation above, Art. 21, para. 1, TFEU shall instead be applied so as to prevent the EU national holding a dual citizenship to be treated less favourably than a EU national having the citizenship of his country of origin only, and therefore having the EU national’s right to family life unreasonably disrupted. Against this backdrop, the *Insight* first highlights the merits of the decision, by also investigating its positive effects within the Brexit process. Secondly, it discloses a main shortcoming that is likely to weaken the overall protection granted to EU citizens, i.e. the CJEU choice to disregard the connection between the provisions on the EU citizenship and the respect of fundamental rights.

KEYWORDS: Directive 2004/38 – Art. 21 TFEU – EU citizenship – right of residence – right to family life – Brexit.

I. INTRODUCTION

In the *Toufik Lounes* case, the CJEU has been asked to clarify the boundaries of Directive 2004/38¹ and the meaning of the EU citizenship. The related judgement,² hereby

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¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the

commented, has two main merits: it represents a further step towards the enhancement of the EU citizenship as the “fundamental status of nationals of the Member States”,³ and it is likely to have a beneficial impact in the long term, indirectly shaping the future relationship between the EU and the UK. Nevertheless, it also discloses a few shortcomings, mainly related to the CJEU choice not to entirely clarify some of the issues arising from its dynamic approach in this field.

Against this backdrop, after presenting the dispute in the main proceeding, the AG Opinion, and the CJEU ruling, this *Insight* will specifically focus on two elements. First, it will investigate the need to accommodate the relevance of fundamental rights anytime where EU citizens’ rights are involved; second, it will briefly examine the post-Brexit implications.

II. THE DISPUTE AT THE MAIN PROCEEDING AND THE PRELIMINARY QUESTION

In 1996 Ms García Omazábal, a Spanish national, moved to the United Kingdom for studying purposes. She started working full time at the Turkish Embassy in London in 2004, and on 12th August 2009 she received the British citizenship. At this time she decided to retain her Spanish nationality.

On 1st January 2014 Ms García Omazábal married in a religious ceremony Mr Lounes, an Algerian national, who had entered the United Kingdom on 20th January 2010. Despite his visitor visa being valid for six-months only, Mr Lounes overstayed illegally in the British territory until he met and then married Ms García Omazábal. The couple has been residing in the United Kingdom since then.

The couple also married in a civil ceremony held in London on 16th May 2014. A few weeks before the civil ceremony, on 15th April 2014, Mr Lounes applied for a resident card as family member of an EEA (European Economic Area) national, thus relying on the EEA Regulations 2006, which amount to the UK transposition of Directive 2004/38.

On 22nd May 2014, such an application was rejected on the basis that Mr Lounes’ wife could no longer be considered an “EEA national” under the abovementioned EU provision. According to the Secretary of State for the Home Department, Ms García Omazábal lost the status of “beneficiary” within the meaning of Directive 2004/38 as soon as she was given British nationality. As a consequence, her husband could no longer rely on the Directive provisions that would otherwise enable him to obtain a residence card as a “family member” of an EEA national. It is worth mentioning that a few

Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

² Court of Justice, judgment of 14 November 2017, case C-165/16, *Toufik Lounes v. Secretary of State for the Home Department*.

³ Court of Justice: judgment of 20 September 2001, case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, para. 31; judgment 17 September 2002, case C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, para. 82.

days before that refusal, Mr Lounes was also issued with a notice acknowledging his breach of the immigration rules and the decision to deport him from the country.

Disappointed by such situation, Mr Lounes brought a claim to the High Court of Justice (England and Wales) challenging the compliance of the decision of 22nd May 2014 with two specific provisions of EU law: Directive 2004/38 and Art. 21 TFEU. The High Court of Justice (hereinafter also “the referring Court”) suspended the proceeding in order to begin a preliminary reference procedure and ask the CJEU to clarify whether Ms García Omazábal, and consequently Mr Lounes, could still be regarded as “beneficiaries” under Art. 3, para. 1, Directive 2004/38, notwithstanding the circumstance that, after having exercised her rights under Directive 2004/38, Ms García Omazábal has now become a British citizen.⁴

III. THE OPINION OF AG BOT

The Opinion delivered by AG Bot focuses on three main points.⁵

First, AG Bot clarifies that the dispute at the main proceeding falls under the field of application of EU law, thus triggering the CJEU jurisdiction on this matter. The rationale behind such conclusion is not only quite logical but also “obvious”:⁶ the AG recalls that “[it] was by virtue of the actual exercise of her rights of free movement and residence that Ms García Ormazábal was entitled to a right of permanent residence in the United Kingdom”.⁷

A second aspect amounts to the possibility for Ms García Ormazábal and therefore for her spouse to be qualified as “beneficiaries” under Directive 2004/38. Again, the reasoning of AG Bot is at time straightforward and convincing. After recalling that Directive 2004/38 does not confer any autonomous right on third-country nationals,⁸ the AG highlights that Art. 3, para. 1, of that Directive confers the status of “beneficiary” to EU citizens that are residing in a Member State other than the State of their nationality.⁹ As already pointed out by the CJEU,¹⁰ firstly, the provisions of the Directive clearly state that its field of application *ratione personae* is limited to the situation just described; secondly, it is a well-established principle of international law that individuals enjoy an

⁴ *Toufik Lounes v. Secretary of State for the Home Department*, cit., para. 27.

⁵ Opinion of AG Bot delivered on 30 May 2017, case C-165/16, *Toufik Lounes v. Secretary of State for the Home Department*.

⁶ *Ibid.*, para. 36.

⁷ *Ibid.*, para. 37.

⁸ *Ibid.*, para. 44.

⁹ *Ibid.*, para. 50.

¹⁰ Court of Justice: judgment of 17 May 2017, case C-133/15, *H.C. Chavez-Vilchez et al. v. Raad van bestuur van de Sociale verzekeringsbank et al.*; judgment of 12 March 2014, case-456/12, *O. v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. B.* (“O. and B.”); judgment of 11 December 2007, case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R. N. G. Eind*; judgment of 7 July 1992, case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*.

unconditional right of residence within each and every State they are nationals. Hence, the field of application of Directive 2004/38 is not intended to cover scenarios other than the one outlined in its provisions. The ultimate conclusion of that reasoning being that – since Ms García Ormazábal has acquired the British nationality – the situation at the main proceeding ceased to fall under Directive 2004/38.¹¹ This leads to the acknowledgment that Mr Lounes shall not be granted a derived right of residence on the basis of Directive 2004/38.

As a third point, AG Bot stresses that Art. 21, para. 1, TFEU should be investigated so to assess whether a “derived right of residence” could eventually be recognised under that provision. Despite some factual differences between some previous CJEU case-law¹² and the situation affecting Ms García Ormazábal and Mr Lounes, AG Bot expresses the opinion that the CJEU should follow the same reasoning adopted in *O. and B.*, i.e. acknowledging and accommodating the importance of the right to private and family life.

Hence, the effectiveness of the rights under Art. 21, para. 1, TFEU requires the provisions of the Directive to be applied *mutatis mutandis*,¹³ so to ensure 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, [are] able to continue the family life they have until then led in that State with their spouse, a third-country national”.¹⁴

IV. THE CJEU RULING AND THE ENHANCED APPLICATION OF DIRECTIVE 2004/38

The CJEU ruling is very much aligned to the AG Opinion: not only does the CJEU share the outcome suggested by the AG, but the legal arguments advanced to reach such a conclusion are the same.

With regard to Directive 2004/38, the Court recalls that it does not confer third-country nationals an autonomous right of free movement and residence. This entitlement is in fact subject to the circumstance that a EU citizen is exercising or has exercised his free movement rights.¹⁵ This observation also implies that whenever a EU citizen is residing in the State of his nationality,¹⁶ he enjoys an unconditional right of residence which stems from the international law principle that States cannot refuse the right to enter and reside to their own nationals. The Court has therefore to

¹¹ Opinion of AG Bot, *Toufik Lounes v. Secretary of State for the Home Department*, cit., para. 65.

¹² *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, cit.; *Minister voor Vreemdelingenzaken en Integratie v. R. N. G. Eind*, cit.; *O. and B.*, cit. E. GUILD, *S v Minister voor Immigratie, Integratie en Asiel (C-457/12) / O v Minister voor Immigratie, Integratie en Asiel (C-456/12)*, in *Journal of Immigration, Asylum and Nationality Law*, 2014, p. 284 *et seq.*

¹³ Opinion of AG Bot, *Toufik Lounes v. Secretary of State for the Home Department*, cit., para. 79.

¹⁴ *Ibid.*, para. 90.

¹⁵ *Toufik Lounes v. Secretary of State for the Home Department*, cit., para. 47.

¹⁶ *Ibid.*, para. 48.

acknowledge that, as soon as Ms García Ormazábal received the British nationality, her right to reside in the UK ceased to be linked to Directive 2004/38, being instead directly connected to her new citizenship status. Since Directive 2004/38 can no longer apply to Ms García Ormazábal, Mr Lounes is subsequently prevented from enjoying the protection foreseen by Directive 2004/38.¹⁷

Secondly, the CJEU assesses whether Mr Lounes could enjoy a derived right of residence in the UK relying on a dynamic interpretation of Art. 21, para. 1, TFEU.¹⁸ Following the same approach of the AG, the Court stresses how the need to ensure the effectiveness of such provisions entails a duty to provide third-country nationals with a derived right of residence anytime where EU nationals' rights under Art. 21 TFEU would otherwise be jeopardised.¹⁹

Additionally the Court discusses two further points. First it highlights that the dispute in main proceeding is embedded into the EU field of application.²⁰ The Court quite properly outlines that the situation at stake is not only linked to the exercise of a right under EU law, but it actually entangles the core value of the European Union to foster the integration among the Member States and achieve an "ever closer union".²¹ Ms García Ormazábal's choice to apply for, and obtain, British nationality shall therefore be seen as a willingness to "seal" her connection with the British nation by becoming "permanently integrated in that State".²² Second, preventing Mr Lounes from receiving a right of permanent residence on the grounds of his relationship with Ms García Ormazábal would clearly amount to a disruption of their right to family life. More precisely, the Court is of the opinion that denying such derived right to Mr Lounes would lead Ms García Ormazábal to be treated less favourably than EU citizens having relied on free movement rights but having the nationality of their country of origin only.²³

The Court therefore concludes that, despite not being directly applicable, Directive 2004/38 should be applied by analogy. This enables the third country national to invoke Art. 21, para.1, TFEU, and thus obtain a derived right of residence to be exercised under the same conditions set out by the Directive itself.²⁴

¹⁷ *Ibid.*, paras 42-44.

¹⁸ *Ibid.*, para. 45.

¹⁹ *Ibid.*, para. 48.

²⁰ *Ibid.*, para. 50.

²¹ See European Council, *Solemn Declaration on the European Union*, 19 June 1983, available in *Bulletin of the European Communities*, No. 6/1983.

²² *Toufik Lounes v. Secretary of State for the Home Department*, cit., para. 57.

²³ *Ibid.*, para. 59.

²⁴ *Ibid.*, para. 62.

V. NON-DISCRIMINATION AND RIGHT TO FAMILY LIFE: THE *MARGINALISATION* OF FUNDAMENTAL RIGHTS

The value of *Toufik Lounes* ruling is undeniable from several viewpoints. First and foremost, the CJEU ruling confirms that the main priority of the EU is still to achieve the fair integration and the equal treatment of all its nationals. Secondly, the *Toufik Lounes* judgment is expected to shape the future relationship between the UK and the EU in the aftermath of Brexit.

V.1. EU CITIZENSHIP AND NON-DISCRIMINATION ON GROUNDS OF NATIONALITY: TWO SIDES OF THE SAME COIN

A closer look to the *Toufik Lounes* ruling reveals that the analysis of non-discrimination and right to family life carried out by the CJEU could (and should) have been more in-depth.

With regard to non-discrimination, this principle is only indirectly mentioned by the CJEU in para. 59, when the Court points out that an EU national holding a dual EU citizenship should not be treated less favourably than an EU national having the citizenship of one Member State only. Notwithstanding the connection with both *Zambrano*²⁵ and *McCarthy*²⁶ cases, the CJEU does not make any reference to those rulings. With specific regard to the latter, AG Bot only justifies his choice not to rely on *McCarthy* arguing that, unlike Ms García Ormazábal, Ms McCarthy had not exercised her right to free movement.²⁷ The lack of a reference to *Zambrano*, on the contrary, is not explained by AG Bot. Despite the factual differences and even though the choice to disregard *Zambrano* and *McCarthy* does not impact on the outcome of the decision itself, it seems that a reference to both decisions was indeed recommended. *Toufik Lounes* is in fact a crossroad of those rulings: as in *Zambrano*, a derived residence right was at stake; as in *McCarthy* the dual nationality of the EU national was likely to constitute an obstacle to the free enjoyment of the rights under the EU citizenship. Therefore, *Toufik Lounes* would have provided a good opportunity for the Court to explain the approach followed within the decisions above, so to clarify that *Zambrano* and *McCarthy* shall not be seen as conflicting decisions, being instead expressions of a single, consistent approach.²⁸ The Court has thus missed the chance to state – once and for all – that Art. 21, para. 1, TFEU, i.e. the genuine enjoyment of the EU citizens' rights, can indeed be undermined, first, by the removal/refusal to admit

²⁵ Court of Justice, judgment of 8 March 2011, case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*.

²⁶ Court of Justice, judgment of 5 May 2011, case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*.

²⁷ Opinion of AG Bot, *Toufik Lounes v. Secretary of State for the Home Department*, cit., para. 49.

²⁸ A. WIESBROCK, *Disentangling the "Union Citizenship Puzzle"? The McCarthy case*, in *European Law Review*, 2011, p. 861 *et seq.*

a family member under Directive 2004/38; second, notwithstanding the actual existence of a cross-border element in the situation at stake.

Moreover, *Toufik Lounes* would have represented the path to cast the enhanced value of the EU citizenship in stone (i.e. by securing its link with fundamental rights), and to provide at least some clarifications regarding its extent.²⁹ At this juncture it should be recalled that the EU citizenship represents the fundamental status of the nationals of the Member States: this statement implies the need to ensure the respect of human rights anytime where the EU citizenship is at stake. If in *Zambrano* the lack of reference to fundamental rights could partially be justified by acknowledging that the Charter was yet to become legally binding,³⁰ this argument does not cover *Toufik Lounes* ruling.

Furthermore another issue raised by *Zambrano*³¹ and yet to be solved by the CJEU amounts to the concept of "reverse discrimination".³² Since the *Toufik Lounes* case involved a EU national having a dual citizenship, it indeed challenged the problem related to the equal treatment of all EU nationals. More precisely, while Ms García Ormazábal was able to rely on the protection of Art. 21 TFEU by virtue of her having retained Spanish nationality and relying upon free movement provisions before receiving the British passport, a British national not satisfying the two requirements above would have been prevented from enjoying such protection. As stated in *Zambrano*, such an outcome cannot be justified by arguing that – in order for the provisions on EU citizenship to apply – at least a *potential* cross-border element must be met.³³ Hence, it has to be acknowledged that the expansion of the rights attached to the EU citizenship does risk putting Member State's nationals in a disadvantaged position. As a matter of fact, if Mr Lounes' spouse was a British national having that nationality only, most likely Mr Lounes would have been unable to remain in the UK and continue his family life there. On one hand the Directive 2004/38 and Art. 21 TFEU would have been inapplicable; on the other hand, the current approach to the right to family life and the circumstance that Mr Lounes originally infringed the UK immigration rules, would have probably led to his removal from the British territory.

The observations above clearly outline the needs presented at the beginning of this sub-section, i.e. to interpret and apply the provisions on EU citizenship taking into due account the respect of fundamental rights so to prevent any violation of those rights and/or tolerate paradoxical situations like the one just described.

²⁹ Opinion of AG Sharpston delivered on 30 September 2010, case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, para. 75 *et seq.*

³⁰ *Ibid.*, para. 151 *et seq.*

³¹ *Ibid.*, para. 123 *et seq.*

³² H. VAN EIJKEN, S.A. DE VRIES, *A New Route into the Promised Land? Being a European Citizen after Ruiz Zambrano*, in *European Law Review*, 2011, p. 710 *et seq.*

³³ *Ibid.*, p. 711 *et seq.*; A. WIESBROCK, *Disentangling the "Union Citizenship Puzzle"? The McCarthy Case*, cit., p. 866.

V.2. THE CJEU *VIS-À-VIS* THE “RIGHT TO FAMILY LIFE”: LIMITING OR ENHANCING ITS POTENTIAL?

With regard to the right to family life, the reasoning followed by the Court is convincing: by moving to the UK and settling there to such an extent that enabled her to become British national, Ms García Ormazábal clearly proved her intention to build a family life in that country. The decision to remove her spouse from the British territory would have therefore amounted to a disruption of such right and hence infringed Art. 21, para. 1, TFEU.

Notwithstanding its clarity, what is surprising about the Court’s reasoning is the lack of any reference to the European provisions which specifically protect the right to family life. Neither Art. 7 of the Charter of Fundamental Rights of the European Union (the Charter), nor Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are mentioned in the decision, thus leading to the question whether such omission has been intentional or purely casual.

A look at the previous rulings concerning similar situations would support the former – rather than the latter – interpretation.³⁴ When free movement rights are involved, and EU citizenship is at stake, the Court is in fact oriented towards dismissing the involvement of human rights rather than engaging in a proper analysis on human rights.

Before addressing the reasons why such an approach shall not be entirely embraced, it is worth investigating the rationale behind the Court’s choice to opt for it. Two observations can be made at this regard.

First, a reference to the Charter and the ECHR provisions would probably represent an additional burden to a set of decisions which are already quite controversial in themselves. Since Member States are already reluctant to fully embrace the CJEU rulings in this field, the Court’s self-restraint might be interpreted as an attempt not to exacerbate Member States’ reactions.

A second remark focuses on the content of both Art. 7 of the Charter and Art. 8 ECHR.³⁵ As highlighted within the “Explanations to the Charter of Fundamental Rights”,³⁶ the correspondence between the two provisions implies that the meaning and scope of the two norms are identical. Equally, so are “the limitations which may legitimately be

³⁴ A. WIESBROCK, *Disentangling the “Union Citizenship Puzzle”? The McCarthy Case*, cit. p. 870 *et seq.*; S. REYNOLDS, *Exploring the “Intrinsic Connection” between Free Movement and the Genuine Enjoyment Test: Reflections on EU Citizenship after Iida*, in *European Law Review*, 2013, p. 376 *et seq.*

³⁵ A. BULTRINI, *I rapporti fra Carta dei diritti fondamentali e Convenzione europea dei diritti dell’uomo dopo Lisbona: potenzialità straordinarie per lo sviluppo della tutela dei diritti umani in Europa*, in *Il Diritto dell’Unione europea*, 2009, p. 700 *et seq.*

³⁶ Explanations relating to the Charter of Fundamental Rights, p. 17 *et seq.* J.P. JACQUÉ, *The Explanations Relating to the Charter of Fundamental Rights of the European Union*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD, *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Hart Publishing, 2014, p. 1715 *et seq.*

imposed"³⁷ on the right to private and family life. The ultimate consequence of such correspondence is the acknowledgment that the European Court of Human Rights rulings on Art. 8 ECHR shape the content of Art. 7 of the Charter. In other words, the European Court of Human Rights jurisprudence, which already constitutes a leading reference in the field of human rights,³⁸ becomes intertwined when a Charter provision is perfectly shaped on the ECHR.³⁹

Against this backdrop, the CJEU approach not to mention the Charter (and the ECHR) can therefore be seen as an attempt to enhance rather than decrease the importance of family life. This latter remark can be easily explained by pointing out that the interpretation and application by the European Court of Human Rights of Art. 8 ECHR are often contradictory and inconsistent.⁴⁰ This is especially true when it comes to balancing the right to private and family life with States' prerogative to control their borders and to manage their immigration rules,⁴¹ since the European Court of Human Rights is keen to recognise that States shall enjoy a wide margin of appreciation. This approach, not only triggers a number of unwanted consequences (such as the idea that States removal decisions can be tolerated under Art. 8 ECHR if family life can be recreated in another country),⁴² but it clearly paves the way to the implementation of quite low standards when assessing the respect to private and family life.

Considering the scenario just presented – and recalling that within the dispute at the main proceeding the third country national overstayed his permit to reside in the UK, thus breaching British immigration rules – it can be argued that the CJEU made a wise call by avoiding referring to either Art. 8 ECHR or Art. 7 of the Charter. This being the case, the approach of the CJEU would be justified by the idea of securing complete

³⁷ *Explanations relating to the Charter of Fundamental Rights*, cit., *Explanation on Article 7 – Respect for private and family life*, p. 20.

³⁸ *Explanations relating to the Charter of Fundamental Rights*, cit., *Explanation on Article 52 – Scope and interpretation of rights and principles*, p. 33.

³⁹ S. PEERS, S. PRECHAL, *Article 52*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD, *The EU Charter of Fundamental Rights. A Commentary*, cit., p. 1490 *et seq.*; K. LENAERTS, J.A. GUTIÉRREZ-FONS, *The Place of the Charter in the EU Constitutional Edifice*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD, *The EU Charter of Fundamental Rights. A Commentary*, cit., p. 1559 *et seq.*; L. BETTEN, *The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?*, in *The International Journal of Comparative Labour Law and Industrial Relations*, 2001, p. 151 *et seq.*

⁴⁰ V. CHETAIL, C. BAULOZ, *Research Handbook on International Law and Migration*, Cheltenham: Edward Elgar, 2014, p. 204; H. LAMBERT, *The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion*, in *International Journal of Refugee Law*, 1999, p. 429 *et seq.*

⁴¹ European Court of Human Rights: judgment of 14 June 2011, no. 38058/09, *Osman v. Denmark*; judgment of 12 October 2006, no. 13178/03, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*; judgment of 21 December 2001, no. 32465/96, *Sen v. The Netherlands*.

⁴² European Court of Human Rights, judgment of 28 May 1998, no. 10730/84, *Berrehab v. The Netherlands*.

flexibility in shaping the right to family life, without subjecting its protection to an *unsatisfactory* case-law, i.e. the European Court of Human Rights one.

Notwithstanding the remarks developed so far, the lack of reference to the existing provisions protecting the right to private and family life still has two shortcomings. While an enhanced legal reasoning from the CJEU would not have changed the outcome of the *Toufik Lounes* judgment itself, it would have constituted a way to clarify the extent of the EU citizenship and to firmly secure its protection.

First, the omission related to Art. 7 of the Charter amounts to an unreasonable self-restraint of the CJEU. According to both Arts 52 and 53 of the Charter, and the related *Explanations*, the full correspondence between a Charter provision and an ECHR rule does not preclude the application of the so called “maximum standard of protection”.⁴³ Although the implication of this statement is yet to be clarified by the CJEU,⁴⁴ the *Explanations* focusing on Art. 52 imply that if the protection granted by the EU is stronger than the one foreseen under the ECHR, the former standard should be implemented. In a situation like the one of Ms García Omazábal a reference to the Charter would have therefore constituted an extremely authoritative support.

A second shortcoming is the lack of reference to Art. 8 ECHR itself: despite the observations above, such reference could be beneficial. More precisely, the mutual respect and consideration denoting the relationship between the CJEU and the European Court of Human Rights could have been used as a way to increase the protection of family life. By linking the enhanced interpretation of the right to family life to the provisions above, the CJEU had the opportunity to indirectly influence the European Court of Human Rights’ approach towards the right to private and family life, and to eventually push forward with its scrutiny within such provision.⁴⁵

Finally, with specific regard to the UK and in the light of Brexit, the abovementioned scenario should be particularly welcomed. As known, at some point⁴⁶ the EU provisions will cease to apply in the British territory and the CJEU will no longer have jurisdiction. The ECHR and the European Court of Human Rights will therefore remain the sole international instrument and jurisdictional body capable of effectively promoting the enforcement of human rights’ protection. The interpretation of Art. 8 ECHR thus becomes of paramount importance towards the effectiveness of the human rights protection in the UK.

⁴³ S. PEERS, S. PRECHAL, *Article 52*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD, *The EU Charter of Fundamental Rights. A Commentary*, cit., p. 1455 *et seq.*

⁴⁴ Court of Justice, judgment of 26 February 2013, case C-399/11, *Stefano Melloni v. Ministero Fiscal*.

⁴⁵ A. ROSAS, *Balancing Fundamental Rights in EU Law*, in *Cambridge Yearbook of European Studies*, 2014, p. 347 *et seq.*; S. PEERS, S. PRECHAL, *Article 52*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD, *The EU Charter of Fundamental Rights. A Commentary*, cit., p. 1496 *et seq.*

⁴⁶ See Section VI below.

VI. THE ADDITIONAL VALUE OF THE *TOUFIK LOUNES* RULING: ITS IMPLICATIONS FOR BREXIT

Further to the observations made at the end of the previous section, the *Toufik Lounes* decision will impact on Brexit under another point of view.

The clarifications provided by the CJEU will indeed be relevant not only in the next year, but will be binding during the “transition period” as well. In order to appreciate the importance of *Toufik Lounes*, a quick look at the latest version of the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community is therefore needed (the Draft Agreement).⁴⁷

The agreement tackles citizens’ residence rights in Part Two, Chapter 1. The whole Chapter can be described as a substantive recognition of the provisions of Directive 2004/38.⁴⁸

With specific focus on the rights that EU citizens residing in the UK and UK nationals residing in one of the Member States will have in the future, the draft accommodates the binding effect of the provisions of Directive 2004/38 until the end of the transition period.⁴⁹

Furthermore, the draft’s provisions pertinent to citizens’ rights are most likely to become enforceable once the agreement will be finalised: as clarified by the draft itself, the text highlighted in green, such as all Part Two of the Draft, “is agreed at negotiators’ level, and will only be subject to technical legal revisions in the coming weeks”.⁵⁰ This means that the interpretation of Directive 2004/38 and its analogic application via Art. 21 TFEU are going to be binding in the UK until the end of 2020. As a consequence, the *Toufik Lounes* decision – which, as shown, is already at the cutting-edge of the Court’s case-law by itself – is likely to have a ground-breaking effect considering that it will have an impact in the UK for almost two additional years after the official *divorce* between the UK and the EU.

The future CJEU case-law regarding citizens’ rights might even have a broader effect insofar as Art. 151 of the Draft Agreement foresees that the CJEU will have jurisdiction to give preliminary rulings “where, in a case which has commenced at first instance within 8 years from the end of the transition period before a court or tribunal in the United Kingdom, a question is raised concerning the interpretation of Part Two of this Agreement, and where that court or tribunal considers that a decision on that question

⁴⁷ European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, 19 March 2018, TF50 (2018) 35 – Commission to EU27.

⁴⁸ *Ibid.*, Arts 8 and 10.

⁴⁹ *Ibid.*, Art. 121.

⁵⁰ *Ibid.*, p. 1.

is necessary to enable it to give judgment in that case".⁵¹ Hence, it appears that the CJEU will certainly have the opportunity and power to further improve the protection of citizens' rights in the near future.

The observations made so far firstly confirm that EU citizenship is a concept at time extremely dynamic and of great inner potential.⁵² Furthermore, this brief overview of the Draft Agreement seems to be capable of appeasing some of the concerns that have been recently raised with regard to the protection of EU citizens' rights living in the UK in the aftermath of Brexit.⁵³

VII. CONCLUDING REMARKS

The analysis carried out in this paper has highlighted the value, but also the shortcomings of the CJEU approach towards the EU citizenship.

The dynamic interpretation devoted by the CJEU to both Directive 2004/38 and Art. 21 TFEU should be welcomed since it aims at increasing the protection of EU citizens and this effect is likely to outlive Brexit. Nevertheless, the lack of full clarity of the *Toufik Lounes* judgment may represent an obstacle towards the effective improvement of citizens' rights.

In this latter regard, the *Insight* has stressed the need to acknowledge, once and for all, the role played by human rights within the interpretation and application of the provisions indicated above. The Court's self-restraint can no longer be tolerated as this approach undermines the consistency of the CJEU case-law. Finally, by stressing the link between the enhancement of citizens' rights and the effective protection of fundamental rights, the Court will not only prevent such inconvenience, but also *secure* its case-law under the shield of the quintessential normative instruments in the European territory: the Charter of Fundamental Rights and the ECHR.

⁵¹ *Ibid.*, Art. 151.

⁵² E. HERLIN-KARNELL, *European Arrest Warrant Cases and the Principles of Non-discrimination and EU Citizenship*, in *Modern Law Review*, 2010, p. 824.

⁵³ K. HUGHES, *Brexit and the Right to Remain of EU Nationals*, in *Public Law*, 2017, p. 94 *et seq.*; G.M. GONZÁLES, *'BREXIT': Consequences for Citizenship of the Union and Residence Rights*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 796 *et seq.*