

# SOLIDARITY AND THE BOND OF NATIONALITY IN UNION CITIZENSHIP LAW

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*While solidarity as an ideal in the legal relationship between a host Member State and the non-national Union citizen has all but vanished from the discourse of EU free movement law, it has resurged in another line of case law concerning Union citizenship. The relationship between the Member States and their own nationals is at the centre of the case law on loss of Union citizenship rights under Article 20 TFEU. The bond of nationality between the individual and the state is there designated as one of ‘solidarity’ and ‘good faith’. This article argues that solidarity, as an ideal, is also relevant for understanding the case law dealing with returning, or naturalising Union citizens who have made use of freedom of movement under Article 21 TFEU. The article provides a discussion on the various expressions of solidarity as a component of the ideal bond of nationality between a Union citizen and their home Member State. Conclusively, it is argued that the meaning of the bond of nationality will continue to develop together with the legal evolution of Union citizenship.*

## 1 INTRODUCTION

Whether it is a legal concept, a value, or even a principle, ‘solidarity’ appears in various places in Union law.<sup>1</sup> In the area of Union citizenship, it has been known to figure in the case law of the Court of Justice of the European Union (the Court) on Union citizens’ use of the right to freedom of movement under Article 21(1) TFEU. The right to non-economically motivated freedom of movement, read together with the principle of non-discrimination on grounds of nationality in Article 18 TFEU, have been referred to by the Court to designate a host Member State’s obligations to show some degree of solidarity with resident non-national Union citizens.<sup>2</sup> However, in the last 10-15 years, the judicial discourse on solidarity in this area has been replaced with that of the host Member State’s legitimate interest to protect their public finances from being burdened as a result of non-national Union citizens use of freedom of movement (see section 2 below).<sup>3</sup>

Instead, the Court has more recently, and repeatedly, referred to solidarity in the line of case law concerning Union citizenship and denationalisation. ‘Solidarity’ and ‘good faith’

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<sup>1</sup> See analyses by Graham Butler, ‘Solidarity and Its Limits for Economic Integration in the European Union’s Internal Market’ (2018) 25(3) *Maastricht Journal of European and Comparative Law* 310; Floris De Witte, *Justice in the EU: the Emergence of Transnational Solidarity* (1st edn, Oxford University Press 2015); Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017).

<sup>2</sup> Case C-184/99 *Grzelczyk* EU:C:2001:458; Case C-456/02 *Trojani* EU:C:2004:488.

<sup>3</sup> Case C-140/12 *Brey* EU:C:2013:565, para 54. See more recently, Case C-709/20 *The Department for Communities in Northern Ireland* EU:C:2021:602, para 80 and the case note by Maria Haag, ‘The Coup de Grâce to the Union Citizen’s Right to Equal Treatment: *CG v. The Department for Communities in Northern Ireland*’ (2022) 59(4) *Common Market Law Review* 1081.

appear together when the Court refers to the quality of the Member State's relationship to their *own* nationals under the Union law rule that creates the status of Union citizenship; Article 20 TFEU. Solidarity is there an ideal, designating the 'bond of nationality' between the individual and the Member State of nationality. In the Court's reasoning, the sanctity of this bond of nationality legitimises that the Member States might enforce their competence in the field of their respective nationality legislation.<sup>4</sup> Albeit that this competence must be exercised with due regard to Union law, specifically, the fundamental rights of the EU's Charter of Fundamental Rights (the Charter), and the principle of proportionality (see section 3).<sup>5</sup>

The purpose of this article is to explore this relatively recently developed aspect of Union law governing Union citizenship, to which solidarity, as part of the 'bond of nationality', has become increasingly relevant. Leaving behind the right to equal treatment and the issue of the non-national Union citizen in relation to their *host* Member State of residence, the article discusses how Union citizenship law in other ways fosters the ideal of solidarity. Specifically, what solidarity might mean for the bond between Union citizens and their *home* Member State of nationality. It will be argued that Union law places obligations that embody an ideal of solidarity on the Member States in their relationship to their own nationals (section 4). Solidarity, as a premise for the national bond between the citizen and the State makes the circular, or returning, Union citizen's use of freedom of movement under Article 21 TFEU interact with the issue of the individual's loss of Union citizenship rights under Article 20 TFEU (section 5).

## 2 THE IDEAL OF SOLIDARITY IN UNION CITIZENSHIP LAW

In EU legal studies, 'solidarity' has often been associated with the issue of equal treatment rights in the context of freedom of movement of non-economically active persons.<sup>6</sup> In cases from the early 2000's, such as *Grzelczyk* and *Trojani*, the Court provided the interpretation that the Member States, when participating in the legal regime that is the internal market, must accept to receive and care for other Member State nationals, in their capacity as Union citizens who are making lawful use of freedom of movement, with a 'certain degree of financial solidarity'.<sup>7</sup>

Some scholars pointed out the potential disharmony between those belonging to the vast majority of the European population who remain 'static', and those who are 'moving' Union citizens. This could happen if the 'static', who never come within the scope of EU free movement law, are forced by a top-down pressure from Union law to include the

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<sup>4</sup> Case C-118/20 *Wiener Landesregierung (Révocation d'une assurance de naturalisation)* EU:C:2022:34, para 52; Case C-221/17 *Tjebbes and Others* EU:C:2019:189, para 33; Case C-135/08 *Rottmann* EU:C:2010:104, para 51.

<sup>5</sup> Case C-118/20 *Wiener Landesregierung* (n 4), paras 58-61 and case law cited there.

<sup>6</sup> See, for example, Catherine Barnard, 'EU Citizenship and the Principle of Solidarity' in Eleanor Spaventa and Michael Dougan (eds), *Social Welfare and EU law* (Hart Publishing 2005); Catherine Jacqueson, 'Union Citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship' (2002) 27 *European Law Review* 260.

<sup>7</sup> Case C-184/99 *Grzelczyk* (n 2) para 44; Case C-209/03 *Bidar* EU:C:2005:169, para 56.

‘moving’ Union citizens into their local solidarity circles without perceiving that they themselves get anything from this supranational system in return.<sup>8</sup>

Such concerns should arguably have faded given the Court’s more recent case law interpreting the principle of non-discrimination on grounds of nationality as expressed in Article 24 in Directive 2004/38 (the Free Movement Directive).<sup>9</sup> The exigence of a ‘certain degree of financial solidarity’ has largely been replaced by the requirement that the individual fulfils the conditions for residence and equal treatment laid down in the Free Movement Directive.<sup>10</sup> Some scholars deplore this vanishing of solidarity in individual cases where it could have been both a legitimate and proportionate demand on host Member States vis-à-vis a resident, non-economically active, Union citizen.<sup>11</sup> Nevertheless, the legal development in this area has shifted from focussing on the effectiveness and the protection of the individual’s free movement rights to that of the legitimate interest of host Member States not having to accept non-national Union citizens becoming a burden on their social assistance system.<sup>12</sup> The legitimisation of this Member State interest, which the case law affirms that the Free Movement Directive protects, has largely disqualified the Union citizen’s expectations of some degree of solidarity based on an individual assessment when making use of freedom of movement as a non-economically active person.<sup>13</sup> Instead, it is presumed that the conditions for residence and equal treatment rights in the Free Movement Directive strike the proportionate balance between the host Member State’s and the individual’s respective interests.<sup>14</sup>

### 3 THE SHIFT IN FOCUS: FROM THE *HOST* TO THE *HOME* MEMBER STATE

In the case law development of freedom of movement of non-economically active Union citizens, solidarity in the legal relationship between a *host* Member State and the non-national

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<sup>8</sup> See in general Alexander Somek, ‘Solidarity Decomposed: Being and Time in European Citizenship’ (2007) 32 *European Law Review* 787; Gareth Davies, ‘The Humiliation of the State as a Constitutional Tactic’ in Fabian Amtenbrink and Peter A J van den Berg (eds), *The Constitutional Integrity of the European Union* (TMC Asser Press 2010).

<sup>9</sup> Case C-333/13 *Dano* EU:C:2014:2358; Case C-67/14 *Alimanovic* EU:C:2015:597; Case C-299/14 *García-Nieto and Others* EU:C:2016:114; Case C-709/20 *The Department for Communities in Northern Ireland* EU:C:2021:602.

<sup>10</sup> 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 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 [2004] OJ L 158/77. On this point, see analysis by Eleanor Spaventa, ‘Earned Citizenship: Understanding Union Citizenship Through Its Scope’ in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017).

<sup>11</sup> See, among others, Niamh Nic Shuibhne, ‘Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship’ (2015) 52(4) *Common Market Law Review* 889; Charlotte O’Brien, ‘The ECJ Sacrifices EU Citizenship in Vain: Commission v. United Kingdom’ (2017) 54(1) *Common Market Law Review* 209; Anastasia Iliopoulou-Penot, ‘Deconstructing the Former Edifice of Union Citizenship? The Alimanovic Judgment’ (2016) 53(4) *Common Market Law Review* 1007.

<sup>12</sup> Case C-140/12 *Brey* (n 3), para 47; Case C-67/14 *Alimanovic* (n 9), para 44; Case C-483/17 *Tarola* EU:C:2019:309 paras 50-51.

<sup>13</sup> See in general, Daniel Thym, ‘The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens’ (2015) 52(1) *Common Market Law Review* 17.

<sup>14</sup> Spaventa (n 10).

Union citizen has all but vanished from the judicial discourse. As an ideal, it has instead resurged in the case law concerning Union citizens' bond to their *home* Member State.

### 3.1 NATIONALITY AS THE GATE TO UNION CITIZENSHIP

The individual's steps towards naturalisation in a Member State require that he or she consents to fulfil certain legally determined conditions for belonging, oftentimes through language tests, knowledge tests, or declarations of loyalty. The Member State, on the other hand, will have to assume a solidaristic inclusion of that individual into its circle of 'insiders' once the naturalisation process is completed.<sup>15</sup> A state therefore needs to uphold their side of the bargain in the social contract that nationhood forms – a contract that, for EU Member States, is shaped in part by the legal concept of Union citizenship, and therefore is also a matter of Union law. The Member States' privileged role as the gatekeepers of Union citizenship acquisition, since the route towards that status goes exclusively via national citizenship, also creates Member State obligations under Union law.<sup>16</sup> Under Article 20 TFEU, these obligations have become apparent with regards to Member State measures that cause the loss of Union citizenship status and/or rights.

### 3.2 FORMAL OR EFFECTIVE LOSS OF UNION CITIZENSHIP RIGHTS

There is by now a small streak of cases from the Court concerning the interpretation of Article 20 TFEU as protection against the *formal* loss of Union citizenship. Typically, this happens through the home Member State's measure of denationalisation of one of their own nationals. In turn, this case law on *de jure* loss of Union citizenship, mirrors the considerably vaster case law on *de facto* loss of Union citizenship rights. The latter concerns Article 20 TFEU's protection against the *effective* loss of 'the genuine enjoyment of the substance of rights conferred' under Union citizenship. The famous *Ruiz Zambrano* judgment from 2011 started the *de facto* line of case law, centring on the individual's loss, in practice, of his or her rights as a Union citizen. In *Ruiz Zambrano*, a child with Union citizenship status was at risk of being forced to leave the EU unless his third-country national parents were granted a right of residence in the child's home Member State Belgium.<sup>17</sup> As with the *de jure* cases, there was no clear element of freedom of movement to the situation in *Ruiz Zambrano*. Instead, Article 20 TFEU was triggered by the home Member State's measure that might result in forcing the child out of the EU, thereby threatening the child's potential use and enjoyment of his Union citizenship rights.

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<sup>15</sup> See in general, Liav Orgad, 'Naturalization' in Ayelet Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

<sup>16</sup> See in general, Francesca Strumia, 'Supranational Citizenship's Enablers: Free Movement from the Perspective of Home Member States' (2020) 45 *European Law Review* 507.

<sup>17</sup> Case C-34/09 *Ruiz Zambrano* EU:C:2011:124. See also Case C-133/15 *Chavez-Vilchez and Others* EU:C:2017:354 and more recently, Joined Cases C-451/19 and C-532/19 *Subdelegación del Gobierno en Toledo (Séjour d'un membre de la famille - Ressources insuffisantes)* EU:C:2022:354.

Essentially, both lines of Article 20 TFEU case law, the *de jure* and the *de facto* situations, affect the same objective: to protect the individual against either formal or effective loss of their Union citizenship rights.<sup>18</sup>

The case law on *de jure* loss of Union citizenship to date consists of three judgments, while a fourth is currently pending before the Court.<sup>19</sup> In the following, it will be argued how the commonalities in the Court's legal reasoning in all three *de jure* judgments, suggest the forming of a specific jurisprudence in this area, in which the ideal of national solidarity echoes throughout.

#### 4 'THE 'BOND OF NATIONALITY' – AFFIRMING THE MEMBER STATES' COMPETENCE IN THE AREA OF NATIONALITY LAW

The *Rottmann* judgment in 2010 established a new frontier of the jurisdictional scope of Union law, in that Article 20 TFEU (formerly Article 17 EC) took effect in a legal situation with no clear cross-border element.<sup>20</sup> It would be followed by the 2019 case of *Tjebbes and Others*, and more recently, the *JY* case in 2022.

##### 4.1 CREATING A JURISPRUDENCE ON THE FORMAL LOSS OF UNION CITIZENSHIP

In *Rottmann*, the Court found that a Member State measure of revoking national citizenship was an issue of Union law insofar as it placed the applicant: '[...] in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto [...].'<sup>21</sup>

*Rottmann* concerned an active measure of denationalisation. Germany, as the home Member State that had granted Mr. Rottmann naturalisation, decided to revoke their naturalisation decision when it surfaced that he had given fraudulent information in his nationality application. In its judgment, the Court highlighted the importance of the Member State having due regard to what it would mean for the individual to lose his Union citizenship, as a direct consequence of the revoked naturalisation decision. The principle of proportionality should be respected when assessing whether the fraudulent behaviour of the applicant should rightfully lead to his loss of nationality.<sup>22</sup>

By contrast, the *Tjebbes and Others* judgment in 2019 dealt with a different issue of denationalisation.<sup>23</sup> Here, the national law at stake was Dutch nationality law, which

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<sup>18</sup> See Opinion of AG Szpunar in Case C-118/20 *Wiener Landesregierung (Révocation d'une assurance de naturalisation)* EU:C:2021:530, para 69.

<sup>19</sup> A fourth case is currently pending at the Court of Justice - Case C-689/21 *X v Udlændinge- og Integrationsministeriet*. See Opinion of AG Szpunar to the case from 26 January 2023 EU:C:2023:53.

<sup>20</sup> C-135/08 *Rottmann* (n 4). See case note by Dmitry Kochenov, 'Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010' (2010) 47(6) *Common Market Law Review* 1831.

<sup>21</sup> C-135/08 *Rottmann* (n 4), para 42.

<sup>22</sup> *ibid* para 55.

<sup>23</sup> Case C-221/17 *Tjebbes and Others* (n 4). See case note by Hanneke van Eijken, 'Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights: ECJ 12 March 2019, Case C-221/17, *M.G.*

ordained, as an automatic consequence of long-term passivity to renew Dutch passports, that Dutch nationals, living in a third country, would experience that their Dutch nationality ‘expired’. The loss of nationality was in these cases not due to an active measure by the Member State to revoke it, but by the *automatic* operation of law. It was not caused by the individual’s fraudulent behaviour, but rather, an automatised consequence of the individual’s passivity. Again, the Court could see an applicability of Union law, in that Article 20 TFEU was activated because of the risk the concerned individuals faced, alongside losing their Dutch nationality, to also lose their Union citizenship.<sup>24</sup> In *Tjebbes*, the Court was clear on that the procedural workings of the Dutch nationality law at issue were off quilt with the requirements of Union law and the principle of proportionality. It was notably the lack of judicial review that the Court criticised:

The loss of the nationality of a Member State by operation of law would be inconsistent with the principle of proportionality if the relevant national rules did not permit at any time an individual examination of the consequences of that loss for the persons concerned from the point of view of EU law.<sup>25</sup>

In addition, the judgment provided what factors should be included in an individual assessment of the consequences of a formal loss of Union citizenship. Elements to consider would be the limitations to the person’s possibility to make use of freedom of movement, including difficulties to re-enter the home Member State or other EU Member States for the purpose of maintaining links with members of his or her family or for the pursuit of professional activity.<sup>26</sup> In this context, the protection of family life of the EU Charter’s Article 7, and, where minors were concerned, the best interest of the child in the Charter’s Article 24(2), should inform the assessment.<sup>27</sup>

The third judgment to date in the line of cases on de jure loss of Union citizenship is the *JY* judgment of 2022.<sup>28</sup> Here, the loss of Union citizenship was due to Austria’s decision to withdraw an assurance of naturalisation that the state had given to a nationality applicant. Austria had given its assurance of future naturalisation into Austrian nationality with the condition that the applicant must firstly renounce her original, Estonian nationality. This was because Austrian nationality law did not recognise the holding of multiple nationalities for persons who were naturalising. As a result, the applicant herself had to initiate the loss of Union citizenship (and thus became stateless) by giving up her original Member State nationality. As per her request, Estonia renounced her Estonian nationality, causing her, it was thought only temporarily, to lose her Union citizenship. When Austria later decided to withdraw their previously made assurance, and deny her naturalisation in what should have become her new *home* Member State, her loss of Union citizenship became permanent. The

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*Tjebbes and Others v Minister van Buitenlandse Zaken*, ECLI:EU:C:2019:189’ (2019) 15(4) European Constitutional Law Review 714.

<sup>24</sup> Case C-221/17 *Tjebbes and Others* (n 4), para 32.

<sup>25</sup> *ibid* para 41.

<sup>26</sup> *ibid* para 46.

<sup>27</sup> *ibid* paras 46-48.

<sup>28</sup> Case C-118/20 *Wiener Landesregierung* (n 4). See case note by Katarina Hyltén-Cavallius, ‘Stateless Union Citizens in a Nationality Conundrum: EU Law Safeguarding Against Broken Promises: ECJ 18 January 2022, Case C-118/20, *Wiener Landesregierung (Revocation of an Assurance of Naturalisation)*, ECLI:EU:C:2022:34’ (2022) 18(3) European Constitutional Law Review 556.

reasoning Austria gave for disqualifying the applicant from attaining Austrian nationality was due to her having committed a number of minor traffic offences, resulting in only pecuniary penalties. The Court called the Austrian measure out as being clearly disproportionate. The permanent loss of Union citizenship could not be motivated by the Member State's reasons for changing its mind *after* an assurance had been given to the applicant.<sup>29</sup> Even though *JY* was already stateless when Austria withdrew the assurance of naturalisation, it was the Austrian naturalisation process as a whole that caused her the definite loss of Union citizenship.<sup>30</sup> In that light, Austria was acting in the role of the *home* Member State that had caused their own (prospective) national to lose her Union citizenship.

#### 4.2 'SOLIDARITY' AS 'THE BEDROCK OF THE BOND OF NATIONALITY'

In all three cases above, the Court, while enforcing the applicability of Article 20 TFEU, also had to determine the Member States' sphere of competence and discretion in this area. Since nationality law, governing the acquisition and loss of national citizenship, is itself a national competence, the demands of Union law should arguably show a relative high degree of respect.<sup>31</sup> In all three cases, the Court found that the Member States' respective measures against the individuals concerned were in and of themselves legitimate. This was so, since 'it is legitimate for a Member State to wish to protect the special relationship of *solidarity* and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality'.<sup>32</sup>

'Solidarity' thereby, together with 'good faith' in the cases on the de jure loss of Union citizenship, is a qualitative component of the ideal nationality bond formed between a state and its national. The reasoning in all three judgments affirm that the Court accepts that the bond of nationality is the Member States' prerogative to define and regulate. The ideal of solidarity embedded therein is thereby one of *national* solidarity, between a state and its nationals.<sup>33</sup> From the point of view of Union law, the importance of the bond of nationality legitimises the public interest of the Member State in some cases to dissolve that bond. At issue before the Court has been, respectively, the measure to revoke a naturalisation that has been granted based on the fraudulent information of the applicant (*Rottmann*); to revoke naturalisation when the individual's attachment to the Member State has been lost (*Tjebbes*), and; to deny naturalisation for an applicant who no longer is deemed to fulfil the national requirements for naturalisation (*JY*). However, despite affirming the legitimacy of the public interest of the Member States to regulate for both naturalisation and denationalisation in their nationality laws, the Court has made clear that these rules, as well as their procedures, must respect Union law. As pointed out in the judgments discussed above, the principle of

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<sup>29</sup> Case C-118/20, *Wiener Landesregierung* (n 4), para 73.

<sup>30</sup> On this point, see analysis by Ilaria Gambardella, 'JY v Wiener Landesregierung: Adding Another Stone to the Case Law Built up by the CJEU on Nationality and EU Citizenship' (2022) 7 *European Papers* 399.

<sup>31</sup> HU Jessurun d'Oliveira, Gerard René de Groot and Anja Seling, 'Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, *Janko Rottman v. Freistaat Bayern Case Note 1* Decoupling Nationality and Union Citizenship? *Case Note 2* The Consequences of the *Rottmann* Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters' (2011) 7(1) *European Constitutional Law Review* 138, 148.

<sup>32</sup> Case C-118/20 *Wiener Landesregierung* (n 4), para 52; Case C-221/17 *Tjebbes and Others* (n 4), para 33, Case C-135/08 *Rottmann* (n 4), para 51 (emphasis added).

<sup>33</sup> See Gill-Pedro in this Special Issue.

proportionality as well as the Charter are of central importance. Notably, this concerns the Charter's Articles 7 and 24(2), respectively the right to respect for private and family life and the protection of the best interests of the child.<sup>34</sup>

Solidarity, as an aspect of the bond of nationality also appears in the application for a preliminary reference made by the High Court of Eastern Denmark (*Østre Landsret*) to the Court on the interpretation of Article 20 TFEU in a currently pending case.<sup>35</sup> In the application, the referring court, as well as the parties, variously refer to 'solidarity', 'loyalty', and 'good faith' when designating the 'genuine link' between a citizen and their state of nationality. The phrasing is equally adopted by Advocate General Szpunar in his Opinion to the pending case, thereby affirming 'solidarity' as an established piece of the legal language that describes 'the bond of nationality' in Union citizenship law.<sup>36</sup>

### 4.3 RESPECTING NATIONALITY LAW BUT PROTECTING UNION CITIZENSHIP

As argued above, Union citizenship law respects the particularities of nationality law. This follows what has been recognised in international law, notably in the well-known judgment by the International Court of Justice (ICJ) in the 1955 case of *Nottebohm*.<sup>37</sup> With that judgment, the ICJ affirmed the sovereign right of each state to enact its own laws on who may become, and remain, its nationals.<sup>38</sup> However, in the EU Court's interpretation, this competence is constrained by the legal exigences that Union law puts on the Member States in the light of Union citizenship being 'the fundamental status' of the nationals of the Member States.<sup>39</sup>

A clear obligation that the protection of Union citizenship requires from the home Member State is to respect their *right of redress* against a Member State decision to dissolve that very bond. This was a central component to the Court's judgment in *Tjebbes and Others*, and will surely be as central in the forthcoming judgment in *X v. Udlændinge- og Integrationsministeriet*. Not only should the individual be able to demand a reassessment of a decision to be excluded from belonging to the nation. Union law also requires that the Member State provides for judicial review, specifically considering what a denationalisation decision means for the individual's belonging to the supranational status of Union citizenship.<sup>40</sup>

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<sup>34</sup> Case C-118/20 *Wiener Landesregierung* (n 4), para 61 and case law cited there.

<sup>35</sup> See Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, made by Østre Landsret (Denmark) on 16 November 2021 in Case C-689/21 *X v Udlændinge- og Integrationsministeriet*.

<sup>36</sup> See Opinion of AG Szpunar in Case C-689/21 (n 19), paras 52, 55, 57-58.

<sup>37</sup> ICJ, *Nottebohm* judgment (*Lichtenstein v. Guatemala*), 6 April 1955, Second Phase, Judgments [1955] ICJ 1, *ICJ Reports 1955*, 4. On the link between the Article 20 TFEU jurisprudence and *Nottebohm*, see also Katja Swider, 'Legitimizing Precarity of EU Citizenship: Tjebbes Case C-221/17, M.G. Tjebbes and Others v. Minister van Buitenlandse Zaken, Judgment of the Court (Grand Chamber) of 12 March 2019, EU:C:2019:189' (2020) 57(4) *Common Market Law Review* 1163, 1168-1169.

<sup>38</sup> *Orgad* (n 15) 348.

<sup>39</sup> Case C-184/99 *Grzelczyk* (n 2), para 31.

<sup>40</sup> Case C-221/17 *Tjebbes and Others* (n 4), para 42 and Case C-689/21 *X v Udlændinge- og Integrationsministeriet*. See Opinion of AG Szpunar in Case C-689/21 (n 19), para 46.



## 5 THE UNION LAW IDEAL OF THE BOND OF NATIONALITY

Based on the discussion above, the ideal bond of nationality in the Court's case law on de jure loss of Union citizenship, consists of two stilts: that of *solidarity* and *good faith* between an individual and a state. These are the factors that may result in a successful naturalisation process under the state's nationality laws. Conversely, the lack thereof, due to the individual's fraudulent or unlawful behaviour, as in *Rottmann* and *JY*, or to the individual's perceived lack of attachment to the Member State, as in *Tjebbes* and the currently pending *X v Udlændinge- og Integrationsministeriet*, may justify a measure to respectively, revoke a decision of naturalisation or of promised naturalisation, or by the operation of law automatically dissolve nationality.

### 5.1 THE INDIVIDUAL'S ROLE IN THE BOND OF NATIONALITY

By confirming the legitimacy of these Member State measures – without necessarily finding them to be proportionate in each case – the Court, in its judgments, is also giving away an implicit definition of what the bond of nationality requires from the individual. The applicant in *Rottmann* had failed in the practice of solidarity and good faith by providing false information in his naturalisation application.<sup>41</sup> Honesty is therefore a component of what the bond of nationality should require from the individual in his or her dealings with the state, and the lack thereof might result in the dissolving of that bond. As for *JY*, the Court recognised that the individual's unlawful conduct may legitimately result in the Member State's denial of naturalisation, albeit that in the case at hand, it was deemed to be a disproportionate measure.<sup>42</sup>

The situation in *Tjebbes and Others*, similar to that of the currently pending *X v. Udlændinge- og Integrationsministeriet*, points to another component; that of the individual's manifest interest in maintaining a nationality link with a Member State. The Court finds it legitimate that a Member State requires from its nationals that, if they move out of the EU, it is up to each person to maintain an active relationship to their Member State of nationality. If not, the bond of nationality may, under certain conditions, lawfully be dissolved.<sup>43</sup> In *Tjebbes and Others*, the act of renewal of passport through contacts with consular bodies of the Member State in third states, would have been the way for the individual to maintain and preserve their bond of nationality.

However, there is something uneven in the assessment of the bond of nationality in these cases. In the judgments so far, the Court has focussed on the ways in which, *the individual* may fail in maintaining the bond of nationality, which in turn legitimises the Member State's wish to cut them off from their nationality link. It can be asked wherein the bond of nationality the expression of solidarity directed *from* the Member State towards their nationals is found. The following is a reflection on how the ideal of national solidarity is implied also in what Union law requires from the Member States in their relationship to their own nationals, in the name of Union citizenship.

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<sup>41</sup> Case C-135/08 *Rottmann* (n 4), paras 50-51.

<sup>42</sup> Case C-118/20 *Wiener Landesregierung* (n 4), para 57.

<sup>43</sup> Case C-221/17 *Tjebbes and Others* (n 4), paras 37-38.

## 5.2 THE MEMBER STATE'S ROLE IN THE BOND OF NATIONALITY

While the de jure case law highlights the procedural requirements for the lawfulness of denationalisation, the de facto case law on Article 20 TFEU also embodies the ideal of national solidarity. In the following, it will be argued that 'solidarity' can also be said to characterise the home Member State's obligations under Union law towards its returning nationals, who have made use of freedom of movement under Article 21 TFEU. In turn, this links the logic of the home Member State's obligations in relation to their own nationals under freedom of movement to its obligations to their own nationals under Article 20 TFEU.

### 5.2[a] *The solidaristic reception of the returning Member State national and his or her family members*

The judgment in *Eind* affirmed how Union law protects the Union citizen's right to return to their Member State of nationality as an integral part of their use of freedom of movement.<sup>44</sup> While a Member State's respect for their own nationals to leave and re-enter the state's territory stems from international law obligations, Union law ensures additional protection of these rights. The expression of a solidaristic bond between the Member State and its national in this regard lies in the very unconditional nature of the Union citizen's right to return after exercising freedom of movement. As was the situation in *Eind*, the national citizen cannot be demanded to return as an economically active person, nor as having sufficient resources not to be a financial burden on the state's public finances.<sup>45</sup> While these are legitimate and lawful requirements for the *non-national* Union citizen, who wishes to establish residence in a host Member State, the national citizen cannot be required to do so, but should be received and re-accepted by the home Member State upon return. For this reason, free movement law also aims to strike down any indirect discrimination that a Member State exerts on one of its returning national citizens, as a result of them having made use of freedom of movement.<sup>46</sup> Unequal treatment between 'static' nationals and 'moving' nationals must be justified and proportionate or is otherwise unlawful under Article 21 TFEU.

The absolute right to return to the home Member State is essential as the safety net for the Union citizen whose use of freedom of movement to a host Member State does not work out. If residence in a host Member State cannot be maintained, for economic reasons, or because of the individual's conduct, the home Member State must re-accept the individual into its national solidarity circle.

In addition, and what is perhaps an even more powerful demand that Union law puts on their Member States in their relation to their returning nationals, is to solidarically receive the returning nationals' family members. As is clear from the reading of *Eind*, together with *O and B*, the Member State of nationality must accept not only the right to return of their national, but also the rights of his non-national family members. As the Court reasoned in *Eind*, the continuation of the derived residence rights of such family members, which have been established in a host Member State, must be valid *per analogy*, when the family comes

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<sup>44</sup> Case C-291/05 *Eind* EU:C:2007:771. See also Case C-456/12 *O. and B.* EU:C:2014:135.

<sup>45</sup> Case C-291/05 *Eind* (n 44), para 32.

<sup>46</sup> See judgments like Joined Cases C-523/11 and C-585/11 *Prinz and Seeberger* EU:C:2013:524, Case C-224/98 *D'Hoop* EU:C:2002:432; Case C-224/02 *Pusa* EU:C:2004:273.

back to settle in the Union citizen's home Member State.<sup>47</sup> Union citizens would be deterred to leave their home Member State and pursue freedom of movement elsewhere, if they were not sure that they could return to their home Member State with their close family members who might have joined them in the host Member State.<sup>48</sup> In the *O and B* case, the reasoning from *Eind* was held to be relevant also for Union citizens who have only resided as non-economically active persons in a host Member State. So long as their residence has been 'sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State', their right of residence in the host Member State should apply by analogy in the home Member State.<sup>49</sup> This right to family reunification in the Union citizen's home Member State upon return may not be conditioned by demands of economic activity or resourcefulness, as this would render the right to return itself conditional and might dissuade the Union citizen from making use of freedom of movement in the first place.<sup>50</sup>

5.2[b] *The acceptance of the naturalising Union citizen's continued right to family reunification*

Following a similar logic to that which applies to circular freedom of movement, the Court in the case of *Lounes* extended a protection for continued derived residence rights of third-country national family members, when the primary rights-bearer, the Union citizen in the family, naturalises in the host Member State. In *Lounes*, a Union citizen with permanent residence status chose to naturalise and become a national in her host Member State.<sup>51</sup> According to the nationality law's conditions, she had fulfilled her part for the bond of nationality to be formed between her and the host Member State, so as to make this state her new *home* Member State. However, her act of naturalisation challenged the validity of her third-country national spouse's derived residence rights that had been established when she was a non-national Union citizen, exercising her right to freedom of movement. The Court could not accept a loss of family reunification rights as being a consequence of a Union citizen's choice to take the most definitive step of integration in a host Member State after permanent residence status, namely to naturalise into one of the Member State's own nationals. This was according to the 'underlying logic of gradual integration that informs Article 21(1) TFEU', to facilitate and encourage the integration of Union citizens and their family members in their host Member States.<sup>52</sup> As a result, when accepting the resident Union citizen as one of its own nationals, the Member State must accept the rights of family reunification that the citizen has already been granted under Union law based on freedom of movement.

The solidaristic expression in the newly formed bond of nationality between a Union citizen and the Member State that goes from being *host* to *home* lies in the obligation to accept

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<sup>47</sup> Case C-291/05 *Eind* (n 44), para 39. See also Case C-456/12 *O. and B.* (n 44), para 50.

<sup>48</sup> Case C-291/05 *Eind* (n 44), paras 35-39.

<sup>49</sup> Case C-456/12 *O. and B.* (n 44), para 51.

<sup>50</sup> Jeremy B Bierbach, 'The Reality Test of Residence Goes through the Looking Glass: Court of Justice of the European Free Trade Association States (EFTA Court), Judgment of 26 July 2016, Case E-28/15, *Yankuba Jabbi v The Norwegian Government, Represented by the Immigration Appeals Board*' (2017) 13(2) *European Constitutional Law Review* 383, 395-396.

<sup>51</sup> Case C-165/16 *Lounes* EU:C:2017:862.

<sup>52</sup> *ibid* para 58.

the accompanying third-country national family members' continued right of residence as rights that have already been created under Union law.

Through the moving Union citizen's naturalisation in the host Member State, the connection between EU free movement law and Union citizenship status comes full circle and the rights incurred under Article 21 TFEU meet the exigences of Article 20 TFEU. Solidarity on behalf of the home Member State vis-à-vis its own national and their third-country national family members is an implicit ideal also in the line of case law on *de facto* loss of Union citizenship rights.

#### 5.2[c] Member State solidarity and *de facto* loss of Union citizenship rights under Article 20 TFEU

The *Ruiz Zambrano* line of cases concerns the effective, practical loss of the 'genuine enjoyment' of the rights attached to Union citizenship.<sup>53</sup> For the purpose of protecting against the disproportionate risk of such effective loss of Union citizenship rights, the home Member State must, into its solidarity circle, accept the third country national family members of their own national Union citizens where there is such a relationship of dependency that the Union citizen would be compelled to depart from the EU if the third country national was not granted residence rights in their home Member State.<sup>54</sup> The home Member State must welcome those third country national family members that are necessary for their own national to be able to enjoy their Union citizenship rights and to remain within the EU.

It is, to that end, the home Member State's role in the bond of nationality to solidaristically provide a legal space for their national Union citizen's third-country national family member, so they can reside lawfully and be the necessary support for the Union citizen that the latter depends on. Any restriction of this right of the Union citizen to reside in their Member State of nationality with their essential family members must be proportionate and respect the fundamental rights standards of the Charter.<sup>55</sup>

While the *de jure* loss of Union citizenship may be caused mostly by the individual's own behaviour, the *de facto* loss of Union citizenship or the restrictions posed to freedom of movement under Article 21 TFEU are due to the behaviour of the home Member State in its relationship to its own, national Union citizens .

## 6 CONCLUSION

If 'solidarity' has lost its legal spark for the relationship between the Union citizen and their *host* Member State, it remains relevant to the continuous legal development of the exigences of Union citizenship and EU free movement law on the *home* Member State's relationship to its nationals. When enacting a formal loss of Union citizenship by its nationality laws, Union law requires that the Member States provide judicial review of the consequences that loss will have for the individual whose nationality bond the state wishes to dissolve. In addition, as an obligation stemming from international law, the home Member State is where a Union

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<sup>53</sup> Case C-34/09 *Ruiz Zambrano* (n 17), para 42.

<sup>54</sup> See recent judgment in Joined Cases C-451/19 and C-532/19 *Subdelegación del Gobierno en Toledo* (n 17), paras 83-86.

<sup>55</sup> *ibid.*

citizen must always have an unconditional right to return to, after having made use of freedom of movement and under Article 21 TFEU. The ideal of national solidarity is here embedded in the Union law requirement that the Union citizen and the family members which they have established a family life with in a host Member State must be welcomed into the national solidarity circle as well. Likewise, Article 20 TFEU, with its demand of the effectiveness of the 'genuine enjoyment' of Union citizenship rights, requires that, if a Union citizen cannot make use of freedom of movement to achieve family reunification with their third country national family member upon whom they depend, the Member State of nationality must allow for that family member to reside in that state together with the national Union citizen. This constitutes part of the responsibility that the Member States have undertaken when forming the status of Union citizenship and adopting Article 20 TFEU. In the years ahead, the material requirements encircling the solidarity constituting the Member States' bond of nationality to their own nationals will likely receive evermore attention in Union law.

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