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EU citizenship misunderstood? The discriminatory effects of Union citizenship as evidenced by the family reunification case law

Introduction

EU citizenship is misunderstood. Not just by the European Court of Justice, but by many in the EU legal community. That is the premise that is explored and defended here. Because of two common misapprehensions, EU citizenship has facilitated discrimination among EU citizens. This is a worrisome conclusion. Although citizenship is a widely contested concept, few will disagree that citizenship is 'a status of equal membership within a bounded polity'.[1] If EU citizenship contributes to discrimination instead of mitigating it, one may wonder whether it is a concept worthy its name.

That EU citizenship has not managed to ensure equal treatment among Union citizens is, of course, not a new assertion. Many have lamented the existence of discrimination in a citizens' Europe.[2] Though I agree with those scholars that the present-day situation is problematic, my solution to the problem differ. EU citizenship has not just been incapable of solving the discriminatory treatment of EU citizens, it is EU citizenship that caused the discriminatory treatment. This has widely been ignored. Paradoxically, those lauding the concept of Union citizenship often have simultaneously praised the ECJ for the decisions creating discrimination among Union citizens.

This is due to two common misunderstandings about EU citizenship, which have plagued this concept since its inception. In fact, the problems can be traced back until its introduction. The first problem is the perception that the ideas advanced by AG Jacobs in his Opinion in *Konstantinidis* are worth copying in a citizens' Europe.[3] Though the learned AG developed his ideas with the citizen in mind – *civis europeus sum* –[4] the ideas violate the basic citizenship premise of equality. If we want to take the concept of EU citizenship seriously, we should dismiss the viability of the AG's ideas out of hand.

The second problem is the believe that Union citizenship has to be markedly different from market citizenship. This is the idea that a proper form of citizenship cannot be based on free movement. The common assumption is that, if to be taken seriously, EU citizenship should go beyond movement. Though the idea that citizenship is more than an economic concept is not contested, what is challenged here is the dichotomy created by scholars between market citizenship and Union citizenship. Although there might be instances where EU citizenship should offer something extra than market citizenship, it is claimed that the market citizen-EU citizen dichotomy is flawed and that EU citizenship is a proper form of citizenship *because* the right to free movement *and* the right to non-discrimination form its core. That EU citizenship is often considered to be a limited form of citizenship because of its 'market' rationale demonstrates the wide misunderstanding of where EU citizenship is about.

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[1] Rainer Bauböck and Virginie Guiraudon, 'Introduction: Realignments of citizenship: Reassessing rights in the age of plural membership and multi-level governance' (2009) 13 CitSt 439, 439.

[2] Dimitry Kochenov, 'Citizenship without Respect; The EU's Troubled Equality Ideal' (2010) JMWP 08/10; Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 LIEI 43; Camille Dautricourt and Sebastien Thomas, 'Reverse Discrimination and Free Movement of Persons Under Community Law: All for Ulysses, Nothing for Penelope' (2009) 34 EurLRev 433; Dimitry Kochenov, 'Equality Across the Legal Orders; Or Voiding EU Citizenship of Content' in Elspeth Guild, Cristina Gortázar Rotaeche, and Dora Kostakopoulou (eds), *The Reconceptualisation of European Citizenship* (Brill 2014).

[3] Opinion of AG Jacobs in C-168/91 *Konstantinidis* [1993] ECR I-1191.

[4] Ibid para 46.

Unfortunately, also the ECJ has misread EU citizenship. Nowhere is this as visible as in the family reunification case law, particularly in the *Metock* case.[5] Though the case is full of references to Union citizenship and the judges seemed to be inspired by citizenship thinking, the ECJ did nothing but undermine the idea of Union citizens as equals; the ECJ only showed its disrespect for the concept of Union citizenship. Unfortunately, later case law only upheld this decision.

These decisions should have stunned legal commentators, would they have taken EU citizenship seriously. On the contrary, the ECJ was widely lauded for its decisions, sometimes even for taking EU citizenship seriously.[6] The rather unfortunate conclusion must, therefore, be that the misunderstandings are deeply rooted in the EU legal community. As a result, moreover, the wrong solutions have been proposed for remedying the current equality problems. Instead of a levelling up, the ECJ needs to level down.[7] It is argued that if the ECJ is to take Union citizenship seriously, it needs to properly balance the right to free movement against the right to non-discrimination. So, in case there is no actual impediment to the right to move and reside, the moving EU citizen needs to comply with the same rules as the nationals of the host state. In concrete, this means that the ECJ needs to reconsider *Metock* and subsequent decisions and build its case law on the principles underlying *Akrich*.[8] As this decision has been qualified as 'the worst judgment in the long history of the Court of Justice',[9] it is probably best to clarify straight away that it is not suggested to return to *Akrich*. Despite all its weaknesses, however, it is argued that the ECJ in *Akrich* was, probably without being aware of it, inspired by citizenship. The principles underlying that decision are the principles upon which EU citizenship needs to be build.

In part 1, it will be explained why AG Jacobs' notion of *civis europeus sum* and the dichotomy between market citizenship and EU citizenship is so problematic. This will be followed by a brief overview of the family reunification case law in part 2. In part 3, then, it is argued how this case law suffers from these two problems and, therefore, undermines the foundations of Union citizenship. A solution is offered in part 4.

1. EU citizenship misunderstood

From its inception, the wrong assumptions have guided the development of EU citizenship. EU citizenship has been misunderstood by many, scholars, Advocates General, and the ECJ alike. Two of these misconceptions will be discussed here, since these have probably had the biggest impact on the case law of the ECJ, as witnessed by the family reunification case law. The first is the idea that the moving EU citizen can be privileged over the static one. Although few argue for this explicitly, it is an assumption implicit in the work of many. The second idea that has also received wide support is that the concept of Union citizenship is or should be completely different from market citizenship. Because both ideas are so prevalent in the literature, it should come as no surprise that the ECJ has been affected by them as well. Unfortunately, therefore, the case law has undermined the concept of EU citizenship.

1.1 Privileging the moving Union citizen

[5] Case C-127/08 *Metock and Others v Minister for Justice* [2008] ECR I-6241.

[6] See, for example, Anastasia Iliopoulou Penot, 'The Transnational Character of Union Citizenship' in Michael Dougan, Niamh Nic Shuibhne, and Eleanor Spaventa (eds), *The Empowerment and Disempowerment of the European Citizen* (Hart 2012) 15, 29.

[7] On the idea of levelling up and levelling down see: Kees Groenendijk, 'Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin' in Elspeth Guild, Cristina J Gortázar Rotaeche, and Dora Kostakopoulou (eds), *The Reconceptualisation of European Union Citizenship* (Brill 2014) 169, 182.

[8] Case C-109/01 *Akrich* [2003] ECR I-9607.

[9] Steve Peers, 'Free Movement, Immigration Control and Constitutional Conflict' (2009) 5 EuConst 173, 178.

Almost as an afterthought, AG Jacobs spelled out his ideas on the scope of fundamental rights within the EU. He had already dismissed the treatment of the German authorities of Mr Konstantinidis because of the discriminatory nature,[10] but felt the need to elaborate on the issue further. The AG wondered whether the treatment of Mr Konstantinidis would also be contrary to the right to free movement if it is not discriminatory, even though it infringes Mr Konstantinidis' fundamental rights.[11] He answered this question in the positive and held that a Community national who goes to another Member State is

'entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values (…) In other words, he is entitled to say '*civis europeus sum*' and to invoke that status in order to oppose any violation of his fundamental rights'[12]

Any Union citizen who has made use of the rights to free movement will, according to this proposal, be able to invoke the fundamental rights protected by the EU, even if that does not contribute to the protection of that EU citizen's right to move and reside.

AG Jacobs realised that his proposal risked creating reverse discrimination, but did not 'think that the danger of reverse discrimination can be a valid argument for limiting the scope of the rights conferred by the Treaty on persons who seek their livelihood in another Member State'.[13] AG Jacobs believed that that his proposal followed logically from the rights incorporated in the Treaties. I beg to differ. The Treaties protect the right to move and reside, not the fundamental rights of the EU citizen who has exercised this right, unless, of course, the fundamental rights violation is an impediment to the free movement rights.

A much more fundamental objection exists, however. Eeckhout, though not unsympathetic towards Jacobs' ideas hinted at the problem. Eeckhout explains that it would raise the question 'why only the *moving* European citizen'[14] is protected. Indeed, why would the moving Union citizen be granted 'additional'[15] rights if this will not facilitate the exercise of the right to move and reside or any other EU citizenship right? Also AG Sharpston expressed these concerns. She submitted that '[i]t would be paradoxical (to say the least) if a citizen of the Union could rely on fundamental rights under EU law when exercising an economic right to free movement as a worker (…) but could not do so when merely 'residing' in that Member State'.[16]

Though both Eeckhout and Sharpston touch upon this very important issue, they fail to address the most fundamental problem. Granting moving Union citizens additional rights is not just 'paradoxical', it is hugely problematic from the perspective of Union citizenship. It conflicts with and even undermines the idea of EU citizenship as a status of equals. EU citizenship not only symbolises

[10] Opinion of AG Jacobs in C-168/91 *Konstantinidis* (n 5), para 31.
[11] Ibid para 45.
[12] Ibid para 46.
[13] Ibid para 49.
[14] Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) CMLRev 945, 972.
[15] Granting moving Union citizens rights in addition to those possessed by nationals of the host state is precisely what AG Jacobs had in mind. The moving Union citizen is not entitled only 'to enjoy the same living and working conditions as nationals of the host State; he is *in addition* entitled to assume that, wherever he goes to (…) he will be treated in accordance with a common code of fundamental values'. Opinion of AG Jacobs (n 38) para 46 (Italics added).
[16] Opinion of AG Sharpston (n 45) para 281.

the link between the Union citizen and the EU. Probably even more important in the current state of the Union, it also allows the national of one Member State to become part of the community of another Member States. The right to non-discrimination on the basis of nationality forms the key to becoming part of the community of another Member State and to integrate there. To foster integration in the host Member State the moving Union citizen should be allowed to enjoy the same rights as the nationals of that Member State. Non-discrimination, when applied properly, however, also implies that the Union citizen should accept the rules and standards in the host Member State when they are not as beneficial as the ones in the home Member State. When applied properly, the concept of Union citizenship not only ensures that the moving Union citizen is not seen as less worthy than the national of a Member State, but also that it is not considered as being more worthy of enjoying certain rights.

Craig's assertion that it could be argued that 'the iteration in more recent jurisprudence to the effect that "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality (…)",[17] is fertile terrain for [the adoption of AG Jacobs' ideas]'[18] is both paradoxical and problematic. The paradox is rather obvious. How can one on the one hand enable 'those who find themselves in the same situation to enjoy the same treatment', while at the same time granting additional rights to the EU citizen that has moved? Someone might be inclined to answer that the moving and static EU citizen are not in the same situation because of the movement. However, this is to misunderstand where EU citizenship is about and demonstrates why Craig's claim is so problematic. The EU citizen who has exercised the right to move and reside should be treated the same as the national of the host Member State. This flows directly from the right to non-discrimination on the basis of nationality. To grant additional rights to the Union citizen that has moved is to violate this right. This is what equal treatment entails, this is what Union citizenship is about, and this is how the ECJ should interpret the law.

As we will see below, *Metock* is in many ways an exact copy of AG Jacobs' Opinion and, therefore, suffers from the same deficiencies. Moreover, those scholars that have applauded the ECJ for this decision have also, if only implicitly, accepted the idea that it is just to privilege the moving EU citizen. Prior to moving on to a discussion of the family reunification case law, however, the second problem in the mainstream conception of EU citizenship needs to be discussed.

1.2 The market citizen – EU citizen dichotomy

The idea that a proper citizenship needs to be different or comprise more than free movement rights goes a long way back. Already in the 1970s, Sir Plender claimed that the extent to which the free movement of workers could be considered an 'incipient' form of citizenship was limited because of the need to move to another Member State.[19] Because of the centrality of the free movement rights, and the limited possibility to invoke EU rights against one's own Member State,[20] the free movement of workers' citizenship characteristics were very minimal. Viewed from such a perspective, it is no

[17] Craig referred to: Case C-184/99 *Grzelczyk* [2001] ECR I06193, para 31.

[18] Paul Craig, 'Fundamental Rights' in Philip Moser and Katrine Sawyer (eds), *Making Community Law: The Legacy of Advocate General Jacobs at the European Court of Justice* (Edward Elgar 2008) 54, 57.

[19] Richard Plender, 'An Incipient Form of European Citizenship' in Francis Jacobs (ed), *EU Law and the Individual* (North Holland 1976) 39.

[20] Ibid 45.

surprise that Sir Plender argued, after the recent EU citizenship case law,[21] that EU citizenship is finally developing into a citizenship proper, though with only an 'incipient substance'.[22]

This view represents a generally shared idea that in order to live up to its promise, EU citizenship has to free itself from its market paradigm. To stop thinking of EU citizenship as a symbolic concept, more substance has to be given to it than merely the right to move and reside.[23] That a proper form of citizenship needs to go beyond free movement rights has been the dominant perspective on EU citizenship from its inception until today. Shortly after the introduction of Union citizenship, Everson claimed that 'it is clear that the status of Union citizenship is intended to contrast with that of market citizenship'.[24] And only very recently it was held that we are witnessing a 'transition from free movement in the internal market to EU citizenship as a fundamental status'.[25] In other words, EU citizenship cannot be the fundamental status if its core is comprised of free movement rights. But why is this so? And why needs Union citizenship to contrast with market citizenship? In all likeliness, this is deemed to be so because it is believed to be so uncommon for citizenship to be centred around freedom of movement.[26]

Examples abound, however, which demonstrate that the right to move can be a core right of citizens. In virtually all federal polities, the federal citizen has the right to move to and reside in another federal subunit and be treated equally to the citizens of that subunit.[27] That federal polities grant the right to free movement and non-discrimination to all federal citizens is not surprising. If anything, the federal level should allow all its citizens to reside wherever they prefer in the federal territory and to be treated equally to the other citizens residing there. That these rights are also EU citizenship's most important rights should, thus, not surprise. That the EU's characteristics are similar to many other federal polities is beyond any doubt,[28] though the division of powers between the statal and federal

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[21] Case C-135/08 *Rottmann* [2010] ECR I-1449; Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177; Case C-434/09 *McCarthy* [2011] ECR I-3375, para 47; Case C-256/11 *Dereçi and Others* (nyr), para. 64; Case C-40/11 *Iida* (nyr), para 71.

[22] Dimitry Kochenov and Richard Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 EurLRev 369.

[23] Hans Ulrich Jesserun d'Oliveira, 'Union Citizenship: Pie in the Sky?' in Allan Rosas and Esko Antola (eds), *A Citizens' Europe: In Search of a New Order* (Sage 1995) 58; PJG Kaptein and P VerLoren van Themaat (LW Gormley (ed), *Introduction to the Law of the European Communities* (Kluwer Law International 1998) 174; Brian Wilkinson, 'Towards European Citizenship? Nationality, Discrimination, and Free Movement of Workers in the European Union' (1995) 1 EPL 417; Stephen Hall, *Nationality, Migration Rights and Citizenship of the Union* (Martinus Nijhoff 1995) 8-13.

[24] Michelle Everson, 'The Legacy of the Market Citizen' in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (OUP 1995) 73, 73. For a recent discussion of the market citizen in EU law see: Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CMLRev 1597.

[25] Elspeth Guild, Cristina J Gortázar Rotaeche, and Dora Kostakopoulou (eds), *The Reconceptualisation of European Union Citizenship* (Brill 2014) 2.

[26] Hans Ulrich Jessurun d'Oliveira, 'European Citizenship: Its Meaning, Its Potential in Renaud Dehousse (ed) *Europe After Maastricht: An Ever Closer Union?* (LBE 1994) 126, 147; Kochenov and Plender (n 20).

[27] Christoph Schönberger, 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism' (2007) 19 ERPL 61; Willem Maas, 'Equality and the Free Movement of People: Citizenship and Internal Migration' in Willem Maas (ed), *Democratic Citizenship and the Free Movement of People* (Martinus Nijhoff 2013) 9; Peter H Schuck, 'Citizenship in Federal Systems' (2000) 48 AJCompL 195; Denis Lacorne, 'European Citizenship: The Relevance of the American Model' in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision* (OUP 2003) 427.

[28] Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009); Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* ((OUP 2003); Anand Menon and Martin A Schain (eds) *Comparative Federalism: The European Unon and the United States in Comparative Perspective* (OUP 2006). It has also been argued that the EU is currently in a situation similar to early forms of federalism: Larry Catá Backer, 'The Extra-National State: American Confederate Federalism and the European Union' (2001) 7 ColJEurL 173.

level is, obviously, different.[29] Also the EU citizen should thus be allowed to move to and reside in any part of EU territory and be treated similarly to the national of the Member States. That the right to move and the right to non-discrimination form the core of EU citizenship should, thus, not be regarded as an oddity. What is meaningless about a concept that allows someone to move from his own Member Sate to another, find work there, build a life there, and to be regarded as one of that Member State own nationals? It should, on the contrary, be regarded as the strength and beauty of EU citizenship.[30] Unfortunately, this does not seem to be the predominant vision of scholars and neither of the ECJ, as is also demonstrated by the family reunification case law.

As any other federal citizenship, EU citizenship needs to be understood as creating a vertical as well as a horizontal link. Taking this horizontal (EU citizens – Member States) link into consideration not only demonstrates that EU citizenship is not such a disappointing concept as is often assumed, it should also change our perception on equality within the EU. Federal citizens enjoy 'a constitutionally protected membership in two polities, one regional and one central'.[31] Union citizenship signifies the membership of two separate but interrelated polities. Consequentially, equal treatment should be guaranteed at both levels, whereby the decision whether to grant equal protection to the Union citizen at EU or Member State level depends on the sphere within the Union citizens finds himself. If the situation is covered by EU rights, all EU citizens, no matter in which Member States they reside, should be treated equally. Is a situation covered by the rights of a Member State, on the other hand, that Member State needs to give equal treatment to all EU citizens in its territory. Federal citizens, thus, 'stand in a position of at least formal equality with respect to the national government, even if differences are allowed among the subnational governments'.[32] Though this may sound like a rather obvious conclusion, it is generally ignored by the proposed solutions against the discrimination resulting from the case law of the ECJ. The problematic aspects of these solutions are further discussed below.

2. The Family Reunification case law

Already in the 1960s, it was realised that Member State nationals were unlikely to make use of their free movement rights would their family members not be allowed to join them. According to Article 10(1) of Regulation 1612/68, the spouse and descendants, if under the age of 21 or depending on the worker, had the right to settle themselves with the Community national worker in another Member State.[33] By protecting the right to family life, the right to move and reside of workers was facilitated. This protection is now offered by the Citizenship Directive.

Despite the seeming clarity, many difficult issues have arisen since the 1960s. Albeit one exception, this right has been interpreted very broadly. The ECJ's rationale behind this is to give maximum protection to the right to move and reside. Where no movement has taken place, Union

[29] This should not prevent one from using the language of federalism in EU context. Federalism is 'agnostic as regards the substantive federal balance'. Schütze (n 26) 5.

[30] For this vision see also: Justine Lacroix, 'Is transnational citizenship (still) enough?' in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart 2014; forthcoming).

[31] Richard Vernon, 'The Federal Citizen' in Thomas MJ Bateman, Manuel Mertin, and David M Thomas (eds), *Braving the New World: Readings in Contemporary Politics* (Nelson 2000) 149, 150.

[32] Vickie C Jackson, 'Citizenship and Federalism' in T Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Brookings Institution Press 2001) 127, 155.

[33] Council Regulation (EEC) 1612/68 concerning the free movement for workers within the Community [1968] OJ L257. Kees Groenendijk, 'Family Reunification as a Right under Community Law' (2006) 8 EJML 215. For the freedom to provide services and the freedom to establishment see: Council Directive (EEC) 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L172.

citizens cannot rely on EU law to ensure family reunification,[34] as is demonstrated by the *Morson and Jhanjan* case. Two Suriname nationals, Mrs Morson and Mrs Jhanjan, wanted to reside in the Netherlands with their children. since their children, however, had never made use of the right to move and reside in another country, they could not rely on the Treaty provisions on the free movement of workers.[35] Also in later family reunification cases, the ECJ has confirmed that situations lacking a cross-border element are not covered by EU law.[36]

In the case of movement, on the contrary, Union citizens derive extensive protection from Union law. The *Singh* case provides an excellent illustration. Mr Singh, an Indian national, had married a UK national in the UK. Shortly, after their wedding, they moved to Germany for economic purposes. Upon their return, two years later, Mr Singh was granted a limited leave to remain. This leave to remain, however, was terminated and a deportation order was made against Mr Singh after he and his wife divorced.[37] The referring court asked the ECJ whether the UK should have given Mr Singh a leave to remain now he and his former wife had moved to another Member State and returned to set up a business in the UK.[38] The ECJ held that

'a national of a Member State might be deterred from leaving his country of origin (…) if, on returning to the Member State of which he is a national (…) the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State'[39]

One will understand the width of the ECJ's interpretation of the right to family reunification if one realises that, despite the formulation used by the ECJ, it is hard to see how exactly the ECJ facilitated the right to move and reside of Mrs Singh. How, after all, can someone be deterred from moving if the law applied to him upon return is the same as when the person would have stayed?[40] The ECJ, nonetheless, also generously interpreted the family rights in the subsequent *MRAX* and *Carpenter* cases.[41]

The ECJ unexpectedly changed course in *Akrich*. Mr Akrich had resided unlawfully in the UK for several years when he married a UK national. A year after the wedding, Mr Akrich was deported to Ireland, where his spouse had been established since several months. Upon return to the UK, Mr Akrich and his spouse relied on the *Singh* judgment in order to obtain a leave to remain in the UK. The ECJ adopted a teleological interpretation of the right to family reunification and held that Regulation 1612/68 'covers only freedom of movement within the Community'.[42] Accordingly, 'the national of a non-Member State, who is the spouse of a citizen of the Union, must be lawfully resident in a Member

[34] Though *Ruiz Zambrano* can be regarded as an exception to this rule.
[35] Case C-35/92 *Morson and Jhanjan* [1982] ECR I-3723, para 15-17.
[36] *MRAX* (n 7), para 39; *Metock* (n 10), para 77.
[37] Case C-370/90 *Singh* [1992] ECR I-4288, paras 1-7.
[38] Ibid para 9.
[39] Ibid para 19.
[40] Miguel Poiares Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination' in Claire Kilpatrick, Tonia Novitz, and Paul Skidmore (eds), *The Future of Remedies in Europe* (Hart 2000) 117, 124; Niamh Nic Shuibhne, 'The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Boday?' in Paul Beaumon, Carole Lyons, and Neil Walker (eds), *Convergence and Divergence in European Public Law* (Hart 2002) 177, 188-189.
[41] Case C-459/99 *MRAX* [2002] ECR I-6591; Case C-60/00 *Carpenter* [2002] ECR I-6279.
[42] Case C-109/01 *Akrich* [2003] ECR I-9607, para 49.

State when he moves to another Member State to which the citizen of the Union is migrating or has migrated'.[43]

Undoubtedly as a result of the vehement criticism on *Akrich*,[44] the ECJ soon decided to reconsider the decision. The ECJ decided not to apply its reasoning in *Akrich* to the *Jia* and *Eind* cases,[45] and overturned the decision in *Metock*. With regard to all four applicants in *Metock*, a TCN had entered Ireland and had applied for asylum. The Irish government had refused all applications. The applicants had, after their arrival, married a non-Irish EU citizen residing in Ireland. Their subsequent applications for residence cards were again refused by the Irish government on the grounds that the applicants had not been lawfully resident in another Member State prior to their arrival. The Irish decisions were explicitly grounded on the judgment in *Akrich*. This did not help Ireland though, due to the ECJ's decision that *Akrich* 'must be reconsidered'.[46] According to the ECJ, the Union citizens would be discouraged from making use of their right to move and reside if they could not be joined by their family. 'The refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State.'[47] In coming to this conclusion, the ECJ drew inspiration from EU citizenship and the Citizenship Directive.[48] EU citizenship made the ECJ feel inclined to enlarge the scope of protection offered. This line of reasoning was confirmed in *Sahin*.[49]

3. The misunderstanding of EU citizenship as evidenced by the family reunification case law

Two common misapprehensions of EU citizenship were discussed in part 1. Upon a closer examination, it turns out that the family reunification case law, in particular *Metock*, is also based on an incorrect conception of EU citizenship. The ECJ evidently privileges the moving Union citizen over the static one and justifies this by contending that due to the introduction of the EU citizenship Directive a more expansive interpretation of the right to family life is warranted.

3.1 Privileging the moving EU citizen in the family reunification case law

Considering that *Singh* has been subjected to considerable criticism, it is rather surprising that *Metock* is widely praised. Just as in the case of *Singh*, it is hard to understand how the broad interpretation given to family reunification rights actually facilitates movement. How can it be said that an EU citizen would be discouraged from moving if the family members, to whom the host Member State refuses to grant entry and residence rights, were not living with the EU citizen in the home state either?[50] Suppose

[43] Ibid para 50.

[44] See for example: AP van der Mei, 'Comment on *Akrich* and *Collins*' (2004) 6 EJML 277; Eleanor Spaventa, 'Case note on C-109/01 *Akrich*' (2005) 42 CMLRev 225; Robin CA White, 'Conflicting competences: free movement rules and immigration laws' (2004) 29 ELRev 385; H Oosterom-Staples, 'Wanneer is er sprake van misbruik van het recht op vrij verkeer van personen? Het arrest Akrich: meer vragen dan antwoorden' (2004) 10 TEurR 77. For a more positive comment see: Christophe Schiltz, '*Akrich*: A Clear Delimitation Without Limits' (2005) 12 MJ 241.

[45] Case C-1/05 *Jia* [2007] ECR I-1; Case C-291/05 *Eind* [2007] ECR I-10719.

[46] Case C-127/08 *Metock* [2008] ECR I-6241, para 58.

[47] Ibid, para 64.

[48] See, for example para 59.

[49] Case C-551/07 *Sahin* [2008] ECR I-10453.

[50] For such an argument, see also: Alina Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Aproach' (2009) 15 ELJ 634. A similar argument was made by AG Geelhoed. Case C-1/05 *Jia*, Opinion of Advocate General Geelhoed, [2007] ECR I-1, para 71.

that a Union citizen, who happens to be single, moves to another Member State for work purposes. After five years of residence in the host Member State, the EU citizen meets, falls in love with, and marries an asylum seeker. Unfortunately for both the asylum seeker and the EU citizen, the asylum application is rejected and the asylum seeker is forced to return to his/her home state. It is indisputable that such a decision has serious consequences for both persons and possibly even for their marriage. However, to say that such a decision would be an impediment to the Union citizen's right to move and reside is somewhat odd. The EU citizen has resided in the host Member State for several years and is treated the same, it is assumed here, as the nationals of that state.

All the ECJ does in the family reunification case law is to adopt the arguments advanced by AG Jacobs in his Opinion in *Konstantinidis*. All EU citizens who have exercised their right to move and reside are allowed to invoke EU law to protect their family rights, while those Union citizens who have not moved have to comply with national immigration rules. Although the ECJ uses a non-restriction argument, the scope of *Metock* and *Sahin* is much wider.[51] Family reunification rights are not just granted merely when this facilitates movement, but also when an EU citizen has merely made use of the right to move and reside.[52] Instead of preventing EU citizens from being discouraged to move and reside in another Member State, the Union citizen is encouraged to make use of this right in order to acquire 'bonus rights'.[53]

Even more worrisome is that the ECJ just as easily dismisses the reverse discrimination objections as AG Jacobs did in his Opinion. The Member States' claim that extending the protection of family life of the moving EU citizen would result in reverse discrimination were rebuffed on the grounds that 'any difference in treatment between [static] Union citizens and those who have exercised their right of freedom of movement, as regards the entry and residence of their family members, does not therefore fall within the scope of Community law'.[54] There probably is no better example of how the judges misunderstand what Union citizenship is about. Obviously, the Member States were not concerned about equality either. But how can the ECJ pretend throughout *Metock* that it is inspired by the concept of EU citizenship, resulting in an extension of the family reunification rights for the moving EU citizens, while so easily dismissing an issue that touches upon the core of EU citizenship – that is, equality among EU citizens? The one simply cannot be squared with the other. If the ECJ would take truly seriously the concept of EU citizenship, it would not create discrimination, on the one hand, and dismiss equality concerns on the other.

3.2 The market citizen – EU citizen dichotomy in the family reunification case law

This criticism is valid, unless it follows from the legislation and the specific characteristics of EU citizenship that it is supposed to privilege those who have made use of their free movement rights. In that case, we cannot but sympathise with the ECJ for the impossible situation it is in; it has to deal with a concept called citizenship, which simultaneously allows the treatment of its citizens as *unequal*

[51] The argument that the family reunification case law demonstrates 'a path dependent process' in the case law of the ECJ, as it builds on the non-restriction approach in other free movement decisions cannot be maintained. For this argument see: Anne Staver, 'Free Movement for Workers or Citizens? Reverse Discrimination in European Family Reunification Policies' in Willem Maas (ed), *Democratic Citizenship and the Free Movement of People* (Martinus Nijhoff 2013) 57, 72-74.

[52] See again Tryfonidou (n 50). See also Samantha Currie, 'Accelerated justice or a step too far? Residence rights of non-EU family members and the court's ruling in *Metock*' (2009) 34 ELRev 310, 319.

[53] For a similar critique on *Singh* and *Carpenter* see: Alina Tryfonidou, '*Mary Carpenter v Secretary of State for the Home Department*: The Beginning of a New Era in the European Union' (2003) 14 KCLJ 81, 84.

[54] *Metock* (n 44) para 78.

members in a bounded polity. The uncomfortable conclusion then needs to be that EU citizenship does not deserve to be called citizenship. Fortunately for EU citizenship, in no way is the interpretation given to the family rights in the EU citizenship Directive warranted. On the contrary, this interpretation follows from the widely shared but very problematic assumption that EU citizenship needs to be very different from market citizenship. Due to the unfortunate and unjustified market citizenship – EU citizenship dichotomy, the ECJ not only has wrongly interpreted EU citizenship, it has given an interpretation to EU citizenship that undermines the viability of this concept: because it has gone along with this dichotomy, it has allowed discrimination between EU citizens.

3.2.1 Hanging too much on the right to residence

The ECJ would be excused for its interpretation if the legislator and, therefore, the Member States are responsible for the creation of reverse discrimination in the case of family reunification. According to such an argument, the ECJ only gave effect to the Citizenship Directive, which differs considerably from earlier legislation. The legislator, thus, gave additional rights to the moving Union citizen and the ECJ merely interpreted the legislation correctly. Upon closer analysis, this argument cannot be maintained.

As follows already from the name of the Citizenship Directive, the aim of the Directive is to protect 'the right of citizens of the Union and their family members *to move and reside freely*'. The rights in the Directive are instrumental rights designed for the facilitation of the exercise of the right to move to and reside on another Member State. Would the ECJ have given a teleological interpretation to the provisions in the Citizenship Directive, it would have come to a different conclusion in cases such as *Metock*. The conclusion of the ECJ in *Akrich* should then have applied to *Metock* as well: the treatment of the Union citizens in the *Metock* case did not 'constitute less favourable treatment than that which they enjoyed before [they] made use of the opportunities afforded by the Treaty as regards movement of persons'.[55] The Union citizens party to the *Metock* case would in no way have been discouraged from making use of their right to move and reside would the ECJ not have forced Ireland to regularise their family status.

Remarkably, the ECJ did not use a teleological argument but a textual argument. Implicitly referring to the decision in *Akrich*, the ECJ held that 'no provision of Directive 2004/38 makes the application of the directive conditional on their having previously resided in a Member State'.[56] This seems a watertight argument, would it not be that the legislation repealed or amended by the Citizenship Directive did not contain this condition either. It is indeed so that according to recital 3 of the Citizenship Directive, as was pointed out by the ECJ and AG Maduro in his View,[57] the Directive aims to 'strengthen the right of free movement and residence of all Union citizens'. It suffices, however, to point out, again, that granting additional rights to Union citizens in no way strengthens this right.

A second argument was used by AG Maduro to support the argument for an expansion of the family reunification rights. The AG compared the title of two Directives and held that 'whereas Regulation No 1612/68 concerned, to cite its title, only "freedom of movement" for workers within the Community, Directive 2004/38 relates (…) to the right of Union citizens not only to "move" but also to "reside" freely within the territory of the Member States'.[58] This is, with all due respect, a rather minimal textual reading of the Citizenship Directive possible. One glance at the Treaty text is sufficient

[55] *Akrich* (n 24) para 53.
[56] Metock (n 28) para 49.
[57] Metock (n 28) para 59; Case C-127/08 *Metock* [2008] ECR I-6241, View of AG Maduro, para 13.
[58] View of AG Maduro (n 95) para 13.

to realise that residence rights are also an essential elements of the rights of workers.[59] Regardless of the weakness of this textual interpretation, its effect cannot be underestimated. This reading embodies the idea that EU citizenship should extend beyond market citizenship – from movement to residence - and had a tremendous impact on the outcome in *Metock*.

By stressing the importance of residence, AG Maduro came to the conclusion that a Union citizen who cannot be joined by his family members on the basis of national law might 'be induced to leave the territory of the Member State in which he had chosen to establish himself in favour of a State, whether a Member State or not, in which he will be able to reunite the family unit'.[60] The ECJ followed this argument and held that

'Where a Union citizen founds a family after becoming established in the host Member State, the refusal of that Member State to authorise his family members who are nationals of non-member countries to join him there would be such as to discourage him from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country.'[61]

Though this argument, at first glance, seems rather persuasive, no less than five objections can be raised against this conclusion. The first is merely textual and not the most important one. However, it is striking to note that the ECJ suddenly finds it problematic that not protecting the family reunification rights would 'encourage' the Union citizen to leave. This is, with all due respect, somewhat hypocritical. *Metock* is about encouraging Union citizens to leave a Member State. Member State nationals who do so can circumvent national rules and rely on much more beneficial EU family reunification rules. Following the logic of the ECJ, it is fine to encourage the EU citizen to move once, but once only.

The second problem with the argument of both AG Maduro and the ECJ is that it is based on assumptions that are unlikely to be true. For the Union citizen to be discouraged from remaining in a particular Member State, there needs to be another Member State with family reunification policies that allow the Union citizen to establish a family relationship. Only if there is another Member State that permits the Union citizen to be joined by his TCN partner would the EU citizen be encouraged to move to another Member State. Considering the tough immigration rules in all Member States it is not too likely that the EU citizen will find a Member State with immigration rules that allow him to be joined by his family. The claim that the EU citizen is discouraged to stay or encouraged to move would his family members not be allowed to join him, therefore, is disputable.

Thirdly, even if this would be the case it is difficult to understand the problem. Just as any other federal polity, the EU offers its citizens an exit option that allows the Union citizen to move to a Member State with less restrictive rules.[62] Federalism provides the citizen with the opportunity to move elsewhere, while, within the bounds of federal laws, it respects the moral choices of the different constituting states. The ECJ should thus not subject the Member States to the family reunification law of the most liberal Member State, or, even worse, its own unfounded interpretation of EU legislation, but should allow the Member State to set their own standards and respect these standards, provided

[59] Article 45(2) TFEU.
[60] View of AG Maduro (n 93) para 13.
[61] Metock (n 29) para 89.
[62] On the exit option in federal polities see: F Kreimer, 'Federalism and Freedom' (2001) 574 The ANNALS of the AAPSS 66.

that the Member States respect the bounds of EU law and do not truly obstruct an EU citizen's right to move and reside. The EU citizen can then decide whether or not to move to the Member State that offers rules that are more beneficial to him.

Fourthly, the claim of the AG and the ECJ again demonstrates how fundamentally misunderstood the concept of EU citizenship is in the case law of the ECJ. It might indeed be that the EU citizen living in the host Member State will decide to leave, but this is just as much the case for the static Union citizen. Also the latter might consider moving to another Member State if they can benefit from rights there which they cannot in their Member State of origin. In the Netherlands, there is the famous Belgium-route and the Danes often move to Sweden to acquire the right be joined by their family. Both the EU citizens who have and have not exercised their right to move and reside will examine whether it is better to move to another Member State. Both groups are in the same position and there is no reason to discriminate against the static Union citizens. By only protecting those who have already moved, the ECJ *again* violates the presumption of equality that is so essential for the concept of Union citizenship. And here we come back to the essence of Union citizenship. The EU citizen should be treated in the same way as nationals of the host Member State. Vice versa, this implies that nationals of the Member States should be treated the same as non-national Union citizens residing in those Member States. Not only is there no justification for hanging so much on the right to residence, the ECJ by doing so again privileged the moving Union citizen over the static one.

Lastly, the EU would end up on a very slippery slope if residence is the only criterion by which these cases are to be assessed. Every possible political decision in a Member State could then come to fall within the scope of EU law. There are plenty of policy changes that could make residence less attractive. This would particularly be so for sensitive issues, such as social distributive policies. A decision to raise tuition fees, or to restrict access to health care would have such an effect. And what to think of an increase of the tax rates in a Member State? Hanging too much on residence would allow the ECJ to get involved in all sorts of issues it should not get involved in. Also because the moving Union citizens would again be privileged: why would only this group be allowed to challenge these policy changes? As is more elaborately explained in part 4, the only viable option in a citizens' Europe is to examine first of all whether there is an obstruction to the right to free movement and, secondly, whether the EU citizen who has moved is not discriminated against in the home Member State. Only if there happens to be discrimination, residence is made less attractive.

3.2.2.The EU citizen as a relational individual

Even if it would be admitted that the most recent family reunification jurisprudence does not really protect the right to move and reside of the EU citizen, that does not change the fact, one might say, that citizenship is a humanistic concept that justifies the decision to move beyond a minimal understanding of family rights. This conviction is demonstrated by the argument that 'the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of dignity, be also granted to their family members'.[63]

Such an idea most clearly embodies the conviction that EU citizenship is to be contrasted with market citizenship and that free movement rights should not be EU citizenship's core. It is not disputed here that EU citizens should be treated as human beings and with dignity, on the contrary. However, by attaching additional importance to dignity in the EU citizenship context, one misunderstands where market citizenship was about. In other words, such views clearly reflect the market citizen – EU citizen

[63] Metock (n 29) para 84.

dichotomy. Accordingly, the concept of EU citizenship, the recognition of Member State nationals as human beings, need to be distinguished from the concept of market citizenship, the workers and service providers, the factors of production. The family member should no longer be treated as an appendage of the EU market participant, but as a relational individual.[64] And apparently we now have to treat the Union citizens and their family members with dignity, while prior to the introduction to Union citizenship this was less so?

When put like this, one may understand the absurdity of these views. The problem is that Union citizenship is too often viewed as a completely novel concept fundamentally different from any of the economic free movement provisions. This idea, on the one hand, ignores the citizenship elements already present in EU law prior to the Treaty of Maastricht and,[65] on the other hand, misunderstands what Union citizenship is about.[66] The reason that the Union protected the family rights of the market citizen is because it was realised that they are not mere factors of productions; They are human beings with emotions, that fall in love and establish relationships.[67] They are relational individuals and, therefore, should be treated with dignity. If the ECJ needed the introduction of EU citizenship to realise that Member State nationals will not move if they are not treated as such, the somewhat embarrassing conclusion must be that they are likely to have mistreated the market citizen for many years. I am not so pessimistic, however. That the legislator already in the 1960s recognised the need for protecting the family rights of Member State nationals and the case law giving effect to the legislation demonstrates that there was a broad awareness that also those moving merely for economic purposes had to be treated in a dignified manner.[68]

By separating EU citizenship rigidly from the economic free movement provisions, one not only ignores the citizenship characteristics of the latter, but also misunderstands the citizenship qualities of the former. EU citizenship allows a Member State national to move to another Member State, to build a life there and to be treated with dignity. The ECJ should, therefore, protect the family rights of the EU citizen if necessary for the facilitation of movement to the Member State. To grant bonus rights to the EU citizen who has moved, however, is to treat that citizen as more worthy of receiving certain rights than the EU citizen who has not moved. It is to make a distinction between the ideal and non-ideal Union citizen. In other words, it is to treat the EU citizen who has not moved as undignified.

4. The solution: Treating EU citizens equally at Member State level

[64] Thanks to Loïc Azoulai for describing this distinction so eloquently.

[65] Richard Plender, 'An Incipient Form of European Citizenship' in FG Jacobs (ed) *European Law and the Individual* (North-Holland Publishing Company 1976) 40. Those incipient citizenship ideas were also present in the case law of the ECJ and Opinions of AGs. For an interesting case see: Case 187/87, *Cowan v Trésor public* [1989] ECR 195. The AG's Opinion most clearly reasoned on the basis of citizenship arguments is of course AG Jacobs' Opinion in *Konstantinidis*.

[66] As explained in part 1.2, EU citizenship's core characteristics are federal and EU citizenship is, thus, predominantly about movement and non-discrimination.

[67] The same logic applies to EU citizens. As AG Sharpston forcefully said: 'when citizens move, they do so as human beings, not as robots. They fall in love, marry and have families.' Opinion of AG Sharpston (n 52) para 128.

[68] As is also demonstrated by Case C-413/99 *Baumbast and R* [2002] ECR I-7091, para 50.

I am hardly the first who finds reverse discrimination difficult to reconcile with the notion of Union citizenship.[69] Particularly the right to family reunification is considered to be a problem.[70] Following all arguments developed so far, however, it will probably not surprise that my ideas on how to solve this problem differs from many scholars. Unfortunately, the solutions advanced so far are based on the idea that a 'levelling up' of the family rights is necessary:[71] EU law should lay down standards for all Union citizens. Since the legislator is, obviously, unwilling to do so, this noble task is reserved for the ECJ.[72] We should be grateful that the ECJ has so far resisted such a move; not only would the consequences be incalculable, such a decision would defy all logic. What is necessary is a levelling down, by the ECJ.[73]

The conclusion following from part 3 is that the reverse discrimination is created by the ECJ,[74] not the Member States. The interpretation given to the Citizenship Directive goes far beyond the aims of the Directive and conflicts with the core premises of Union citizenship. Since the ECJ is to blame for the unequal treatment of static EU citizens, it is for the ECJ to remedy this situation, and it should *not* do so by forcing all Member States to give static EU citizens the same rights as moving Union citizens are now granted. The arguments of all scholars who encourage the ECJ to extend the rights given to moving EU citizens to all EU citizens are, with all respect, unconvincing. Those arguments amount to nothing but an equation of law with mathematics, whereby multiplying two negatives becomes a positive. In law, the result of the multiplication of two negatives is very negative. The ECJ should thus not remedy its first mistake, the *ultra vires* interpretation of the Citizenship Directive, by even further disregarding the limits of its powers and extending the scope of the Citizenship Directive to all static EU citizens as well. While such a move should be opposed simply and only because of these principled reasons, also the effects created by such a move would be absurd. There are hardly any limits the Member States can place on the family reunification rights of Union citizens. Extending this reasoning to all EU citizens would remove all powers of the Member States to place any limits on the right to family reunification.

An even more fundamental objection exists, however. All solutions advanced suggest to create equal treatment at EU level of an issue that is governed by the Member States. As discussed in part

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[69] Kochenov (n 2); Tryfonidou (n 2); Dautricourt and Thomas (n 2); Niamh Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on? (2002) 39 CMLRev 731; Robin CA White, 'A fresh look at reverse discrimination' (1993) 18 ELRev 527, 532; Miguel Poiares Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination' in Claire Kilpatrick, Tonia Novitz, and Paul Skidmore (eds), *The Future of Remedies in Europe* (Hart 2000) 117, 126; Henri de Waele, 'EU Citizenship: Revisiting its Meaning, Place and Potential' (2010) 12 EurJML 319; Catherine Jacqueson, 'Union Citizenship and the Court of Justice: Something New Under the Sun? Towards Social Citizenship' (2002) 27 EurLRev 260, 281; James D Mather, 'The Court of Justice and the Union Citizen' (2005) 11 EurLJ 722, 735; Peter Van Elsuwege and Stanislas Adam, 'Case note on Case C-212/06' (2009) EuConst 5 327, 333; Case C-212/06 *Walloon* [2008] ECR I-1683, Opinion of AG Sharpston; Opinion of Advocate General Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

[70] Dimitry Kochenov and Peter van Elsuwege, 'On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13 EJML 443; Anne Walter, *Reverse Discrimination and Family Reunification* (WLP 2008); Helen Oosterom-Staples, 'To What Extent Has Reverse Discrimination Been Reversed?' (2012) 14 EJML 151; Kees Groenendijk, 'Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin' in Elspeth Guild, Cristina J Gortázar Rotaeche, and Dora Kostakopoulou (eds), *The Reconceptualisation of European Union Citizenship* (Brill 2014) 169.

[71] Groenendijk (n 68) 182.

[72] Toevoegen wat Sharpston heft gezegd

[73] Though Groenendijk discusses the option of levelling down, he

[74] Though the ECJ tries to make us believe otherwise: Metock (n 28) para 76.

1.2, due to EU citizenship's federal nature, equal treatment should be guaranteed at EU level and Member State level, depending on which level governs the situation. The family reunification policies for Union citizens are in principle still governed by Member State policies. As long as the decisions of a Member State do not impede the moving Union citizen's free movement rights, that EU citizen needs to comply with the same rules as all other EU citizens within the host state, whether they have moved or not. Also the Union citizen who has exercised the right to free movement should be subject to the family reunification rules of the host Member State, unless this results in an obstruction of his right to move and reside.

The only solution would thus be for the ECJ to deliver a new, though much better reasoned version of *Akrich*. On the basis of *Akrich*, a two-step test can be developed that much better reflects where EU citizenship stands for than the current EU family reunification regime. The first step should assess whether there is a violation of the right to free movement and the second step should comprise of an examination whether the EU citizen who has moved is treated equally in comparison to the nationals of the host state.

Akrich has been criticised on many grounds, and rightly so, but to qualify it as 'the worst judgment in the long history of the Court of Justice'[75] is an enormous exaggeration. The ECJ indeed failed to clarify the relation between *Akrich* and previous judgments, which made that the exact scope and effects of the decisions were unclear.[76] However, to dismiss the judgment in its entirety is to ignore the correctness of the principle on which the decision is based. Though the focus has been mainly on the prior lawful residence criterion employed by the ECJ, this criterion is the logical result of the idea that the treatment which an EU citizen receives after the movement to another Member State 'cannot constitute less favourable treatment than that which they enjoyed before [they] made use of the opportunities afforded by the Treaty as regards movement of persons'.[77] The first step for the ECJ to take in its analysis of those cases is to examine whether there has been an obstruction of the freedom of movement. In case the host Member State does not recognise the family status granted to the EU citizen by the home Member State, this would clearly constitute less favourable treatment. If there is no obstruction to the free movement rights, the Member States should be allowed to apply their own standards, on the condition, of course, that it applies these standards without discrimination on the grounds of nationality. This is the second aspect the ECJ should examine in its decisions. So, a Dutch moving to Belgium should be allowed to establish a family in Belgium on the same conditions as the Belgian citizen and the same reasoning applies for the Dane moving to Sweden. That is what equal treatment entails, that is what Union citizenship is about, and that is how the ECJ should interpret the law.

Conclusion

Though these conclusions will be uncomfortable and difficult to accept for everyone who is sympathetic towards the ECJ's liberal immigration regime, it is also a conclusion that is difficult to avoid if one views the issue from the perspective of EU citizenship. The suggested solution to the problem should, after all, feel entirely familiar. Most EU citizenship issues are decided on the basis of this two-stage test, though the ECJ mostly deals with the right to move and reside and the right to non-discrimination simultaneously. There is absolutely no reason to treat the family reunification rights as a special category. No one would accept that the EU citizen who has moved would, for example, get

[75] Steve Peers, 'Free Movement, Immigration Control and Constitutional Conflict' (2009) 5 EuConst 173, 178.
[76] For such a critique see: Ibid; Eleanor Spaventa, 'Case note on C-109/01 *Akrich*' (2005) 42 CMLRev 225.
[77] *Akrich* (n 24) para 53.

additional social benefits over the nationals of the host state, so why give more extensive family reunification rights to that EU citizen. Whether the EU citizens in living in the host state have moved or not, they are all EU citizens living in the same Member State and should, therefore, be subject to the same rules. Only when we accept this banal logic, we can say that we properly understand where EU citizenship is about and that we have reckoned with the misconceptions on which EU citizenship is currently build.