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# EU Citizenship: An Analysis of its Evolution and Application to the Expulsion of Minorities

*Nedim Malovic**

## Introduction

Modern states found legitimacy by being the territorial expression of a given culture and people residing within them. Similarly EU citizens share interwoven values, beliefs and customs, effectively acknowledging their inherent similarities as a population within the EU.

The CJEU has remained firm to the idea that under international law, it is for each Member State, having due regard to EU law, to lay down the conditions for the acquisition and loss of nationality. Despite CJEU's apparent unwillingness to interfere with Member States' criteria for awarding national citizenship, such jurisprudence must not detract from the fact that the judicial arm of the EU is nonetheless prepared to enforce citizenship rights under Article 20 of the Treaty on the Functioning of the European Union (TFEU) in inextricably sensitive and politically fragile areas. This soundly introduces the CJEU position towards EU citizens moving and residing within the Union, in particular the circumstances under which this right might be capitalized on by family members of that citizen. As will be discussed further sub Part 1, the CJEU has been willing to interpret proactively the relevant legislative framework to secure a reasonable and just outcome for EU citizens that have not triggered EU citizenship rights, by not moving from one Member State to another. The absence of intra-Union movement and the grant of citizenship benefits under Article 20 TFEU suggest that citizenship today does not in any manner require movement to trigger the rights associated with it. However, despite CJEU's commitment to upholding and expanding the rights of EU citizens, Member States have discriminated and deported ethnic minority groups composed of EU citizens on grounds likely to fall outside those permitted under the CRD. [1] Member States may restrict the freedom of movement and residence of EU citizens and their family

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[1] Directive 2004/38 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, OJ L 158, 77-123.

members, irrespective of nationality, on grounds of public policy, public security or public health, subject to a proportionality assessment within Article 27(2) CRD.

In 2009 the EU Agency for Fundamental Rights released a report entitled 'The Situation of Roma EU citizens', in which it highlighted that there is no specific policy framework guiding the inclusion and equality of Roma EU citizens who have exercised their rights of freedom of movement and residence.[2] As explained thoroughly by Gunther[3], following some riots by French-based Roma in Paris provoked by a community member's killing by police officers in July 2010, former French President Nicolas Sarkozy announced tougher measures against Roma "illegally residing" in Paris.[4] Such measures resulted in the almost immediate repatriation (in exchange for some money) of Roma persons from France, on grounds that they had allegedly committed public order offences, such as begging and petty crimes.[5] While it was claimed that crimes committed by Romanian nationals had increased since the beginning of 2009, it emerged already after the first week of deportations that none of the persons expelled had had any contact with the police or a previous criminal conviction.[6] The EU Commission – especially former Commissioner Viviane Reding[7] – criticized France's initiative.[8] The European Parliament urged the EU Commission to ensure compliance with EU law by Member States.[9] Eventually, the EU Commission limited its comments to noting that France had not yet transposed the CRD into national legislation and urged France to take

[2] European Union Agency for Fundamental Rights, *The situation of Roma EU citizens moving to and settling in other EU Member States* (2009), available at http://fra.europa.eu/sites/default/files/fra_uploads/705-Roma_Movement_Comparative-final_en.pdf, 7.

[3] CT Gunther, 'France's Repatriation of Roma: Violation of Fundamental Freedoms?' (2012) 45 Cornell Int'l LJ 205, 205-207.

[4] M Saltimarsh, 'Sarkozy toughens on illegal Roma' (29 July 2010), The New York Times, available at http://www.nytimes.com/2010/07/30/world/europe/30france.html?_r=0.

[5] Le Ministre de l'Intérieur, de l'Outre-mer et des Collectvités territoriales, Evacuation des campements illicites, 5 August 2010, available at http://www.lecanardsocial.com/upload/IllustrationsLibres/Circulaire_du_5ao%C3%BBt_2010.pdf.

[6] Le Monde, 'Les Roms récemment renvoyés de France n'étaient pas fichés par la police' (29 August 2010), available at http://www.lemonde.fr/societe/article/2010/08/29/les-roms-recemment-renvoyes-de-france-n-etaient-pas-fiches-par-la-police_1404113_3224.html.

[7] Statement by Viviane Reding, Vice-President of the European Commission, EU Commissioner for Justice, Fundamental Rights and Citizenship, on the recent developments concerning the respect for EU law as regards the situation of Roma in France, MEMO/10/502. See also L Cendrowicz, 'Sarkozy Lashes Out as Roma Row Escalates' (17 September 2010), Time, available at http://www.time.com/time/world/article/0,8599,2019860,00.html.

[8] The situation of Roma in France and in Europe – Joint information note by Vice-President Viviane Reding, Commissioner László Andor and Commissioner Cecilia Malmström, 1 September 2010.

[9] European Parliament resolution of 9 September 2010 on the situation of Roma and on freedom of movement in the European Union, 9 September 2010*;* European Parliament resolution of 9 September 2010 on the situation of Roma and on freedom of movement in the European Union, 9 September 2010; Situation of Roma in Europe: MEPs quiz the Commission, 20100927IPR83712, 30 September 2010.

appropriate measures to this end.[10] The soft-hand approach (*revirement*?) of the Commission was justified on grounds that, following mention of the possibility to start infringement proceedings, the French government had issued a memo in which it was stated that police and relevant local officials were to evacuate all illegal settlements, regardless of who occupied them. This was sufficient to reassure the Commission that France was not behaving in a discriminatory manner toward Roma and travellers in pursuing its security policies.[11] As some authors have suggested, however, it is questionable whether since then France has actually adopted a non-discriminatory policy in relation to Roma people.[12] Also under the current Hollande Government, Roma expulsions have occurred in France.[13]

Although other authors have refrained from providing an answer[14], in this paper we shall argue that France's initiatives in relation to Roma in 2009-19 suggest an incorrect application of the CRD. In our view, national authorities may be held liable for the *de facto* withdrawal of certain rights and entitlements. In other words, they may be considered to have breached obligations under EU law.

Part 1 will present the expulsion of Roma in France in 2010 and undertake a chronological analysis of the concept of modern citizenship, examining the conceptual changes that have occurred over the past decade in the EU. In particular, it will examine the development of the relevant case law and legislation that has been adopted in the context of free movement of goods and show how they have been spilled over into the provisions of free movement of citizens. We conclude that these changes highlight the impact of the transformation of the EU onto different areas, and serve to indicate the degree under which Member States may refuse residency where public policy and security are at stake.

Part 2 will question the grounds for expulsion, the primary vindications being public security and public policy. Whilst two separate criteria, the paramount focus is whether or not the individual's conduct poses a "*genuine and sufficiently serious threat to society*". While the

[10] European Commission assesses recent developments in France, discusses overall situation of the Roma and EU law on free movement of EU citizens, IP/10/2007.

[11] K Severance, 'France's expulsion of Roma migrants: a test case for Europe' (21 October 2010), Migration Policy Institute, available at http://www.migrationpolicy.org/article/frances-expulsion-roma-migrants-test-case-europe.

[12] S Carrera, *Shifting responsibilities for EU Roma citizens: the 2010 French affair on Roma evictions and expulsions continued* (2013) CEPS Papers in Liberty and Security in Europe Paper No 55.

[13] Amnesty International, Chased Away - Forced Evictions of Roma in Ile-de-France (2012), available at http://www.romsintimemory.it/assets/files/discriminazione/intercultura/guerra-ai-rom/Forced_evictions_of_roma_in_Ile_de_france.pdf, 10.

[14] Gunther, 'France's Repatriation of Roma', *cit.*

CJEU has not established a threshold to the permissible grounds to expulsion, the implications of recent CJEU judgments are that deportation on the basis of public security shall be enforced upon the condition that adequate harsh repression of nationals is enforced by the deporting Member States. Where such practice is not found, any deportation is likely to be treated as disproportionate.

Part 3 (a case study on the recent events occurred in France in relation to Roma persons) will address the expulsion provisions under Article 27, 28 and 30 CRD and seek to determine whether it could be considered legitimate to deport Roma citizens on the basis of begging and petty crimes. In committing to the latter, a brief reflection will be made in relation to the theoretical foundations of EU citizenship with a view to provide a solution to the problem of non-compliance of Member States with obligations under EU law. This paper will briefly address the impact of the European Convention on Human Rights[15] and the impingement of human rights interests of foreigners subject to deportation.

## Part I - The expulsion of Roma; theoretical perspectives underlying EU integration and Member States' sovereignty

In 2010 former French President Nicholas Sarkozy ordered the dismantling of 300 illegal camps belonging to Roma travellers from Bulgaria and Romania.[16] The dismantling took place across France as part of a fight against crime and urban violence. Sarkozy also ordered "*almost immediate*" expulsion of Roma from Bulgaria and Romania who had committed public order offences.[17] In a statement issued after a ministerial meeting to discuss the Roma 'problem', the president's office also announced new legislation making it easier to expel groups such as Roma for security reasons.[18] The statement from the President's office described illegal camps as "*sources of illegal trafficking, of profoundly shocking living standards, of exploitation of children begging, of prostitution and crime*".[19] Approximately

[15] European Convention on Human Rights (1950) as amended by Protocols No's 11 and 14, supplemented by Protocols No's 1, 4, 6, 7, 12 and 13.
[16] G Bon, 'France to dismantle Roma Camps, expel offenders' (28 July 2010) Reuters, available at http://www.reuters.com/article/2010/07/28/us-france-roma-idUSTRE66R5CE20100728.
[17] *Ibid*.
[18] *Ibid*.
[19] *Ibid*.

10,000 Roma settlers had been already expelled from France in 2009 out of public policy and security concerns.[20]

Following these events, the European Parliament urged Member States to stop illegal expulsion of Roma people and bring ethnic profiling to an end. The Parliament condemned attempts by EU countries to limit unlawfully the right of Roma people to freedom of movement in the EU.[21]

Although EU law allows the deportation of EU citizens under Article 27 CRD, the possibly formal and substantial illegality of French expulsions illustrates Member States' resistance to committing to a fully developed EU citizenship policy. Despite attempts by the CJEU to enhance gradually EU citizenship[22], this resistance is still reflected in current expulsion practices which are influenced by economic thresholds and conceptually uncertain provisions originally envisaged to strengthen the socio-cultural rooting of residence rights.[23]

The present analysis is mostly concerned with an assessment of the compatibility of initiatives like the one described above with a certain Member State's obligations under EU law, notably free movement of persons within Article 20 TFEU and the CRD, as well as the principle of proportionality embodied therein. Recital 23 in the preamble to the CRD states that:

> Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State,

[20] C Stancescu, 'Expulsion and eviction: Roma policy in France' (5 August 2014), The NATO Association of Canada, available at http://natoassociation.ca/expulsion-and-eviction-roma-policy-in-france/.
[21] European Parliament, 'Roma discrimination: end illegal expulsions and ethnic profiling, MEP's say' (12 December 2013), available at http://www.europarl.europa.eu/news/en/news-room/content/20131206IPR30032/html/Roma-discrimination-end-illegal-expulsions-and-ethnic-profiling-MEPs-say.
[22] The starting point is the seminal decision in *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, C-184/99, EU:C:2001:458.
[23] SA Sowah, 'Deporting EU citizens – The legality of expulsions of EU citizens under the current legal framework and the value of EU citizenship (2014) 6 The Student Journal of Law, available at https://sites.google.com/site/349924e64e68f035/issue-6/deporting-eu-citizens.

> their age, state of health, family and economic situation and the links with their country of origin.

From a broader, theoretical, perspective it is also apparent that initiatives of this sort call into consideration deeper questions regarding the relationship between EU integration and Member States' sovereignty.

As Agamben observes, the principles of nativity and sovereignty, which were separated in ancient regimes (where birth marked only the emergence of a subject), are today irrevocably united in the body of the "*sovereign subject*" (the Leviathan to borrow from Thomas Hobbes[24]) so that the foundation of the new nation-state may be constituted.[25] It is not possible to understand the 'national' development and vocation of the modern state in the nineteenth and twentieth centuries if one forgets that what lies at its basis was not man as a free and conscious political subject but, above all, man's bare life, the simple birth that as such is, in the passage from subject to citizen, invested with the principle of sovereignty.[26] Still according to Agamben, the fiction implicit here is that *birth* immediately becomes *nation* such that there can be no interval of separation between the two terms.[27] Rights are attributed to man (or originate in him) solely to the extent that man is the immediately vanishing ground (who must never come to light as such) of the citizen.[28]

The concept of modern citizenship, achieved by the EU at an unprecedented supranational scale, is centric upon the notion of the nation-state, realised largely in part by the social and political upheaval inspired by the French Revolution. Bellamy managed to contextualise effectively this idea, by holding that, "*rather than being the fiefdoms of monarchs, these new [nation-states] found legitimacy through being the territorial expression of a given culture and people*".[29]

The second part of Bellamy's evaluation endorses the very premise of EU citizenship, in that European peoples are said to share interwoven values, beliefs and customs. These ingredients

[24] T Hobbes, *Leviathan* (1651-1668).
[25] G Agamben, *Homo Sacer: sovereign power and bare life*, (Stanford University Press, 1998), 76.
[26] *Ibid*.
[27] *Ibid*.
[28] *Ibid*.
[29] R Bellamy, 'Introduction: The Making of Modern Citizenship', in R Bellamyet et al (eds), *Lineages of European Citizenship: Rights, Belonging and Participation in Eleven Nation State*s (Palgrave Macmillan, 2004) 441.

correspond to a unique recognition in that it respects their national identities whilst, effectively, acknowledging their inherent similarities as a population. This possibly does not mean that, from a constitutional perspective, the concept of EU citizenship necessarily posits the idea of individuals composing one entire nation but rather that, similarly to the US constitutional experience, a plurality of peoples have embraced and developed the common idea of an EU project.[30]

Martiniello reiterates somehow Bellamy's idea, noting that EU citizenship is "*a complementary set of rights which confirms the existence of the cultural and political identities corresponding to the Member States*".[31] It should be stressed, however, that the effectuation of citizenship, at least on a legal basis, was not mentioned in the original European Economic Community (EEC) Treaty.[32] In other words, the Treaty of Rome did not discuss the prospect of a supranational citizenship but did contain provisions enabling the free movement of persons across Member States. The roots to the construction of a European concept of citizenship are to be found in the 1975 Tindemans Report, that held the view that:

> The construction of Europe is not just a form of collaboration between States. It is a 'rapprochement' of peoples who wish to go forward together, adapting their activity to the changing conditions in the world while preserving those values which are their common heritage.[33]

The reasoning here was born against a backdrop of proposals aimed at integrating European nationals resident in other Member States more fully into their neighbouring host nations. A means to achieve this, according to the 1975 Report, was to devolve civil, political and social rights to nationals of all Member States, who then would be able to exercise them freely in other Member States, thereby placing them on an "*equal footing with the state's own nationals*".[34] This concept was given extended due weight prior to the ratification of the Maastricht Treaty[35] with the Intergovernmental Conference on Political Union. Here, the

[30] R Schütze, 'Constitutionalism and the European Union', in C Barnard – S Peers, *European Union Law* (OUP:2014), 79.
[31] M Martiniello, 'The Development of European Union Citizenship, in M Roche and R van Berkel (eds), *European Citizenship and Social Exclusion* (Ashgate, 1998) 35, 37-8, as cited in D Chalmers – G Davies – G Monti, *European Union law*, (2nd edn, Cambridge University Press, 2010), *cit*, 445.
[32] Treaty Establishing a European Economic Community (EEC), 25 March 1957 [not published].
[33] L Tindemans, *European Union; Bulletin of the European Communities – Supplement 1/76, Tindemans Report*, 1975, 26.
[34] D Chalmers – G Davies – G Monti, *European Union law*, (2nd edn, Cambridge University Press, 2010) 444.
[35] Treaty on the European Union (Maastricht Treaty), OJ C 191/01, pp. 4-96.

Spanish Government submitted a paper entitled 'The Road to European Citizenship', defining citizenship even further as:

> The personal and indivisible status of nationals of the Member States, whose membership of the Union means that they have special rights and duties that are specific to the nature of the Union and are exercised and safeguarded specifically within its boundaries.[36]

## 1. Citizenship within the EU

The 1992 Maastricht Treaty gave way for the first 'constitutionalization' of EU citizenship[37], with the result that "*the right to move and reside in the Member State of choice has become a constitutional right flowing from the status of citizenship of the Union.*"[38]

Prior to the adoption of the Maastricht Treaty the EEC Treaty provided guarantees for the free movement of economically active persons, but not for other non-economically active persons. The initial idea of citizenship was written up with strong foundations in early development of commercial and industrial market economies which pushed towards the exchange of goods, capital, labour and services.[39] In other words, the economic connotation seemed crucial to the notion of free movement.[40] Since Member States had to uphold the rule of law, and the protection of property rights, it was thus through the traditional social hierarchies that the concept of citizenship was fostered.[41]

Today, EU citizenship entails that a person has the right to move and reside freely within the EU; to vote and stand as a candidate in European Parliament and municipal elections; to be protected by the diplomatic and consular authorities of any other EU country; and finally to petition to the European Parliament and/or complain to the European Ombudsman.[42] These

[36] The Spanish memorandum on Citizenship, 'The road to European Citizenship', SN 3940/90 of 24 September 1990 in F Laursen and S van Hoonacker (eds), *The Intergovernmental Conference on Political Union: Institutional Reforms, New policies and international Identity of the European Community* (Martinus Nijhoff, 1992), as cited in Chalmers – Davies – Monti, *European Union law*, cit., 444.
[37] P Craig and G De Burca, *EU Law: Text, cases and materials* (5th ed, OUP 2011), 820.
[38] RCA White, 'Free movement, equal treatment, and citizenship of the Union' (2005) 54(4) ICLQ 885, 886.
[39] Chalmers – Davies – Monti, *European Union law, cit*, 441.
[40] H van Eijken – SA de Vries, 'A new route into the promised land? Being a European citizen after Ruiz Zambrano' (2011) 36(5) EL Rev 704, 707.
[41] *Ibid*.
[42] Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 326/12, 47-390, Articles 20(2)(a) – (d).

rights are currently found under Article 20(2) TFEU and elaborated upon under Articles 21 to 25 TFEU.[43] Although this dissertation will not discuss the latter in detail, it is important to observe that those provisions seek to expand on the legal instruments set out in Article 20 TFEU. In terms of the application of the citizenship within the Treaty system, attention must be first directed at Article 9 of the Treaty on the European Union (TEU) which sets out the basic principle of citizenship, stating that "*Every national of a Member State shall be a citizen of the Union. Citizenship of the* [EU] *shall be additional to and not replace national citizenship".* [44]

Article 9 TEU therefore denotes that EU citizenship is additional to national citizenship and entitlement follows from national citizenship. In its landmark decision in *Rudy Grzelczyk,* C-184/99 the CJEU has clarified how EU citizenship is also an engine for promoting equality:

> The status of [the] citizen of the European Union is destined to be the fundamental status of nationals of all the Member States, conferring on them, in the fields covered by Community law, equality under the law, irrespective of nationality.[45]

EU law does not regulate directly the conditions under which Member States confer nationality although it may indirectly regulate aspects of this process by requiring Member States to recognize it and not impede enjoyment of the persons with dual nationality as granted by another Member State.

Overall, whilst Article 20(1) TFEU grants citizens of the EU a complementary citizenship, the CJEU has remained firm to the idea that "*under international law, it is for each member state, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality*".[46] This was recently reiterated in *Rottman v Freistaat Bayern*, C-135/08, (*Rottman*)[47]. Whilst dissimilar in its background from the landmark decision in *Micheletti v Delegacion del Gobierno Cantabria*, in that this case focused upon the situation whereby a Member State (Germany), sought to withdraw the German citizenship of a former Austrian national[48], the CJEU reaffirmed that it is for the Member States alone to determine the rules

[43] *Ibid*, Articles 21 – 25.
[44] Consolidated Version of Treaty on the European Union, OJ C 326/12, 13-390, Article 9.
[45] *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, cit,* [31].
[46] *Micheletti v Delegacion del Gobierno Cantabria*, C-369/90, EU:C:1992:295 [10].
[47] *Rottman v Freistaat Bayern*, C-135/08, EU:C:2010:11.
[48] According to Austrian law, Mr Rottmann's naturalisation in Germany had the effect of him losing his Austrian nationality.

for granting citizenship. The Court also confirmed that it is not contrary to EU law, in particular Article 20 TFEU, for a Member State to deprive a citizen of nationality acquired by naturalization when that nationality has been obtained through deception. [49]

In conclusion, for the first time in the history of modern theory of sovereignty, the EU citizenship has given rise to a concrete citizenship design beyond the nation-state, thereby undermining the exclusivity of national citizenship.[50] To a great extent, this historically unprecedented moment did not apprehend the political imagination, originally emphasised by the EU. Most scholars and policy-makers regarded EU citizenship as a purely decorative and symbolic institution.[51] The first reason behind this view is that, because EU citizenship was premised on the pre-existing EU law rights of free movement and residence, it did not add much to existing EU law with the exception of electoral rights at local and European Parliament and the right to diplomatic and consular protection when travelling abroad. Secondly, EU citizenship appears to comprise a core set of economic entitlements designed primarily to facilitate market integration, whereas national citizenship premises citizens' claims and entitlements based on a historically developed rich notion of membership in a national community.[52] Additionally, EU citizenship appears to be relevant only to a favoured group of EU nationals, *ie* a minority of EU citizens who acquire the necessary material resources needed for intra-EU mobility. Thirdly, EU citizenship is regarded as having a weak compliance dimension.[53] Unlike national citizenship, which reflects strong national identities and the horizontal ties of belonging to a state, conceived of as either a homogeneous ethnocultural community (ethnic nation) or a community of shared values (civic nation), EU citizenship was intended not as recognising a natural bond, but rather as a means to help in the construction of a European demos so to elicit subjective identification with the European integration project.

## 2. The CRD and the Internal Market

Despite CJEU's apparent unwillingness to interfere with Member States' criteria for granting citizenship, the judicial arm of the EU has appeared nonetheless prepared to enforce Article

[49] *Rottman*, *cit*, [59].
[50] T Kostakopoulou, 'European Union Citizenship: Writing the Future', (2007), 13(5) ELJ 623, 625.
[51] *Ibid*.
[52] *Ibid*.
[53] *Ibid*.

20 TFEU in inextricably sensitive and politically fragile areas. This soundly introduces the Court's position towards citizens of the EU moving and residing within the Union, in particular the circumstances in which this right might be capitalized on by family members of that citizen. In terms of this group, the CRD defines both who constitutes a family member[54] and the corresponding statutory rights that such persons are able to exercise within the territory of the Union.[55] Arguably, however, the CJEU's interpretation of the CRD broadens the rights of family members of EU citizens whilst, more importantly, aggrandizing the rights of the citizens themselves. It is necessary to examine such opinions of the Court in order to contextualize fully the paramount weight afforded to EU citizens, particularly where such citizens' rights are threatened with deportation from the host Member State.

Crucially, it would appear that the wholly internal rule – the concept that rules concerning free movement cannot be triggered in favour of EU citizens absent *movement* – has been vastly eroded, thus creating both far reaching and ultimately drastic effects for Member States. As the CJEU held in in *La Reine v Vera Ann Saunders*, C- 175/78, (*Saunders*)[56]:

> The Provisions of the Treaty on Freedom of Movement for Workers cannot therefore be applied to situations which are wholly internal to a Member State. In other words, where there is no factor connecting them to any of the situations envisaged by Community law.[57]

In that case the CJEU appeared to suggest that the ability of Member States to establish their own immigration rules is becoming more and more coordinated by the CJEU. In this respect attention should be directed at *Zhu and Chen*, C-200/02 (*Chen*)[58]. Here, Catherine Chen, an Irish citizen, commanded the right to move to and reside within the United Kingdom by virtue of Article 21 TFEU. However her parents, both Chinese nationals, were refused permanent entry to the United Kingdom. Thus, her ability to exercise such free movement rights were rendered meaningless since, aged two, she depended solely upon her parents. In a both leading and controversial decision whose crucial importance was underscored by the Court

[54] CRD, Article 2.
[55] *Ibid*, Articles 3-35.
[56] *La Reine v Vera Ann Saunders*, C- 175/78, EU:C:1979:88.
[57] *Ibid*, [11].
[58] *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, C-200/02, EU:C:2004:639.

sitting as full court[59], the CJEU in its interpretation of what is currently Article 21 TFEU remarked that:

> [To] refuse to allow the parent, whether a national of a Member State or a national of a non-member country, who is the carer of a child to whom Article 21 (TFEU) [...] grants a right of residence, to reside with that child in the host Member State would deprive the child's right of residence any useful effect.

Chalmers, Davies & Monti hold the view that, following *Chen*, a parent arriving from outside the Union with a minor child whom they can demonstrate is a EU citizen shall automatically have a right to remain within the territory of the EU, provided they possess the necessary resources and health insurance.[60] It is difficult to say how one can disagree with this proposition; indeed, it is all the more secured with reference to the following case, *Gerardo Ruiz Zambrano v Office national de l'emploi,* C-34/09, (*Zambrano*).[61] By following the Opinion of the Advocate General (AG) Eleanor Sharpston, the CJEU stated that[62]:

> Article 20 (TFEU) is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union Citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union Citizenship.

In the same case, AG Sharpston also addressed the issue of 'reverse discrimination'. Reverse discrimination occurs when EU Member States treat their own nationals less favorably than nationals of other Member States in situations where EU law applies. This initially occurs when nationals of a Union Member State do not exercise their freedom of movement across the EU and cannot therefore trigger their EU citizenship rights.

Indeed, AG Sharpston sought in the *Zambrano* case to overcome reverse discrimination, by relying on two principal arguments.

[59] B Hofstotter, 'A cascade of rights, or who shall care for little Catherine? Some reflections on the Chen case' (2005) 30(4) EL Rev 548, 550.
[60] Chalmers – Davies – Monti, *European Union law, cit*, 468.
[61] *Gerardo Ruiz Zambrano v Office national de l'emploi*, C-34/09, EU:C:2011:124.
[62] *Ibid*, [45].

First, in the development of free movement provisions, following the CJEU judgment in *Procureur du Roi v Benoit and Gustave Dassonville,* C-8/74 (*Dassonville*),[63] *"[a]ll trading rules enacted by Member States which are capable of hindering directly or indirectly, actually or potentially* [EU trade] *are to be considered as measures having an effect to quantitative restrictions".*[64] Observing the notions 'actually' or 'potentially' implies in our context of citizenship rights that, citizens do not necessarily need to move but merely have the potential to do so.[65]

Secondly, earlier citizenship case law suggests that limited movement enables citizenship rights. According to the AG, the rationale for this could be drawn directly from traditional free movement case law according to which free movement rights remain dormant until triggered by crossing a border.[66] The cross-border nationality is entrenched in the wording of Articles 34, 49 and 56 TFEU. The assumption is that although these are different areas the basic treatment remains the same. This is because the role of movement of goods had been reduced in case law concerning the internal market provisions as seen in *Dassonville.*[67] Furthermore, in citizenship cases where the element of "*true movement is either barely apparent or frankly non-existent*", the Court made it clear that it is willing to go great lengths in order to secure citizenship rights. This is evident in cases such as *Carlos Garcia Avello v Belgian State,* C-148/02[68] where the children of Mr Garcia were born in Belgium and had never moved from there; *Chen* where the parent had only moved from one part of the UK to another; and *Rottman* where Mr Rottman remained in Germany after becoming a naturalized German citizen. Furthermore it is of importance to note that some citizenship rights conferred by the Treaties, such as the right to seek diplomatic protection overseas under Article 20(2)(c) TFEU or the right to petition to the European Parliament and apply to the EU Ombudsman under Article 20 (2)(d) TFEU could be enjoyed without intra-EU movement. Therefore, the absence of intra-Union movement and the grant of the citizenship benefits under Article 20 TFEU suggests that many aspects of citizenship today do not in any manner require movement to trigger these rights.

[63] *Procureur du Roi v Benoit and Gustave Dassonville*, C-8/74, EU:C:1974:82.
[64] *Ibid*.
[65] *Zambrano, cit,*[132].
[66] *Ibid*, [69]-[81].
[67] *Ibid*.
[68] *Carlos Garcia Avello v Belgian State,* C-148/02, EU:C:2003:539.

By formally de-coupling citizenship rights from free movement, AG Sharpston suggested that these could be enjoyed without the need to migrate.[69] *Zambrano* illustrates how actions of national authorities may limit enjoyment of EU law rights. The Belgian authorities in these circumstances had no genuine reason to refuse Mr Zambrano's application for residence. The unprecedented rulings by the CJEU suggests that the court is willing to go great lengths to secure citizenship rights for both EU and third country nationals.

Ultimately both *Chen* and, in particular, *Zambrano*, capture the extent to which the CJEU is prepared to go in order to secure, at least where young children are concerned, a EU citizen's inherent right to "*move and reside freely within the territory of the [European Union]*". A Member State's ability to derogate effectively from this entitlement is thus diluted heavily at the expense of the supranational competences of the EU Treaties. That being said, however it should not be treated as a blanket capability; indeed, the CRD identifies a number of areas in which, whilst enforced with much caution by the CJEU, Member States are armed with the right to deport citizens of other Member States. Such powers should be seen as a means for Member States to exert some form of self-determination against the seemingly unassailable force of Article 21 TFEU. This being in the sense that national authorities retain discretion in refusing citizenship on the basis of public policy and/or public security. In this spectrum, the most pertinent factor is the mandate given by the EU to national authorities to examine particular threats arising under their domestic jurisdictions. Nonetheless, even if Member States retain some discretion in the attainment of national citizenship, the CJEU has made it clear through its ruling in *Zambrano* and *Saunders* that, the rules are becoming increasingly coordinated at the EU level.

## Part 2 - The grounds for expulsion, public policy, public morality and proportionality

### 1. Public policy and public morality

In order to understand fully the extent to which restrictions on free movement and residence may be utilized by Member States, it is necessary to revert to the relevant provision in the

[69] L Solanke, 'Using the citizen to bring the refugee in: Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM) (2012) 75 MLR 106; van Eijken –de Vries, 'A new route', *cit*, 719.

CRD. Article 27 provides that: "*Member States may restrict the freedom of movement and residence of union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health*".[70] In addition the measures thus taken[71] must not be invoked "*to serve economic ends*".[72] In particular a citizen's right to move and reside within another Member State under Article 21 TFEU is not to be prejudiced by a Member State's financial precariousness, not even where that Member State appears to be in financial crisis and the deportation of citizens from neighbouring Member States would soften this burden. In *Régina v Pierre Bouchereau,* C-30/77, the CJEU clarified that "*measures*"[73] is to be intended as "*any action which affects the right of persons coming within the [application of Article 21 TFEU] to enter and reside freely in the Member States under the same conditions as the nationals of the host state*".[74]

In terms of the actual expulsion of an individual, the CRD identifies the considerations which Member States are obliged to undertake when contemplating an expulsion order. Indeed, Article 27(2) notes that any measures "*taken on grounds of public policy or public security shall comply with the principle of proportionality*"[75], and "*shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures*"[76]. Furthermore, the "*personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*.[77]"

Arguably, this captures the sentiment expressed by the CJEU in *R v Bouchereau*, notably that:

> In so far as it may justify certain restrictions on the free movement of persons subject to Community Law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence […] of a genuine and sufficiently serious threat affecting one of the fundamental interests of society[78].

[70] CRD, Article 27(1).
[71] *Ibid*, Article 27(2).
[72] *Ibid*, Article 27(1).
[73] *Régina v Pierre Bouchereau*, C-30:77, EU:C: 1977:172, [29].
[74] *Ibid*.
[75] CRD, Article 27(2).
[76] *Ibid*.
[77] *Ibid*.
[78] *Bouchereau*, [35].

Additionally, the CRD contends that "*justifications […] isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted*"[79]. This particular issue was addressed in *Orfanopoulous,* C-482/01.[80] German legislation required the expulsion of nationals of other Member States who committed specific crimes. In its judgment, the CJEU held *inter alia* that it was disproportionate to deport automatically such persons, since this disables national authorities from examining the post-crime behavior of the convicted. A similar approach was taken in *Commission v Spain,* C-503/03.[81] The Spanish government had a practice of denying entry to foreigners whose names prompted an alert according to its register on the Schengen Information System. Amongst others the CJEU concluded that any such concerted practices did not entail a proportionate means of denying entry to foreigners, since without the Spanish government's own due consideration to the relevant persons, it was not possible to determine independently whether a foreigner's presence constituted a danger for Spanish society. Overall, it appears that Member States are free to define the imperative grounds of public policy and public security according to their national needs. However such discretion is not limitless, as it will be discussed further below.

## 2. Proportionality

The most commonly used grounds for exclusion are public policy and public security.[82] Whilst two separate criteria, the common focus is whether or not the individual's conduct poses a "*genuine, present and sufficiently serious*"[83] threat to the society of the relevant Member State. What is more important is reference to the principle of proportionality.[84] The classic formulation of this doctrine is to be found in *Regina v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others,* C-331/88 (*Fedesa)*[85], in which the CJEU maintained that measures are proportionate if they are "*appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question*".[86] The relationship between proportionality and Article 27[87] exclusion

[79] *Ibid*.
[80] *Orfanopoulous & Oliveri*, Joined Cases C-482/01 and C-493/01, EU:C:2004:262.
[81] *Commission of the European Communities v Kingdom of Spain*, C-503/03, EU:C:2006:74.
[82] Chalmers – Davies – Monti, *European Union law*, *cit*, 476.
[83] *Orfanopoulous* cit, [36].
[84] *Ibid*.
[85] *Regina v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*, C-331/88, EU:C:1990:391.
[86] *Ibid*, [13].
[87] CRD, *cit*, Article 27.

orders appears topical when considering whether or not a consistent approach has been taken in respect of nationals and foreigners alike since, after all, the derogations under the CRD are EU law concepts which ought to be applied only in most severe circumstances. In this respect, attention should be drawn first to *Van Duyn v Home Office* C-41/74 (*Van Duyn*)[88]. Besides articulating further the notion of direct effect of EU law[89], the CJEU held that public policy measures cannot be determined unilaterally by Member States; rather they must be subject to some sort of EU legitimacy control, notwithstanding the fact that Member States do have an area of discretion to work within. Member States may impose restrictions of entry upon foreigners (in this case a woman was denied entry into the United Kingdom based on her affiliation with the Church of Scientology) "*despite the fact that no restriction is placed upon nationals of the said Member State who wish to take similar employment with these same bodies or organisations*".[90] This reasoning must now be limited to an understanding of how the CJEU *used* to conduct itself, since the more recent case of *Rezguia Adoui v Belgian State,* C-115/81 (*Rezguia Adoui*)[91] offers a more pertinent line of reasoning:

> It should nevertheless be stated that conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national or national of another Member State in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct[92].

The CJEU therefore found that Member States are unable to deny residence to non-nationals because of a conduct that, when attributable to a Member State's nationals, does not give rise to repressive measures of equivalent effect to combat such behaviour. Such reasoning would suggest that deporting a foreigner from a Member State on the grounds of, for instance, begging and petty crimes would be ultimately disproportionate, since it is unlikely that such repressive measures exist in any Member State which punishes its own nationals in such an authoritarian fashion. Whilst, conclusively, the CJEU did not establish a threshold in *Rezguia Adoui* of what is to constitute permissible grounds of expulsion of foreigners, the implication

[88] *See Yvonne van Duyn v Home Office*, C-41/74, EU:C:1974:133.
[89] M Bobek, 'The effects of EU law in the national legal systems' in Barnard – Peers, *European Union Law*, *cit*, 149.
[90] *Van Duyn*, *cit*, [24].
[91] See *Adoui and Cornuaille v Belgian State and City of Liege*, C-115/81 and C-116/81, EU:C:1982:183.
[92] *Ibid*, [8].

of this reasoning is clearly intelligible: deportation of persons on grounds of public policy or public security may be enforced by Member States upon the condition that adequate harsh repression of its own nationals is enforced by the deporting Member State. Where such practice does not exist, any deportation is likely to be treated as disproportionate in terms of Article 27(2) CRD. This was confirmed by the CJEU in *Land of Baden-Württemberg v Panagiotis Tsakouridis,* C-145/09[93] (*Tsakouridis*), in particular with regard to expulsion measures where foreigners are entitled to "*enhanced protection*"[94] under the CRD. The factual background was as follows: Mr Tsakouridis, a Greek national born in Germany (where he had spent most of his life), was subject to an expulsion measure to Greece after being sentenced to imprisonment of more than five years for dealing in narcotics as part of an organized crime ring. Given that Mr Tsakouridis had "*resided in [Germany] for the previous ten years*"[95], he was entitled to enhanced protection. This would entail that "*an expulsion decision may not be taken against [him], except if the decision is based on imperative grounds of public security, as defined by Member States*"[96]. Whilst the definition of the grounds of public security are effectively at the discretion of the concerned Member State, as the CJEU also emphasized in its judgment in *P.I.*, C-348/09, such grounds "must nevertheless be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union".[97]

It is thus without question that imperative grounds of security transcend well above the aforementioned example of threats posed by begging and petty crimes. Where a foreigner has resided in a Member State for at least ten years, the grounds upon which expulsion may be based, according to AG Bot, must be justified in light of the "*exceptional seriousness*"[98] of the threat posed by that individual. Conclusively, "*very good reasons would have to be put forward to justify the expulsion measure*"[99] where the individual is covered by the enhanced protection mechanism of Article 28(3)[100]; lowly crimes are unlikely to fall within this category since they do not represent a "*social and economic danger to mankind*"[101] in

[93] *Land of Baden-Württemberg v Panagiotis Tsakouridis*, C-145/09, EU:C:2010:708.
[94] CRD, Article 28(3).
[95] *Ibid*, Article 28(3)(a).
[96] *Ibid*.
[97] *P.I. v Oberbürgermeisterin der Stadt Remscheid*, C-348/09, EU:C:2012:300, [23].
[98] Opinion of Advocate General Yves Both in *Land of Baden-Württemberg v Panagiotis Tsakouridis*, C-145/09, EU:C:2010:322, [49].
[99] *Ibid*, [53].
[100] CRD, Article 28(3).
[101] *Tsakouridis*, *cit*, [55].

comparison to crimes including terrorism, drug trafficking and slavery. The reason behind this is compliance with the principle of proportionality.

## 3. Human Rights and EU Citizenship

In the engagement over the rights of EU migrants, issues of protection might also arise under a human rights angle. Despite the fact that since the adoption of the Lisbon Treaty the Charter of Fundamental Rights of the European Union (Charter)[102] has been placed on the same hierarchical level as of the Treaties, full commitment of the EU to human rights protection may not be yet complete.

Nevertheless, all EU Member States are also all parties to the ECHR and can therefore still be subject to the scrutiny of the European Court of Human Rights (ECtHR) if a violation is allegedly found within their national territory.

Indeed, in *Tsakouridis*, AG Bolt drew a parallel with *Maslov v Austria*[103], in which the ECtHR held that the deportation of a subject – who had spent the majority of his life in Austria – for burglary constituted a violation of his right to respect for his family and private life as guaranteed by Article 8 ECHR. In reaching its decision in *Maslov v Austria,* the ECtHR considered that, similarly to Article 28(1) CRD, the following criteria should be considered: the length of the applicant's stay in the host country; the time elapsed since the offence was committed and the applicant's conduct during that period, and; the solidity of social, cultural and family ties with the host country and with the country of destination.[104] Similar to the concept of enhanced cooperation, the ECtHR found that the deportation order made by the Vienna Federal Police Authority was disproportionate to the legitimate aim of preventing crime and disorder, holding *inter alia* that the offences of burglary were of a non-violent nature and thus did not merit expulsion.[105]

The relevance of this decision corresponds to the human rights interests of the foreigner subject to deportation are of paramount importance in determining the legality of the

[102] Charter of Fundamental Rights of the European Union, OJ C 83, 389-403.
[103] *Maslov v Austria*, App no 1638/03 (ECtHR, 23 June 2008).
[104] *Ibid*, [57].
[105] *Ibid*, [100].

expulsion.[106] In this respect, therefore, while petty crimes are deserving of punishment, it may be flawed to maintain that a proportionate means of punishment should be deportation. Not only does this fail to adhere to the principle of proportionality within the CRD[107], but also violates the foreigner's inherent right to respect for his private and family life guaranteed by Article 8(1) of the ECHR.

Conclusively, the deportation of a foreigner lawfully exercising his right of free movement is subject to Member States' discretion. However, this is subject to significant constraints. *Rezguia Adoui* suggests that there must be consistency between deporting a foreigner based on criminality, and the repressive measures imposed on nationals of the deporting Member State. To this view, expulsion is unlawful because deportation in form of punishment is unlikely to be applied in case of theft and begging to an individual in possession of a national citizenship in a Member State. Additionally, *Tsakouridis* highlights that only the most extreme crimes should merit the criteria of either public security or public policy[108], in particular where the individual has both family and cultural ties with the deporting Member State, and has resided there for some time. Again, this threshold is unlikely to be met by petty crimes, such as theft, and begging. Furthermore, since deporting an individual from one Member State to another always affects his right to respect for family life, the interference with this human right similarly requires a substantially high proportion of justification. As already indicated, it is unfair, unjust and unreasonable to contend that individual charges small crimes and counts of begging are sound excuses to remove an individual's right to move and reside within a neighbouring Member State of the EU; to do so would be to tamper extensively with his right to a private life. Ultimately, to hold otherwise is to reduce the integrity of EU citizen's rights under both Article 9 TEU and Article 20 TFEU from statutory prerogatives to third generation human rights open to abuse.

[106] J Callewaert, 'The European Convention on Human Rights and European Union law: a long way to harmony' 6 EHRLR 768.
[107] CRD, Article 27(2).
[108] *Ibid*, Article 27(1).

## Case study: The application of provisions under Article 27, 28 and 30 CRD in relation to the expulsion of Roma minorities on the basis of petty crimes and begging

The preceding parts have provided an overview of the relevant legislative framework on EU citizenship, free movement of persons and expulsion of EU nationals as interpreted by the CJEU and the ECtHR. This part intends to examine how such principles would apply to the expulsion of Roma people from France in 2010, discuss whether such conduct is compliant with EU law. First, the compatibility of the Roma people expulsions with the public policy and/or public security derogations will be assessed. Secondly, an analysis will be undertaken with regard to the procedural safeguards against expulsion under Article 30 CRD and also the expulsion of minors. Finally, a brief reflection will be made in relation to the theoretical foundations of EU citizenship with a view to provide a solution to the problem of non-compliance of a certain Member State with its obligations under EU law.

The public policy derogation forms an essential basis for the expulsions which in some cases have been directed at Roma on grounds that they had allegedly committed public order offences. An example of this is the case of a Romanian national who was reportedly being arrested and forced to leave France after he was assaulted by a man whose bins he was about to search for food.[109] While such behaviour is obviously too trivial to trigger the exception of public security which covers threats to the State's very existence, it might nonetheless be possibly justified only on this ground. As the CJEU established in *Rottman* [110] and *Tsakouridis*[111], restrictive measures on public policy grounds must be based exclusively on the individual's personal conduct and previous criminal convictions as such may not justify them. If previous criminal convictions were for serious offences, then the national authorities would have to identify a threat arising in addition to the anomaly occasioned by the offence to the social order. This can prove problematic to apply in the case of a person who has resided in a certain Member State for over 10 years, as he or she may not be expelled unless imperative grounds exist. In *Tsakouridis* [112] the CJEU explicitly interpreted the CRD expulsion provision in a narrow fashion, contending that drug possession and pushing were not sufficiently imperative to the social order in the application of an expulsion order.

[109] Sowah 'Deporting EU Citizens' cit,§2.6.
[110] *Rottman, cit.*
[111] *Tsakouridis, cit.*
[112] Ibid.

Additionally, Article 27(2) CRD provides that measures cannot be justified on grounds irrelevant to the individual case at hand and must not be used as a deterrent based on general preventative measures.[113] As regards the episodes occurred in France, it would seem that the relevant expulsions were triggered by an undue association of Roma persons as such with the commission of criminal offences.[114] Arguably, instead of assessing individual circumstances, the French authorities expelled persons based on a general perception of disorder caused by Roma, based on the aim of preventing "*exploitation of children for begging, prostitution and crime*".[115] It should be also observed that, if nothing else, in France begging was de-criminalized in 1994 when the new criminal code was adopted.[116] Hence it appears questionable that a non-criminal offence could suffice to trigger expulsion. This is also because:

> Even indigent Union citizens, who have to live off what they solicit on the streets, may not be deported because, by definition, they *cannot* become an unreasonable burden on the social assistance system of the host Member State.[117]

Furthermore, the individual's personal conduct must represent a "*genuine, present and sufficiently serious threat affecting one of the interests of society*"[118] which is not established merely because there is a likelihood of committing further petty crimes. Judging from the Roma-related issue in France and the evidence available[119], the only activities of interest to the Roma minority at that time in Paris were begging, searching for food and living in illegal settlements in impoverished conditions. Such activities occurred on a permanent basis in temporal connection with the expulsions. As mentioned above, the seriousness of these activities for the sake of deportation is – to say the least – questionable, given the fact that non-aggressive begging and food scavenging may be considered negligible acts resulting from poverty and destitution. Overall, these acts do not usually result in repressive actions against French nationals, nor do they pose a threat to public policy in a strict sense. Instead,

[113] CRD, Article 27 (2).
[114] Le Monde, 'Les Roms récemment renvoyés', *cit.*
[115] Sowah, 'Deporting EU citizens', *cit.*
[116] J Damon, 'La prise en charge des vagabonds, des mendiants et des clochards. Le tournant recent de l'historie' (2007), available at http://eclairs.fr/wp-content/uploads/2011/09/PriseEnChargeVagabondsDamonRDSS.pdf, 4.
[117] A Somek, 'Solidarity decomposed: being and time in European citizenship' (2007) 32(6) EL Rev. 787, 796.
[118] CRD, Article 27 (3).
[119] Le Monde, 'Les Roms récemment renvoyés', *cit.*

the social damage caused by begging and food scavenging should be described as minor nuisance, while the harm caused by settlements might be slightly more considerable due to the environmental effects because of garbage piles.

When compared to offences previously arising in this context, such as drug possession (*Tsakouridis*), or prostitution[120] the cumulative danger emanating from the presence of Roma minorities appears marginal. In any case the form of disorder engaged by these groups is unlikely to endanger the very substance of any democratic society, given the fact that the personal conduct must represent a threat affecting the fundamental interest of society.[121] As a result, the French expulsion orders based on public policy appear to be unlawful because procedural safeguards and threat requirements were initially unsatisfied.

Article 28(1) CRD further stipulates that before taking an expulsion decision based on grounds of public policy or public security, the host Member State shall consider aspects such as how long the individual has resided in the territory for. Up till now, this provision has represented the most readily applicable safeguard for adults against expulsion. Applied to the Roma case in France, it would appear the deportations were ordered lacking a comprehensive analysis of personal conditions within Article 28(1) CRD.[122] Although considerations regarding age and health may be difficult to ascertain, the same may not be true for family and economic situations. In the case of Roma subjects, the latter are often characterised by large groups of relatives living in impoverished conditions and with limited prospect of securing financial support. Furthermore, the struggle in assessing the relationships to the country of origin lies in the deprived position within society which constantly forces the Roma to migrate to other Member States.[123] The fairly short lengths of residence and secluded forms of living in illegal settlements may prevent social and cultural integration.[124] As such, lacking more information, it may be difficult to establish whether a certain minority, eg Roma

[120] See Adoui and Cornuaille v Belgian State and City of Liege, Joined Cases 115/81 & 116/81, EU:C:1982:183.
[121] CRD, Article 27 (2).
[122] *Ibid*, Article 28(1): "Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin".
[123] W Guy, 'Why Roma migrate' (30 June 2015), openDemocracy, available at https://www.opendemocracy.net/beyondslavery/will-guy/why-roma-migrate.
[124] *Ibid*.

people, may benefit from Article 28 CRD, which prioritises integration in allocating increasing protection from expulsion.[125]

With particular regard to Roma minors, it follows from Article 28(3)(a) CRD that their expulsion must be "*based on imperative grounds of public security*", with the exception of expulsion itself being necessary to safeguard the best interest of the child, considering the protection of links to the family.[126] Evidently, besides the CJEU decision in *Chen* this provision also echoes Article 3 of the Convention on the Rights of the Child[127] (although not ratified by the EU as such, the Convention has been ratified by France), which requires that "*[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*." In the specific case of Roma people, it is not clear whether imperative grounds of public security were invoked or that any special consideration was given to the best interests of those children who were being systematically expelled together with their families. Even if the child's best interest could be also considered to be with his or her family, the lack of individual consideration could nonetheless lead to the exclusion of relevant factors in specific instances. This is also illustrated by the recent case (not directly relevant to the present discussion in that involving a non-EU citizen) of a Roma schoolgirl who was expelled along with her parents and five siblings after they had lost their battle for asylum in France, with a possible negative effect on her education.[128] It might have been in the child's best interest to stay in France, where there would be an opportunity to be educated. So, in the hypotheses in which she was an EU citizen, the absence of imperative grounds of public security, requiring an extraordinary threat, would/should protect them from expulsion.

Another issue is the requirement under Article 30(3) CRD, according to which a written notification of the expulsion should be served one month before the deportation.[129] The person subject to an expulsion measure should receive a precise and full statement detailing the grounds for the decision at hand, in order to enable him/her to take effective measures to

[125] Sowah, 'Deporting EU citizens', *cit.*
[126] CRD, Article 28 (3) (a) – (b).
[127] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.
[128] N Vincour, 'France's Hollande faces backlash in schoolgirl deportation row' (10 October 2013) Reuters, available at http://uk.reuters.com/article/2013/10/20/uk-france-immigration-idUKBRE99J03F20131020.
[129] CRD, Article 30(3).

prepare his/her defence.[130] Taking the view that most Roma minorities in France do not necessarily acquire comprehensive language skills, the question may become whether they were provided with adequate interpretation by the French government. This in turn suggests that they did not understand the legal process and were not provided with further assistance, all indicating that the persons concerned were not able to comprehend the content and implications' of the notifications given to them. This could be another factor weighing in the sense of the unlawfulness of France's initiative.

Lastly, Article 2 TEU (which is echoed in Article 21 of the Charter of Fundamental Rights of the European Union) provides that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.[131] Article 10 TFEU imposes a positive obligation on Member States to implement policies and activities to contrast discrimination on the basis of *inter alia* racial and ethnic origin.[132] The evidence of mass expulsions of minority groups such as the Roma, combined with the numerous official statements signalling out the Roma as an ethnical group that should be targeted in the conduction of evictions and expulsion operations, suggest more serious non-discrimination and fundamental rights violations. Claims may still be brought be individuals against Member States under Article 14 ECHR which prohibits discrimination on the basis of social and national origin. In *Conka v Belgium* the ECtHR held that the term "*collective expulsion*" is to be intended as "*any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group*".[133] This term appears applicable and is almost identical to the discussion examined above. Hence, the violation of rights against non-discrimination and collective expulsion forms an additional basis of unlawful expulsions under Article 14 ECHR.

Overall the case study at hand inextricably portrays some Member States' inability to deal adequately with EU citizens exercising their freedom of movement. EU law correctly asserts that only persons representing an unreasonable burden or a serious threat to the state may be expelled. In a democratically transparent Union, by abiding to the rule of law the rights of its citizens including their freedom of movement should only be restricted under exceptional

[130] *Ibid*, Article 30(1).
[131] TFEU, Article 2.
[132] *Ibid*, Article 10.
[133] *Conka v Belgium*, App no 51564/99 (ECtHR, 5 February 2002), [59].

circumstances, subject to proportionality. By extending the right of residence to EU citizens who are not only non-active but perhaps even place a reasonable burden on host states, EU citizenship law has encouraged the movement of persons not matching Member States' image of the 'law-abiding immigrant'. The expulsion of Roma in France has illustrated Member States' incapability of dealing with EU citizens who live off what they solicit on the streets, present an insufficiently serious threat and cannot become an unreasonable burden. While on the one hand it appears understandable that local authorities want to reduce the distress caused by marginal criminal activities it is on the other hand unacceptable that such minorities are pushed from one country to another on grounds other than those envisaged by the CRD. The prolonged political discourse between EU institutions and the French government during which unlawful expulsion continued to be exercised shows the ineffective and undemocratic grounds of current EU law compliance procedures by Member States. If it is true that the principle of nativity and the principle of sovereignty are united in the body of the 'sovereign subject' (as Agamben observed)[134], then it may be argued that Member States cannot unduly compress the rights arising out of EU citizenship. As an arguably sovereign entity, the EU should effectively aspire to employ stricter compliance procedures to enforce on Member States, under which it should be clear that expulsion ought to be treated as the ultimate measure' to take in case of public emergency. Member States' discretion when derogating from EU citizenship provisions undermines the integrative goals of EU law and should therefore be limited. It appears highly questionable to put the fate of EU citizens' rights into the hands of Member States which are potentially compelled to induce expulsion measures in order to accommodate their own priorities.

## Conclusion

EU citizenship made its first official appearance in the EU legal system with the 1992 Treaty of Maastricht. In 2004 the EU also adopted a specific directive on the rights of EU citizens. Over the past few years the CJEU has interpreted extensively the relevant provisions in the Treaties and the CRD, thus defining both the scope and boundaries of EU citizenship. With particular regard to deportation of EU citizens within Article 27 CRD, the relevant grounds include public policy, security or health, and any measures in this respect must be subject to a proportionality scrutiny. The latter was clarified in *Fedesa,* in which the CJEU held that

[134] Agamben, 'Homo Sacer', *cit,* 76.

expulsion orders are subject to the principle of proportionality and must be based on the personal conduct of the individual concerned. In *Orfanopoulous* the CJEU further clarified that when considering a claim to object to deportation, the requirement of the existence of a present threat must be satisfied at the time of the expulsion. *Rezguia Adoui* highlighted how Member States are prevented from denying residence to non-nationals by reason of conduct that, when attributable to Member States' nationals, would not give rise to repressive measures of equivalent. Hence, deportation of persons on the grounds of public policy or public security shall be enforced upon condition that adequate harsh repression of nationals is enforced by the deporting Member State. Overall, it appears that the CJEU has narrowed down the room available to Member States not to comply with EU citizenship rules.

In light of relevant legislation and CJEU case law, this contribution has suggested that deportation of Roma subjects from France was not lawful under EU law. The Roma affair also prompts a broader reflection as to the relationship between the EU and its Member States. This is because the scope of discretion available to Member States when enforcing their own legal standards and thus derogate from what is required under EU law automatically undermines the unifying and integrative goals of the EU as such. Furthermore expelling EU citizens from their own territory also highlights the close relationship between legal conceptions and politics, and how easy it can be for the latter to overstep, possibly on grounds of preserving a certain Member State's own need to re-assess concept like solidarity and identity, both of which are particularly unstable in economically hard times.

Overall, this also involves the need to consider to what extent Member States have given and should give away their sovereignty for the sake of the EU project in general and for the right to decide who may reside on their territory more in particular. Arguably Member States still retain some sovereignty as EU citizenship is initially contingent upon the nationality of Member State which is regulated by domestic law. However, it appears clear following relevant CJEU case law that the room for independent national initiatives has been compressed significantly, also on consideration of the increased relevance of fundamental rights within the EU system. The right to respect for family and private life under Article 7 of the Charter (and 8 ECHR) interferes with EU citizenship and strengthen its value.