INSIGHT

FREEDOM OF MOVEMENT, SOCIAL INTEGRATION AND NATURALIZATION: TESTING REVERSE DISCRIMINATION IN THE RECENT CASE LAW OF THE COURT OF JUSTICE

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ABSTRACT: The *Insight* addresses reverse discrimination in the field of free movement and derived residence rights for EU citizens' family members who are third country nationals. It outlines the debate concerning the justification for differential treatment and discusses the role of the EU and the Member States in relation to reverse discrimination. While the Court of Justice has traditionally considered the exercise of the freedom of movement as a sufficient link with EU law, the recent case law shows that the coherence of this approach is under pressure. As the *Lounes* preliminary ruling shows (judgment of 14 November 2017, case C-165/16, *Lounes* [GC]), when movers settle in the host State, are fully integrated and eventually naturalize, differential treatments between movers and statics can be hardly justified and urge the Member States to address this phenomenon.

KEYWORDS: reverse discrimination – purely internal situation – EU citizenship – freedom of movement – derived residence right – family member.

I. BRIEF INTRODUCTORY REMARKS: CITIZENSHIP, NATIONAL SOVEREIGNTY AND NATURALIZATION IN THE EU LEGAL ORDER

According to settled principles of international law, it is up to States to decide who their nationals are.[1] Hence, the acquisition and loss of citizenship have usually been considered building blocks of domestic sovereignty. In the past, this existential approach to nationality led to fictitious perceptions of an individual's belonging to a State, centred on blood ties and adherence to the allegedly homogenous (ethnic, cultural, linguistic, etc.) features of a given community. Fictitious exclusivity resulted in oddities, such as diminished rights for

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[1] The Court of Justice describes it as a principle of customary international law: Court of Justice, judgment of 20 February 2001, case C-192/99, *Kaur*, para. 20.

naturalized or dual citizens in comparison with "authentic" ones, or international conventions aimed at discouraging the phenomenon of multiple nationalities.

However, national authorities' quest for control over the precise composition of their communities was soon confronted with overarching factors such as international migration flows, globalization and the rise of fundamental rights. These factors broke the chains of national exclusivity and the fiction was unveiled. As a result, the incidence of multiple nationalities and naturalization – as well as the importance of residence rights – rose sharply over the final decades of the twentieth century, leading to complex interactions between different legal systems around the world.[2]

In the European Union, these interactions have been amplified by the objective of achieving an ever-closer union among the peoples of Europe, particularly through freedom of movement and the establishment of EU citizenship. Key rights – such as unconditional access to the national territory or residence rights – that were previously considered as belonging to the Member States have either overcome their jurisdictions or been reproduced at the EU level.

Still, this additional legal complexity reveals two potential and deeply intertwined flaws. On the one hand, reverse discrimination comes to the fore, with the exercise of rights stemming from EU law potentially becoming a source of differential treatment between Union citizens. In particular, those who have never taken advantage of their freedom of movement are in principle barred from certain rights stemming from EU law, such as derived residence rights for family members who are third-country nationals.

On the other hand, the many possible evolutions of an individual's situation can be an unexpected and powerful amplifier of reverse discrimination. The deepening of the European integration process has brought about increasing interactions among Member State nationalities. Thanks to the opportunities offered by the internal market and the area of freedom, security and justice, EU citizens move and settle abroad with their families. An increase in multiple nationalities and naturalizations is an inherent outcome of fully-fledged implementation of the freedom of movement of persons in an ever-closer and socially cohesive Union. In principle, this phenomenon represents a major success for the European integration process. At the same time, it can be difficult to handle in an area where the scope of EU law is limited and a significant degree of fragmentation of national legal orders persists.[3]

Walking the fine line between reverse discrimination, national sovereignty, advances towards successful EU citizen integration in host Member States and the eventual

[2] Interestingly, many States contribute to the rise of multiple nationalities. They often decide to expand the scope of their control by conferring nationality to the descendants of their nationals leaving the country. D. KOCHENOV, *Double Nationality in the EU: An Argument for Tolerance*, in *European Law Journal*, 2011, p. 323 *et seq*.

[3] For instance, a static citizen could be a national of a Member State in which he has never lived, due to the nationality acquisition rules of the State in which he lives.

establishment of a true European community of people, the Court of Justice has tried to find a way to eliminate the flaws outlined above. Or, at least it has tried to mitigate the impact of reverse discrimination, despite being constrained by the limits of its jurisdiction and of EU competences in general. Over the last decade, the Court of Justice has been at the forefront in empowering EU citizenship and free movement rights, as demonstrated by the case law involving derived residence rights for third-country nationals related to a Union citizen.

A recent preliminary ruling is particularly illustrative in this regard and further exacerbates the tensions between the expansion of the rights granted by EU (primary) law and national migration policy choices. In *Lounes*,[4] the Court was confronted with the opportunity to acknowledge a derived residence right in favour of a third country national whose wife – an EU citizen – had been naturalized in the Member State in which she had resided for over 20 years. Along with its precedents, *Lounes* challenges the current justifications to differential treatment between movers and static Union citizens, as well as the future feasibility and overall consistency of the approach followed by the Court of Justice thus far. It raises systemic questions regarding the consequences attached by domestic legal orders to a failed or successful path of social integration in the host Member State, as well as how a Union citizen's degree of integration impacts the enjoyment of the rights stemming from Union citizenship and free movement.

In this context, this *Insight* firstly addresses the debate concerning reverse discrimination in the area of the free movement of persons (Section II). Secondly, it focuses on the current reach of the Court of Justice case law on the definition of purely internal situations, as a (temporary?) way of delimiting the impact of reverse discrimination (Section III). The following section applies these premises to the never-ending saga of the scope of free movement and EU citizenship rights and their interactions with national legal orders (Section IV). The *Lounes* judgment is used as an example of how exceptional – but actually strategic and reasonably not uncommon in the European Union in the long run – factual circumstances can test the interaction between EU law and national legal orders and take the underlying tensions between the two poles to the extreme. The last Section briefly discusses the systemic implications of this case law, which affects the overall coherence of the Court's sectoral approach to the delimitation of the scope of EU law and puts pressure on the current justification for reverse discrimination.

[4] Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes* [GC].

II. The debate on reverse discrimination and freedom of movement

Reverse discrimination has always been a contentious issue in the EU legal order.[5] Pleas against it have been raised repeatedly alongside the gradual strengthening of the internal market and the rise of the four fundamental freedoms.

Some scholars have pointed out that reverse discrimination conflicts with the landmarks of the progress of the EU legal order, such as the abolition of controls at internal borders in the Schengen area[6] or the establishment of EU citizenship.[7] More generally, the structural paradigm shift of the Union integration process from primarily economic objectives to the "creation of a sense of identity" and the centrality of fundamental rights has been put forward to argue that reverse discrimination is outdated.[8] From this point of view, a ground-breaking role is attached to the principle of equal treatment under Art. 18 TFEU, which "further undermines the survival of reverse discrimination".[9]

This is understandably the essence of the criticism against situations where EU law basically requires Member States to treat EU citizens in a way they did not originally intend to treat their own nationals. Accordingly, some authors contend that Union institutions should bear the responsibility for addressing and resolving this asymmetry. In particular, from this perspective, the Court should promote a more extensive interpretation of the Treaty provisions on EU citizenship, equal treatment and free movement of persons.[10] Eliminating reverse discrimination would be an effective way of promoting a meaningful concept of EU citizenship as a status advancing individuals' rights rather than separating Union citizens in differentiated regimes, since equal treatment enshrines a right conferred by EU law to all nationals of the Member States.[11]

The existential connection between the Union integration process and non-discrimination has been used to counter acceptance of reverse discrimination even within the Court of Justice. AG Mischo famously labelled reverse discrimination as unacceptable

[5] Discrimination is characterized as reverse when an unexpected group is treated less favourably than a group that is normally discriminated against: G. Davies, *Nationality Discrimination in the EU Internal Market*, Den Haag: Kluwer Law International, 2003, p. 19. For a comprehensive analysis see F. Spitaleri, *Le discriminazioni alla rovescia nel diritto dell'Unione europea*, Roma: Aracne, 2010.

[6] H. d'Oliveira, *Is Reverse Discrimination Still Permissible After the Single European Act?*, in T.M. de Boer (ed.), *Forty Years on: The Evolution of Postwar Private International Law in Europe*, Den Haag: Kluwer Law International, 1990, pp. 73-74.

[7] N.N. Shuhibne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move on?*, in *Common Market Law Review*, 2002, p. 731 *et seq*.

[8] C. Datricourt, S. Thomas, *Reverse Discrimination and Free Movement of Persons Under Community Law: All for Ulysses, Nothing for Penelope?*, in *European Law Review*, 2009, p. 454.

[9] S. O'Leary, *The Evolving Concept of Community Citizenship: From Free Movement of Persons to Union Citizenship*, Den Haag: Kluwer Law International, 1996, pp. 276-277.

[10] A. Tryfonidou, *Reverse Discrimination in EC Law*, Den Haag: Kluwer Law International, 2009, pp. 61-64.

[11] E. Spaventa, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects*, in *Common Market Law Review*, 2008, p. 44.

in the long run, because he believed that the principle of equal treatment should have been the guiding star for the development of the internal market all along.[12]

Even so, the Court has consistently acknowledged that, in the event of a purely internal situation,[13] EU law does not prevent a Member State from treating its nationals less favourably than Union citizens benefiting from the rights conferred by EU law. Two main arguments have been used to support this approach. Firstly, overcoming reverse discrimination would impact considerably the vertical division of competences between the EU and the Member States. Aside from any concern regarding its actual political feasibility, the expansion of the scope of rights stemming from EU law would require significant amendments to the Treaties and could hardly be achieved through an extensive interpretation of existing clauses.[14]

Secondly, unless a clear contrary political choice "to eliminate the inequality" is made by the Member States, reverse discrimination appears to be an inherent feature of the intersections in the multi-layered governance on which the Union is based.[15] More specifically, it can be considered a natural consequence of the co-existence, in the same territory, of norms belonging to different legal systems, often pursuing different objectives or grounded on a variety of values or political priorities.[16] In line with this approach, the Court of Justice itself has repeatedly remarked that it is up to the national court to assess whether there is discrimination, and up to domestic authorities to determine whether and how any given discrimination is to be eliminated.[17]

Considering the structural nature of reverse discrimination, Lenaerts contended that it can be proscribed only insofar as such treatment is in plain contradiction with the objectives of EU law.[18]

Therefore, the key concern is the criterion determining an accepted inequality. In this respect, as the Court of Justice made clear in its early case law,[19] purely internal situations fall outside the scope of application of EU law and consequently allow room for coexisting differentiated regimes based on EU and national law respectively. The next Section examines this concept and its development within the framework of the free movement of persons.

[12] Opinion of AG Mischo delivered on 24 September 1986, joined cases 80/85 and 159/85, *Edah*.

[13] See Section III.

[14] N.N. SHUIBHNE, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, p. 1615.

[15] D. HANF, *Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity or Judicial Choice?*, in *Maastricht Journal of European and Comparative Law*, 2011, p. 29 *et seq*.

[16] E. CANNIZZARO, *Producing Reverse Discrimination Through the Exercise of EC Competences*, in *Yearbook of European Law*, 1997, p. 29 *et seq*.

[17] Court of Justice, judgment of 16 June 1994, case C-132/93, *Steen*, para. 10.

[18] K. LENAERTS, *L'égalité de traitement en droit communautaire*, in *Cahiers de droit européen*, 1991, p. 41.

[19] The first reference to the concept of purely internal situations dates back to 1979: Court of Justice, judgment of 7 February 1979, case 115/78, *Knoors*, para. 24.

III. The exercise of the freedom of movement as a sufficient link with EU law

The Court of Justice gave the first definition of a purely internal situation in *Saunders*, referring to the absence of "factors connecting [it] to any of the situations envisaged by [Union] law".[20] The Court then clarified that a sufficient link is enough to trigger the application of EU law and further connected it to the presence of a cross-border element. In relation to Art. 45 TFEU, a prominent role is traditionally given to the exercise of the freedom of movement, based on both a textual and teleological interpretation of primary law.[21]

Recourse to an internal market-oriented logic, which collides with the rationale underpinning Union citizenship and with the rise of fundamental rights, has proven to be a contentious issue. In *Flemish Care Insurance*, AG Sharpston challenged the sustainability of the purely internal situation doctrine, considering that Art. 21 TFEU recognizes *per se* a right to move and reside anywhere in the territory of the Union to all EU citizens, regardless of whether or not they are static.[22]

Moreover, the Court's attempt to provide a criterion defining the scope of application of EU law has been challenged as an arbitrary distinction "begging the question of what degree of connection is required".[23] The fact that individual situations are often complex and difficult to interpret amplifies the risk of uncertainty and unpredictability, which are even worse than the problem the criterion is intended to solve.[24]

Key questions are then raised, such as "what kind of movement should be exercised, when that exercise should have happened and for how long a cross-border element should exist".[25] The what, when and how of free movement have been the constant concern of Court of Justice case law throughout the last two decades, aiming to address the quest for increased certainty and minimized inequality. Partially in line with this approach,

[20] Court of Justice, judgment of 28 March 1979, case 175/78, *Saunders*, para. 11.

[21] Court of Justice, judgment of 27 October 1982, joined cases 35/82 and 36/82, *Morson and Jhanjan*, paras 15-18. Admittedly, unlike the other relevant Treaty provisions, Art. 45 TFEU does not refer to actual cross-border movement, but the Court of Justice as always considered this element to be an implicit feature of this provision.

[22] Opinion of AG Sharpston delivered on 28 June 2007, case C-212/06, *Government of the French Community and Walloon Government v. Flemish Government (Flemish Care Insurance)*, paras 121 and 140. On the contrary, the Court of Justice has always supported the need for a cross-border element, because of the wording of Art. 21 TFEU, which refers to the limits and conditions prescribed by primary law. Court of Justice, judgment of 5 June 1997, joined cases C-64/96 and C-65/06, *Uecker and Jacquet*, para. 23 *et seq*.

[23] D.M.W. Pickup, *Reverse Discrimination and Freedom of Movement of Workers*, in *Common Market Law Review*, 1986, p. 154.

[24] A. Tryfonidou, *Reverse Discrimination*, cit., p. 218. Moreover, "lottery rather than logic would seem to be governing the exercise of EU citizenship rights": Opinion of AG Sharpston delivered on 30 September 2010, case C-34/09, *Ruiz Zambrano*, para. 88.

[25] P. van Elsuwege, S. Adam, *The limits of Constitutional Dialogue for the Prevention of Reverse Discrimination*, in *European Constitutional Law Review*, 2009, p. 334.

AG Tesauro even tried to add a "why" to the list of questions outlined above, in order to avoid abusive reliance on EU law. In his opinion in *Singh*, he expressed the view that a direct causal link between the exercise of the freedom of movement and the right relied on pursuant to EU law was to be ascertained as a pre-condition for determining whether a situation falls under the scope of application of EU law.[26]

However, the Court of Justice did not uphold this approach and has been trying to bridge the gap between the abstract acknowledgement of the cross-border criterion and the many facets and traps of the actual exercise of the right to move. On the one hand, the Court of Justice has defined the general framework within which the notion of movement is placed. For instance, it has taken the stance that the actual connection with EU law cannot be represented by "a purely hypothetical prospect" of exercising the freedom of movement.[27] On the other hand, it has resorted to the empowerment of EU citizenship as a means to limit the importance – or even the exclusivity – of the material element of the exercise of the freedom of movement. In a well-known series of cases,[28] which is still being refined and clarified,[29] the Court of Justice acknowledged that Art. 20 TFEU can be the basis for granting such a derived residence right as long as refusal would not preclude the "the genuine enjoyment of the substance of the rights conferred by virtue of his[/her] status as a Union citizen" for the EU citizen involved.

However, the protection afforded by Art. 20 TFEU is inherently limited to exceptional situations, *de facto* embodied by the primary caregivers of minor EU citizens so far. Currently, the Court has conversely acknowledged that this provision does not prevent a Member State from denying a derived right of residence in its territory, as long as the EU citizen has never exercised the right to move and provided the core of the rights stemming from Union citizenship is not affected.[30] Therefore, the presence of actual movement is still a predominant criterion upon which the scope of application of EU law is made conditional.[31]

[26] Opinion of AG Tesauro delivered on 20 May 1992, case C-370/90, *Singh*, para. 5.

[27] Court of Justice, judgment of 28 June 1984, case 180/83, *Moser*, para. 18; in relation to the derived rights of an EU citizen's family member, Court of Justice, judgment of 8 November 2012, case C-40/11, *Iida*, para. 77.

[28] See, *inter alia*, Court of Justice: judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano* [GC]; judgment of 5 May 2011, case C-434/09, *McCarthy*; judgment of 15 November 2011, case C-256/11, *Dereci* [GC].

[29] Court of Justice: judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez* [GC]; judgment of 8 May 2018, case C-82/16, *K.A. and Others v. Belgium* [GC].

[30] Court of Justice, judgment of 8 May 2013, case C-87/12, *Ymeraga*, para. 45.

[31] Cf. C. MORVIDUCCI, *I diritti dei cittadini "statici" nella giurisprudenza recente della Corte di giustizia*, in A. DI STASI (ed.), *Cittadinanza, cittadinanze e nuovi* status*: profili internazionalistici ed europei e sviluppo nazionali*, Napoli: Editoriale Scientifica, 2018, pp. 258-262.

IV. From U-turners to naturalized citizens: the role of Art. 21, para. 1, TFEU

In this context, the persisting prominence of tangible movement derives from two further factors. Firstly, Art. 3, para. 1, of Directive 2004/38/EC codifies the need for a transboundary element. Pursuant to this provision, the Directive applies only to Union citizens moving to or residing in a "Member State other than that of which they are a national". Secondly, ever since the initial phases of the integration process, the Court of Justice has consistently held that a person cannot be treated less favourably because he/she left the Member State of origin.[32] So, the Court considers that any measure capable of discouraging a person from exercising the freedom of movement is in principle incompatible with EU law.

At the same time, building on this settled approach, the Court of Justice has been trying to expand the scope of the concept of a person's movement. Eliminating obstacles to movement is indeed the compelling *ratio decidendi* behind the Court's stance on U-turners, whose situation falls outside the scope of the Directive. Returners, in fact. are those EU citizens who move back to their country of origin after enjoying the freedom to move and reside in another Member State, thereby failing to fulfil the criterion set forth in Art. 3, para. 1, of the Directive.

In *Singh* and in *Eind*,[33] the Court of Justice stated that the Treaty entitles the family member to a derived right of residence in the State of origin to which a worker returns after having settled abroad. Years later, in *O. and B.*,[34] it made a step forward, acknowledging that U-turners residing abroad on the basis of their sole status as Union citizens enjoy a right to return while maintaining family connections.[35] The original exercise of the freedom to move understandably includes the decision to go back to one's State of nationality and consequently triggers the protection afforded by EU law, under Art. 21, par. 1, TFEU. If this were not the case, EU citizens could be dissuaded from leaving their Member State of origin, thereby hindering the full effectiveness of the freedom of movement.[36] So, in other words, returning to the State of nationality falls within the scope of EU law.

[32] Court of Justice, judgment of 7 February 1979, case 115/78, *Knoors*, para. 20.

[33] Court of Justice: judgment of 7 July 1992, case C-370/90, *Singh*; judgment of 11 December 2007, case C-291/05, *Eind* [GC].

[34] Court of Justice, judgment of 12 March 2014, case C-456/12, *O. and B.* [GC].

[35] Interestingly, on all these occasions, the Court specified that the right to return is contingent upon genuine residence in the host State, in line with the requirements laid down in Arts 7, paras 1 and 2, and 16 of Directive 2004/38/EC. The Directive does not apply, but its provisions strike back by analogy. See *O. and B.* [GC], cit., paras 37-40.

[36] In the parallel case *S. and G.*, the Court followed the same approach in relation to Art. 45 TFEU. The Court acknowledged a residence right for a family member of an EU worker who regularly moved to another Member State on a weekly basis for work, without having acquired formal residence there. Court of Justice, judgment of 12 March 2014, case C-457/12, *S. and G.* [GC].

More recently, the Court's approach has been challenged by an even more borderline situation. In *Lounes*, Ms. Ormazabal is a Spanish national who moved to the UK in 1996, settling there on a permanent basis. In 2009, she decided to naturalize as a British citizen, while retaining her Spanish nationality. In 2014, she married Mr. Lounes, an Algerian national residing illegally in the UK. Her husband soon applied for a residence card by virtue of being an EU citizen's family member. However, his application was rejected, on the grounds that, due to naturalization and pursuant to national law, his wife could no longer be regarded as a beneficiary of the rights conferred by Directive 2004/38/EC.

Basically, the Court of Justice was confronted with an apparent "internalization" of a cross-border situation created by a movement dating back over 20 years. Moreover, the exercise of this fundamental freedom eventually resulted in the mover being naturalized in the host Member State, i.e. the most considerable outcome of a successful process of social integration. Consequently, Directive 2004/38/EC could not be relied on and the United Kingdom sought to apply (undeniably more stringent) domestic immigration law.

Against this backdrop, the Court of Justice considered that the situation was not purely domestic, confirmed that Ms. Ornazabal could not be considered a beneficiary for the purposes of Directive 2004/38/EC and took the stance that a derived right to residence in favour of Mr. Lounes was to be drawn from Art. 21, para. 1, TFEU. Ms. Ornazabal's movement from Spain to the UK – albeit far in the past – established a sufficient link with EU law.

Lounes confirms that, in principle, dual nationality does not preclude the application of EU law. The Court had already held that a link with EU law exists when a national of a Member State habitually resides in another Member State of which he/she is also a national.[37]

More generally, the solution offered by the Court is in line with its case-by-case attempt to erode the purely internal situations doctrine, whenever any sort of link with EU law can be detected. In the present case, the Court of Justice achieves its aim by stretching the importance of the exercise of the freedom of movement to the extreme. While it is a means to expand the rights stemming from EU law, the Court's reliance on a very feeble link with EU law fans the embers of the highly controversial justification of reverse discrimination against those EU citizens – the vast majority, actually – who decide not to leave their home country.

V. Concluding remarks: how long does a mover need special protection?

Differential treatments and their perception inherently evolve over time. Certain discriminations may have gone previously unnoticed or tolerated because of objective and

[37] Court of Justice, judgment of 8 June 2017, case C-541/15, *Freitag*, para. 34.

compelling justifications,[38] or due to the moral attitude underlying a legal order.[39] Therefore, differential treatments require careful reconsideration over time, along with the evolution of the scope and meaning of the general principles of a given community of law and the societal values they express.

As discussed above, reverse discrimination in the European Union is the domestic by-product of not entirely converging – if not actually diverging – EU and national regimes. As such, it is a systemic phenomenon deriving from the interaction between different regulatory levels. However, this does not mean it is irrefutable. The allocation of roles and responsibilities in dealing with this phenomenon – and, consequently, for the ongoing review of the acceptability of a certain differential treatment – is one of the core issues at the heart of the relationship between the EU and national legal orders.

Member States are structurally disadvantaged, as they are expected to apply provisions that are more favourable than their own regimes to certain categories of people (at least), within the realm of EU law. Crucially, this vertical and unilateral source of discriminations puts Member States at the forefront, as national authorities bear the primary burden of dealing with the implications of differential treatment within their territory. This is *per se* natural, as national institutions are best positioned to address reverse discrimination in the domestic political and legal arena. It is up to them to decide whether maintaining differential treatment is a price worth paying and, if it is, how to generalize such EU-driven more favourable treatment. A look at some national legal orders reveals opposing systemic solutions. In Italy, for instance, Art. 53 of the Law no. 234 of 2012 provides for a general ban on reverse discrimination against Italian citizens.[40] In France and Germany, on the other hand, differential treatments to the detriment of nationals are considered the result of the coexistence of national and EU laws. Therefore, they involve situations that are not comparable and do not affect the principle of equality.[41]

At the same time, EU-driven advantageous treatment often involves sensitive issues on which the advances of EU law face more conservative positions at the domestic level. As the recent *Coman* preliminary ruling and the Romanian legal and political scenario demonstrate,[42] a Member State may have difficulty accepting a more favourable EU re-

[38] Opinion of AG Sharpston delivered on 22 May 2008, case C-427/06, *Bartsch*, paras 45-46.

[39] H.L.A. HART, *The Concept of Law*, Oxford: Oxford University Press, 1994, p. 163.

[40] Law no. 234 of 24 December 2012 (Italy), Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche europee.

[41] For a discussion on selected legal orders, including the French and the German ones, see V. VERBIST, *Reverse Discrimination in the European Union. A recurring Balancing Act*, Cambridge: Intersentia, 2017, p. 303 *et seq*.

[42] Court of Justice, judgment of 5 June 2018, case C-673/16, *Coman* [GC]. On the Romanian situation concerning the recognition of same-sex marriages see C. COJOCARIOU, *Same-Sex Marriage Before the Court and Before the People: The Story of a Tumultuous Year for LGBT Rights in Romania*, in *Vervassungsblog*, 25 January 2017, verfassungsblog.de. A referendum was called in order to change the national constitution, by clarifying the will to limit the scope of the notion of family to heterosexual unions. The referen-

gime *per se* and, consequently, may not be ready or willing to extend it beyond the subjective scope of application of EU law. This calls for remedies at the EU level to prevent discrimination and, in any case, provide common solutions.

As a first option, allocation of responsibility to the EU would entail legal harmonization, which appears both unfeasible and undesirable. Not only would it require a serious reconsideration of the current competences of the Union, especially in the fields of citizenship and migration law, but it would move to the EU level several considerable powers currently reserved to the national legislature.

As for the role of the Court of Justice, its supporters have basically contended that it has done its best with the limited interpretative tools it has had so far. What is more, its judgments share the common denominator of expanding the scope of the rights granted by EU law, in favour of their beneficiaries. However, as outlined above, there have been repeated pleas for an in-depth review of such an interpretative path in order to abandon the case-by-case approach and the uncertainty it generates.[43] Reliance on the scope of application of EU law can be intrinsically unpredictable when combined with the multiple facets of an individual's situation.

Lounes is an instructive example in this regard. EU law grants favourable regimes to movers based on their special situation and these differential treatments are justified for as long as the difficulty of living in a State that is not their own exists. However, the Court considers that even a naturalized mover deserves special protection, precisely because his/her situation is different from that of a national of the (still?) host State who has never left home.[44] Once a mover, always a mover, one might say.

On its part, Art. 21, para. 1, TFEU covers both the dynamic dimension of the freedom of movement and the objective of stable settlement in the host Member State. These are complementary poles encompassing the traditional internal market logic and a more progressive idea of an ever-closer and inclusive union among the peoples of Europe. Nonetheless, once this permanent settlement occurs and is formalized through naturalization, one might expect national law to apply, because of both the logic underpinning the interaction between EU and national law and the choice made by the person involved, who has decided to settle in a Member State and is then expected to abide by its societal values and laws.

Lounes even overturns the Court's stance on U-turners. In fact, that line of cases refers to the maintenance of statuses and rights already established abroad. In *Lounes*, the Court of Justice states that Art. 21, para. 1, TFEU also covers family links created after naturalization in the host State. This raises key questions: namely, how long an EU

dum was held on 6 and 7 October 2018, but failed to gain the needed support and to meet the minimum required quorum.

[43] See opinion of AG Sharpston, *Ruiz Zambrano*, cit., paras 125-130, where the AG proposes a different and comprehensive reverse discrimination test.

[44] *Lounes* [GC], cit., para. 54.

citizen residing abroad requires protection, and how long more favourable treatment can be justified after naturalization. The answers to these questions involve three strategic challenges to the current state of the art of reverse discrimination in the EU.

Firstly, the judgment under consideration threatens the coherence of the Court's sectoral approach to the notions of movement and purely internal situations.[45] The Court has opened the door to a new sub-category of movers that goes well beyond the compelling situations acknowledged thus far.

Secondly, and consequently, *Lounes* amplifies the unpredictability of the scope of EU law, thereby affecting the rationale underpinning migrants' special rights and the justification for differential treatment.

In this way, thirdly, rather than minimizing the impact of reverse discrimination, the Court of Justice exacerbates it and calls into question the role of the Member States. In fact, it is frankly difficult to determine the actual difference between a family relationship established by a static EU citizen and a link established by a former mover now permanently settled or even naturalized in the host State.

Besides the specific factual circumstances, the Court's approach in *Lounes* puts pressure on the current division of responsibilities in justifying reverse discrimination and addressing it, and may call for future alternative solutions at both the EU and national levels.

[45] As underlined by Cornasaru, national legislations and practices do not cover all possible situations, in particular in the area of citizenship and migration law, thereby leading to a "permanent judicialisation of the problem". See D.M. CORNASARU, *Once Again with Reverse Discrimination in the Case of Dual Citizens: From McCharty to Lounes*, in A. DI STASI (ed.), *Cittadinanza, cittadinanze*, cit., p. 344.