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Citizenship?

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Expulsion of Own Nationals: What Implications for EU Citizenship?

*Sandra Mantu**

Abstract

This working paper examines the protection that EU citizens enjoy against expulsion from their host EU state in comparison to the protection that own nationals enjoy when it comes to expulsion. It is concerned with understanding how we legally frame the question of protection against expulsion in an area of common EU citizenship for persons who are not nationals but enjoy a supranational citizenship status – EU citizenship - that distinguishes them from foreigners per se. If we take seriously the claim that EU citizenship is a fundamental status and a citizenship status, then the question of protection against expulsion for EU citizens needs to be discussed alongside the protection enjoyed by nationals against expulsion from their state of nationality where they enjoy a right to be present on state territory. The questions explored by this contribution are whether it is possible to claim that EU citizenship creates a similar right of presence on state territory and whether we can speak of a notion of EU territory as a coherent space in which citizenship is to be enjoyed.

1. Introduction

This working paper examines the protection that EU citizens enjoy against expulsion from their host EU state in comparison to the protection that own nationals enjoy when it comes to expulsion. It is concerned with understanding how we legally frame the question of protection against expulsion in an area of common EU citizenship for persons who are not nationals but enjoy a supranational citizenship status – EU citizenship - that distinguishes them from foreigners per se. If we take seriously the claim that EU citizenship is a fundamental status and a citizenship status, then the question of protection against expulsion for EU citizens needs to be discussed alongside the protection enjoyed by nationals against expulsion from their state of nationality where they enjoy a right to be present on state territory. In EU scholarship, the fact that EU citizens can be expelled from their host state is seen as indication that EU citizenship is better described as a migration status rather than citizenship status, per se. This position is linked with the general understanding that under international law states cannot expel their own nationals and that nationals enjoy a right to remain in the territory of their state of nationality (e.g., Article 13 Universal Declaration of Human Rights, Article 12 International Covenant of Civil and Political Rights and Protocol 4 of the European Convention of Human Rights). As an appendix of the principle of territorial sovereignty, states have the right to control the presence of foreigners on their territory, although this right is increasingly circumscribed by international human rights and refugee law. From this perspective, the fact that EU citizens can be expelled from their host state is an indication that EU citizenship cannot be described

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as a nationality as the Member States can exercise a certain degree of control over the presence of EU citizens on their territory. This control is subject to the jurisdiction of the European Court of Justice and has to respect EU law, but it serves as a reminder that EU citizens are not nationals for the purposes of expulsion. Instead, EU citizenship creates an alternative model that protects EU citizens depending on the duration of their residence in the host state and situates them at the crossroads of nationality and foreignness.

By analyzing sources of protection against expulsion that go beyond EU law, the paper tries to understand what the EU rules on expulsion reveal about the nature of EU citizenship and the nature of protection that is awarded to EU citizens. The manner in which we approach EU citizenship – as a citizenship status or something else, maybe an in-between status - has consequences for the legal framework that we use to assess the question of expulsion. By allowing expulsion, EU citizenship breaks away from one of the tenets of international law that views a national's right to be present on state territory and to enter/leave that territory as a hallmark of nationality understood as legal status that expresses the relationship between the state and the citizen. The aim of this analysis is to understand what this position under international law implies for protection against expulsion and how such a principle functions in the EU context. This right to be present on the state's territory with its corollary that the state can deny entry or expel non-nationals is changed by EU citizenship since EU citizens have a right to be present in the territory of other EU states but traditionally within their own state, the right to reside, to be present there stems from state nationality as expression of the link between the citizen and the state territory. However, recent case law concerning static citizens whose family members face expulsion suggests that EU citizenship is creating a right to be present in the territory of the Union that creates a direct link between the EU citizen and the territory of the Union as the space within which EU citizenship is to be enjoyed. This link remains mediated by state nationality but it is possible to argue that it changes the relationship between the citizen, his/her state and the Union. The questions that the paper seeks to explore are whether it is possible to claim that EU citizenship creates a similar right of presence on territory and whether we can speak of a notion of EU territory as a coherent space in which citizenship is to be enjoyed similar to how national citizenship requires a state territory to which it is bounded.

2. International Law and Expulsion of Own Nationals

The starting point in international law is that the state enjoys a right to expel foreigners but there are general limitations to this right that include substantive and procedural standards such as the prohibition of abuse of rights, the principle of good faith or the prohibition of arbitrariness. It is primarily through international human rights law that standards have developed in this field, both substantive and procedural. In 2014, the International Law Commission adopted draft articles on the expulsion of aliens as part of its mandate to codify rules of international law.¹ ILC's work engaged

1 UN (2014) *ILC Draft articles on the expulsion of aliens with commentaries*, A/69/10.

with the issue of expulsion of own nationals as a limit relating to the right of states to expel aliens. It equally clarifies that international law has been interested in own nationals and expulsion only where the person was previously a state national but became an alien – thus, it can be defined as an interest in deprivation of nationality and expulsion of former nationals. The ILC Draft Articles on expulsion focus on the treatment of aliens and there is only one provision that addresses nationals as such. Draft Article 8 states that ‘A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.’ This provision deals with the very specific situation in which a state might deprive a national of his or her nationality, and thus makes that national an alien, for the sole purpose of expelling him/her. Such a deprivation of nationality, insofar as it has no other justification than the state’s desire to expel the individual, would be abusive, indeed arbitrary within the meaning of Article 15(2) UDHR. Where it also creates statelessness, it would also violate the prohibition of creating statelessness stemming from the 1961 UN Convention on the Reduction of Statelessness.²

The right to expel aliens is linked with the principle of territorial sovereignty: the existence of a state depends upon a population that recognizes its sovereignty and also a territory in which sovereignty is exercised *de facto* and *de jure*. ILC views expulsion as involving two fundamental interests: a) the fundamental principle of state sovereignty in the international order which gives the state the power to issue domestic regulations in accordance with its territorial jurisdiction; and b) the fundamental principles underpinning the international legal order and basic human rights which all states must respect.³ As such the right to expel is viewed as a natural right of the state emanating from its own status as sovereign legal entity with full authority over its territory which may be restricted under international law only by the state’s voluntary commitments or specific *erga omnes* norms.⁴ That states have this right has not been contested in literature and is seen as reinforced by state practice and decisions of human rights bodies including the ECtHR (see article 8 ECHR jurisprudence on expulsion of aliens stating that as a matter of well-established international law states have the right to control the entry, residence and expulsion of aliens⁵). The power to expel aliens needs to be exercised within the limits set by international law including considerations of humanity and is therefore limited to the rights of the individual and his/her property rights.⁶ Limits will need to be examined in light of a state’s obligations stemming from custom, treaty or general principles of law that are complemented by obligations they have under international human rights, refugee and migrant workers’ laws.⁷ Constitutional law may also contain rules specifically preventing the expulsion of own nationals. According to the ILC there is no general rule

2 S. Mantu (2015) *Contingent citizenship. The law and practice of citizenship deprivation in international, European and national perspectives*, Leiden: Brill Nijhoff, p. 44-55.

3 A/CN.4/581 para 4.

4 A/CN.4/581 para 7.

5 For example, *Üner v. The Netherlands*, Application no. 410/99, ECtHR 18 October 2006, para 54.

6 A/CN.4/581 para 17.

7 A/CN.4/581 para 19.

of international law that prohibits the expulsion of nationals in general. Yet, despite the lack of such a provision, a state may find it difficult to expel a national due to provisions of international human rights law. There seems to be doctrinal acceptance of the principle that states do not expel their own citizens but some authors cite expulsions of own nationals that have taken place in Latin American countries, showing that state practice may diverge from legal standards.⁸ While there is no *jus cogens* norm, there are international treaties that contain specific clauses that prevent the expulsion of own nationals and State parties to such Treaties have a conventional obligation not to expel. Examples include Article 3 of Protocol 4 of the ECHR, and Article 12(4) ICCPR, the latter is generally understood as an implicit prohibition stemming from the right to return to one's own country. These two examples are examined in more detail below.

Article 12 ICCPR

Article 12 ICCPR deals with the right to free movement, which comprises an internal element (freedom to move within a country) and an external one concerning movement among states.⁹ The latter includes the right to leave one's country - Article 12(2), and the right to enter one's 'own country' - Article 12(4). The right of a national to remain and return to his own country is seen as an essential right attached to nationality under international law and a symbol of the difference between nationals and aliens. Moreover, the practical difficulties of expelling own nationals, which stem from the fact that expulsion is possible only if there is a receiving state willing to take the person in are seen as limiting the power of a state to expel own nationals. The position under international law is that states are under no obligation to receive back persons expelled who are not nationals¹⁰ – a state may agree to take back foreigners based on bilateral/multilateral agreements, as is the case with readmission agreements in a migration context but the general rule remains that states are obliged to take back as a matter of international law only nationals. A different approach would lead to conflicts in the enjoyment of peaceful international relations. As a result, states are seen to enjoy discretion over the admission of aliens to their territory but not over nationals.

8 N. MacDermot, Latin America – Expulsions, the Right to Return, Passports, *The Review: International Commission of Jurists*, no 14, 1975, pp 3-8.

9 Article 12 ICCPR states:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

10 A. Kesby (2012) *The Right to have Rights: Citizenship, Humanity and International Law*, Oxford University Press.

In *Stewart v Canada*,¹¹ the UN Human Rights Committee – the body tasked with supervising the implementation of the ICCPR - provided an interpretation of the notion of ‘own country’ in relation to Article 12(4) ICCPR (no one shall be arbitrarily deprived of the right to enter his own country). The notion was found to include nationals but also persons who although not nationals cannot be labelled aliens either within the meaning of Article 13 ICCPR. Based on the situations envisaged by the Committee, the persons who come within the personal scope of such a category of neither nationals nor aliens are mainly former nationals and persons who could not obtain the nationality of the state they reside in. Such aliens have special ties with the country or they have special claims in relation to a given country. The examples given by the Committee include persons stripped of nationality in violation of international law or persons whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied to them. It may also include other categories of long-term residents, particularly stateless persons deprived of the possibility to acquire the nationality of the country of residence but the notion does not go as far as to say that immigrants are as a rule included.¹² Thus, the notion of ‘own country’ although it may seem broad, in fact covers situations that are linked with the possibility of disturbing peaceful international relations by the fact that no other state would be willing to accept such persons on its territory, rather than an individual’s right to reside in his own country.¹³

There is an increasing tension between the starting point of international law that is not amicable to the idea that a person can have more than one country to consider as his/her own and the fact that a migrant can potentially call two countries as his own: the state of nationality and the state of residence. While the position under international law stems from conflict of law rules and the attempt to mitigate the potential for disruption of peaceful international relations, a migrant’s right to reside in his host state is progressively being constructed under international migration and human rights laws. This tension is present also in the dissenting opinion of E. Evatt, C. Medina Qiroga and F. J. Aguilar Urbina in *Steward v Canada*. Their dissenting opinion pushes towards a different interpretation of Article 12 ICCPR whereby an alien who is lawfully within the territory of a state may claim the protection of Article 12, if s/he can establish that it is his/her own country. In their view

‘for the rights set forth in Article 12 the existence of a formal link to the state is irrelevant; the Covenant is here concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it’ [...] ‘the words his own country invite considerations of such matters as

11 *Stewart v Canada*, CCPR/C/58/D/538/1993, UN Human Rights Committee (HRC), 1 November 1996, available at: <http://www.refworld.org/cases,HRC,584a90807.html> [accessed 16 October 2018].

12 For a similar interpretation see also, UN Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, available at: <http://www.refworld.org/docid/45139c394.html> [accessed 29 October 2018].

13 A/CN.4/581, para 43.

long standing residence, close personal and family ties and intentions to remain as well as the absence of such ties elsewhere'.¹⁴

The dissenters accept that where the person is not a national the connections would need to be strong to support a finding that it is his own country but that an alien should have the possibility to show this. The dissenting opinion in *Stewart v Canada* is an exemplification of the current trend whereby the protection given to nationals against expulsion is extended to aliens who have acquired a status similar to nationals under national law. The work of the Special Rapporteur Kamto on the ILC Draft Articles on the expulsion of aliens for example advocates that nationality is a restrictive and inadequate criterion against which to define the concept of alien.¹⁵ Kamto argues that the principle of non-expulsion of own nationals should be understood broadly as applying to 'ressortissants' of a state, that is not only to persons who like nationals have the nationality of a state but also to certain aliens who have a similar status to that of nationals under the laws of the receiving state or have ties with that state.¹⁶ These are persons whom the state assimilates to nationals, they are not strictly speaking aliens either; in respect of such persons the state accepts limitations to its powers to expel.

Article 3 Protocol 4 ECHR

Article 3 of Protocol 4 to the ECHR¹⁷ contains a clear prohibition against the expulsion of own nationals:

- '1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
2. No one shall be deprived of the right to enter the territory of the State to which he is a national.'

As it is the only provision reserved for the benefit of the nationals of ECHR state parties, the underlying issue centres on the possession of the state party's nationality and the power of the state party to either deny or deprive an individual of nationality, so as to make him an alien.¹⁸ According to the Explanatory Report to the drafting of Protocol 4, the drafters considered to introduce a provision stating that

'a State would be forbidden to deprive a national of his nationality for the purpose of expelling him'. Nevertheless, in the end 'the majority of experts thought it was inadvis-

14 Individual opinion by Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco José Aguilar Urbina in *Stewart v. Canada*, para 5.

15 A/CN.4/581 para 29.

16 A/CN.4/581 para 43.

17 Protocol 4 has been opened for signature on 6 May 1963 and entered into force on 2 May 1968.

18 J.M. Henckaerts (1995) *Mass Expulsion in Modern International Law and Practice*, Martinus Nijhoff Publishers, p. 86-87.

able in Article 3 to touch on the delicate question of the legitimacy of measures depriving individuals of nationality. It was also noted that it would be very difficult to prove, when a State deprived a national of his nationality and expelled him immediately afterwards, whether or not the deprivation of nationality had been ordered with the intention of expelling the person concerned.¹⁹

The Explanatory Report to Article 3 Protocol 4 states that the word 'expulsion' is to be understood in its generic meaning, in current use, that is 'to drive away from a place'.²⁰ The underlying idea is to prohibit any constitutional, legislative or administrative or judicial authority from expelling nationals from their own country. The choice was made for the words 'state of which he is a national' and not 'own country' because the former formulation was judged to have a more precise legal meaning. Besides historical examples of national laws allowing for exceptions from this rule, the Explanatory Report to Protocol 4 suggests that the drafters did envisage exceptions from the right of nationals to be present on state territory. The report argues that it was understood that an individual's right to enter the territory of the state of which he was a national could not be interpreted as conferring on him an absolute right to remain in that territory as in the case of a criminal who is extradited to state B but returns to his state of nationality.

Judging from the case law of the ECtHR, the scenario envisaged by the Protocol has come up rarely.²¹ On one occasion, the former Commission has dealt with a case in which the stateless claimant challenged the refusal of the Federal Republic of Germany to award him nationality and afterwards tried to expel him.²² The Commission argued that *prima facie* it is not competent to rule on the refusal to grant nationality but it did not rule out the possibility of establishing a causal link between the denial of nationality and the immediate expulsion order and the fact that the sole aim of the denial of nationality was to make it easier for the authorities to expel the person. In this particular case, the Commission was not satisfied that such a link existed, holding that the state was within its rights to refuse nationality. Presumably, the standard of proof required for an opposite finding would be high. In an admissibility decision dating from 2005, the Court argued, '*in some cases the revocation of citizenship followed by expulsion may raise potential problems under Article 3 of Protocol no 4*'. In the end, it rejected the claim since the deportation order had not been carried out.²³ This short examination of the prohibition of expelling own nationals does not lead to a clear conclusion concerning the existence of a customary rule of international law. Article 12 ICCPR does not uphold an absolute right to be present on state territory;

19 *Ibid.*, p. 77.

20 Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, CETS 046, available at <https://rm.coe.int/16800c92c0>.

21 D. Gomien, D. Harris & L. Zwaak (1996) *Law and Practice Of the European Convention on Human Rights and the European Social Charter*, Council of Europe Publishing, p. 20.

22 *X v. Federal Republic of Germany*, Application no. 3745/68, Dec. 15.12.69, Collection 31, p. 107 (110).

23 *Naumov v. Albania*, Application no. 10513/03, admissibility decision 4 January 2005.

rather we can speak of a derived right stemming from the prohibition of being expelled from one's own country; and even in the context of ECHR (Protocol 4 ECHR) where we can speak of an express prohibition to expel own nationals, exceptions are envisaged. *Opinio juris* on this issue is also divided: some authors have suggested that this is a right held by individuals under international human rights law (Article 13 UDHR) rather than a consequence of the principle that states should not encroach upon other states' sovereignty. However, such a position is complicated by the declaratory character of the UDHR and the absence of clear *jus cogens* rule. Other scholars argue that 'the right to admittance and prohibition of expulsion is only an implicit right based on the general right to return to one's own country as expressed in the ICCPR' and that the right is not absolute as what is prohibited is arbitrary deprivation of this right thus not deprivation in all cases.²⁴ Derogations are allowed in cases of national emergency as long as they are not discriminatory in line with the general rules of Article 4 ICCPR. In his view 'a state has an obligation to admit its nationals and not expel them when no other state is willing to permit the individual to remain within its territory as that would infringe on other states' sovereignty'.²⁵ As such, it is possible to speak of a right to admission, residence and/or against expulsion where such a right is provided by municipal/national law²⁶, an issue that is differently arranged by the municipal laws, including in the EU context. This would suggest that the right not to be expelled that own nationals are supposed to enjoy against their state of nationality is the strongest where constitutional or municipal law upholds it rather than when simply provided for by international law.

3. EU Citizenship and Expulsion

EU law grants EU citizens a right to enter and reside in another EU state (Article 21 TFEU and Directive 2004/38) and limits the possibility of the host EU state to end this right by providing for a limited number of grounds for expulsion – public policy, public security and public health – as well as offering material and procedural safeguards that EU states must observe as a matter of EU law. The EU rules concerning expulsion are protective of the EU citizen's right to reside in his EU state of choice, and from the perspective of international law such an EU host state may be deemed an 'own country', with whom the EU citizen enjoys a special relationship. The family members of the EU citizen enjoy the same protection. The legal framework created by the EU citizenship provisions in the EU Treaties and secondary legislation comes close to the situation where, from the perspective of international law, municipal law provides for a positive right to enter and reside in one's own country.

24 For an overview, see W.T. Worster (2009) *International Law and the Expulsion of Individuals with more than one Nationality*, 14 *UCLA J. INT'L & Foreign Aff.* 423, p. 431.

25 Worster (2009) p. 433.

26 Worster (2009) p. 440.

Nonetheless, important differences remain between the right to reside that nationals enjoy in their state of nationality based on that status and the right to reside enjoyed by EU citizens based on EU citizenship. As the Court states in its jurisprudence, *‘the right of Union citizens and their family members to reside in the European Union is not unconditional but may be subject to the limitations and conditions imposed by the treaty and by measures adopted to give it effect’*.²⁷ Firstly, the notion of residence in EU citizenship law has been defined by the Court as legal residence that meets the conditions laid down in Directive 2004/38.²⁸ These conditions differ depending on whether the EU citizen exercises a right of residence under Articles 6 or 7 of the Directive; moreover for residence longer than 3 months different conditions need to be fulfilled depending on whether the EU citizen exercises free movement rights as an economically active or inactive person. Secondly, the right to reside can be limited on public policy, public security and public health grounds. The protection awarded via EU law to EU citizens and their family members is stronger than that awarded to aliens in general as the starting point in EU law is the citizen’s right to enter and reside rather than the state’s right to expel an alien. The strength of the protection enjoyed by EU citizens against expulsion from a host state is linked with the length of their residence and the level of integration in that host state. Concerning the length of residence, Article 28 of Directive 2004/38 provides for increased protection against expulsion after having acquired the right to permanent residence – that is, after 5 years of continuous and legal residence in the host EU state. Permanent resident EU citizens and their family members can only be expelled on *serious* grounds of public policy and public security. Where the permanent resident EU citizen has resided for longer than 10 years in a host EU state, s/he can be expelled only on *imperative* grounds of public security – this level of protection is reserved for EU citizens only, TCN family members are excluded. Furthermore, the rules contained in Directive 2004/38 rely on the notion of ‘integration’ to link residence and protection from expulsion: the longer the EU citizen has resided in a host state, the better integrated s/he is, so that the greater the safeguards are that citizen may rely on against expulsion.²⁹ The Court has defined integration as based *‘not only on territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host member State’*.³⁰ The commission of crimes and execution of prison sentences are example of situations that affect negatively the integration of the EU citizen and have the potential to undermine the higher level of protection against expulsion that is reserved for permanent resident EU citizens.³¹

At a more fundamental level, irrespective of the length of their residence in the host state and their integration level, EU citizens never enjoy the same treatment as nationals who in accordance with the ECJ’s interpretation of international law cannot be expelled from their state of nationality, nor denied a right to be present on that

27 Case C-193/16 E, EU:C:2017:542, para 16.

28 Case C-424/10 and C-425/10 *Ziolkowski and Szeja*, EU:C:2011:866, para 46.

29 See for example, Case C-145/09 *Tsakouridis*, EU:C:2010:708, para 25.

30 Case C-378/12 *Onuekwere*, EU:C:2014:13, para 24.

31 See for example, Case C-316/16 B and C-424/16 *Vomero*, EU:C:2018:256.

state territory. EU law upholds the traditional view that a national resident in his state of nationality enjoys a right to be there stemming from that nationality. As stated by Article 20 TFEU, EU citizenship does not replace state nationality – that is, it does not seek to replace the function of nationality as the expression of the link between the citizen and his/her state. For example, in the *McCarthy* case, the Court of Justice acknowledged the traditional position under international law that sees the prohibition of expelling own nationals as a marker of nationality

‘Likewise, the Court has also held that a principle of international law, reaffirmed in Article 3 of Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, that European Union law cannot be assumed to disregard in the context of relations between Member States, precludes a Member State from refusing its own nationals the right to enter its territory and remain there for any reason (see Case 41/74 van Duyn [1974] ECR 1337, paragraph 22, and Case C-257/99 Barkoci and Malik [2001] ECR I-6557, paragraph 81); that principle also precludes that Member State from expelling its own nationals from its territory or refusing their right to reside in that territory or making such right conditional (see Cases C-370/90 Singh [1992] ECR I-4265, paragraph 22 and C-291/05 Eind [2007] ECR I-10719, paragraph 31).’³²

Moreover, the Court uses this principle as the starting point in dealing with nationals of the Member States who have never moved and who claim protection against expulsion of their family members based on EU rather than national or human rights law. As a result,

‘Mrs McCarthy enjoys, under a principle of international law, an unconditional right of residence in the United Kingdom since she is a national of the United Kingdom.’³³

For such EU citizens, the right to be present on state territory remains linked to their position as own nationals under international law. In the absence of an exercise of free movement rights, such an EU citizen remains as a general rule captured by national law and outside the scope of Directive 2004/38 and of Article 21 TFEU. The Court can be said to rely on the prohibition of expelling own nationals to delineate the scope of application of EU citizenship. Equally, by presenting such prohibition as an accepted principle of international law, it reinforces the strength of such a principle within EU states.

Since EU citizenship is also additional to state nationality, it seems reasonable to expect that it enhances and supplements state nationality. The question remains to what extent EU citizenship also reshapes the relationship between citizen and own state and territory by introducing an additional right to be present on EU territory. There is one strand of case law in the court’s citizenship jurisprudence that can be seen to modify the right of residence in the state of own nationality. In this case law, EU citizenship itself functions as a source of protection of the right to be present on

32 Case C-439/09 *McCarthy*, EU:C:2011:277, para 29.

33 *McCarthy*, para 50.

the territory of the Union as a whole as the space within which EU citizenship rights are to be enjoyed. This case law concerns static EU citizens who are not themselves at risk of being expelled by their own state but whose family members are. While static EU citizens are not covered by Directive 2004/38 which details the rules concerning the expulsion of mobile EU citizens and their family members, the Court of Justice has clarified that Article 20 TFEU prevents national measures which have the effect of depriving the Union citizen of the genuine enjoyment of the substance of the rights conferred upon them by virtue of their status as EU citizens.³⁴ As EU citizens, the nationals of the Member States may rely on the rights pertaining to that status including against the Member State of which they are a national.³⁵ Although Article 20 TFEU does not give autonomous rights of residence to TCNs, in certain exceptional circumstances a right of residence must nevertheless be granted to a TCN who is a family member of an EU citizen if as a consequence of such a refusal, the EU citizen would be obliged in practice to leave the territory of the EU as a whole, denying him the genuine enjoyment of the substance of the rights conferred by virtue of the status of EU citizen.³⁶

The right of residence derived from Article 20 TFEU can be subjected to limitations. Article 20 TFEU does not affect the possibility of the Member States to rely on an exception linked to upholding the requirements of public policy or public security. However, since the situation of the family member falls within the scope of EU law, the exceptions/limitation to Article 20 TFEU need to be assessed on the basis of EU law. Relevant here are Article 7 of the EU Charter of Fundamental Rights which enshrines the right to respect for private life and family life read together with the best interest of the child - Article 24(2) of the EU Charter. The concepts of public policy and public security need to be interpreted strictly and they cannot be determined unilaterally by the Member States. In practice, the Court applies a similar treatment to that stemming from Directive 2004/38 (no automatic connection between criminal conviction and refusal of residence permit; criminal record on its own is not enough to justify a refusal; the following factors are relevant in assessing the refusal: the personal conduct of the individual concerned; the length and the legality of residence; the nature and gravity of the offence committed; the extent to which the person concerned is currently a danger to society; the age of the children at issue and their state of health; the economic situation of the children; the children's family situation).³⁷

The Court insists in this case law on the fact that the EU citizen would be forced to leave the territory of the Union as a whole if the family member is not allowed to stay, which can be interpreted as going further than simply creating a right to family reunification for the static EU citizen on the basis of EU law.³⁸ In *CS*, the Court clarifies that the child

34 Case C-34/09 *Zambrano*, EU:C:2011:124.

35 Case C-304/14 *CS*, EU:C:2016:674, para 24.

36 Case C-164/14 *Rendon Marin*, EU:C:2016:675, para 74.

37 *Rendon Marin*, para 84; also, Case C-304/14 *CS*, EU:C:2016:674.

38 Case C-256/11 *Dereci*, EU:C:2011:734, para 66.

‘has the right, as a Union citizen, to move and reside freely within the territory of the European Union’.³⁹

and that the

‘The expulsion of that child’s mother, who is his primary carer, could result in a restriction of the rights conferred by the status of Union citizen, as he may be compelled, de facto, to go with her, and therefore to leave the territory of the European Union as a whole. In this sense, the expulsion of the child’s mother would deprive the child of the genuine enjoyment of the substance of the rights which the status of Union citizen nevertheless confers upon him.’⁴⁰

The Court’s approach to expulsion in such cases comes close to the definition proposed by the drafters of Article 3 Protocol 4 ECHR, who define expulsion as a measure that drives away the state national from that state territory. In this case, the situation where an EU citizen is forced to leave the territory of the EU is legally assimilated to the situation where a national would be faced with an expulsion measure from her/his state of own nationality. The relationship between the EU citizen and the territory of the EU as the space within which this status and the rights attached to it are to be enjoyed becomes important suggesting the creation of a direct link between the citizen and the EU territory similar to the relationship that nationals enjoys with the state territory. Supranational citizenship status requires a physical space within which it can be enjoyed. It is not that state nationality is by-passed in this process and made irrelevant but rather that EU citizenship becomes more like a nationality status and the EU territory is no longer a composite territory of 27 national territories bundled together in an area of freedom, security and justice; to a certain extent the notion of EU territory gains materiality.

4. Concluding Remarks

This working paper has explored the links between the prohibition of expelling own nationals and the protection that EU citizens enjoy against expulsion on the basis of EU law. The fact that EU citizens can be expelled has been described as one of the limitations of supranational citizenship status and an indication that in certain aspects EU citizenship resembles a migration status. Relying on the prohibition of expelling own nationals as an organizing principle that would allow us to decide whether EU citizenship is a citizenship status or not may not hold too much promise once it becomes clear that under international law such prohibition is not absolute. When comparing EU citizens and own nationals, if we take the view (see Worster) that there is no positive right under international law that prohibits expulsion of own nationals – at best the prohibition concerns arbitrary expulsion – than the position of EU citizens is not that dissimilar to that of own nationals. Only where national law provides for

39 CS, para 31.

40 CS, para 32.

express prohibition of expulsion of own nationals and where state practice shows that no expulsion of own nationals takes place, are EU citizens less protected than own nationals. At the same time it is important to acknowledge that what from the perspective of international law what can be described as a non-absolute right not to be expelled from the state of own nationality, in the EU context becomes a much stronger right as a result of its incorporation into the EU citizenship legal framework. In its citizenship case law, the Court of Justice has taken the view that in the EU, own nationals enjoy an unconditional right to be present on state territory that is linked to their status as nationals and that nationals cannot be denied a right to enter their own state. This position is the entry point into defining the spheres of interaction between the protection against expulsion that nationals of the EU states can expect based on their respective statuses: own nationals and EU citizens. Where the EU citizen has not moved s/he remains primarily an own national, and the protection that such a citizen and/or his/her family members can expect against state measures that restrict his/her right to reside on national territory is primarily national protection. Where the EU citizen has moved, protection stemming from EU citizenship status kicks in for both the EU citizen and his/her family members. Recent jurisprudence shows that in certain circumstances (where the EU citizen is at risk of being forced to leave the territory of the EU due to state measures affecting the residence rights of that citizen's family members) EU citizenship makes important inroads into national protection by stepping in where that protection stops. As a result, it is possible to speak of a direct link between the EU citizen and the territory of the Union as the space where EU citizenship rights can be enjoyed. The case law that sparks these observations continues to be described by the Court itself as limited to exceptional circumstances. However, the process of granting static EU citizens rights based on their EU citizenship status reshapes the relationship between own state, Union and EU citizen by highlighting the territorial aspects of EU citizenship.