Chapter no

*Civic engineering: The role of Advocates General in the divination, design, and destiny of EU citizenship*

**Charlotte O'Brien**

I. Introduction

EU citizenship has gone through various cycles of being fundamentalised, undermined, hollowed out, and rehabilitated. Its story is messy, incoherent, and characterised by some of the most visionary judicial pronouncements, and some of the most illogical and weakly reasoned judgments in EU free movement law. In tracking the development of EU citizenship case law, a substantial amount of commentary understandably reflects on the constitutional conversations between the EU judiciary and legislature, or between the EU courts and domestic courts and parliaments of Member States.[[1]](#footnote-1) But as a matter of excavating the reasoning, and tracking the ambitions, characteristics and nature of EU citizenship, this chapter argues that it is necessary to analyse the dialogue between advocates general and the Court, not least to examine the intellectual, profoundly humane, and influential contributions Eleanor Sharpston has made to judicial citizenship discourse.

Using a structured textual analysis,[[2]](#footnote-2) we can build up a clear picture of this dialogue, and of the degree of medium-term “influence of ideas” AGs have had (as opposed to the short-term influence over disparate, individual case results). This analysis shows that AG Opinions have been integral to EU citizenship case law in three key ways: (i) in centring EU citizenship as a legal phenomenon with legal consequences, in particular with regard to free movement rights; (ii) in asserting (and re-asserting) the importance of proportionality as a fundamental principle in a legal system that deals in law-as-fairness rather than law-as-lists; and (iii) in trying to establish a system in which people have rights and value not just as mobile factors of production, but as humans linked together by bonds of European solidarity.

II.Centring EU citizenship and keeping it on life support

Let us start with an early articulation of what EU citizenship could be. In 1992, delivering an Opinion on a case whose facts preceded the coming into force of the Maastricht Treaty and the introduction of EU citizenship, AG Jacobs called upon a ‘common code of fundamental values’ to allow EU nationals to rely upon their European status ‘to say ‘civis europeus sum’ and to invoke that status in order to oppose any violation of his fundamental rights.’[[3]](#footnote-4)

The phrase “civis Europeus sum” has since been quoted in five cases since – each time by another Advocate General, never in a judgment.[[4]](#footnote-5) The immediate aftermath of the introduction of Union citizenship was however muted until *Martinez Sala* blazed onto the scene. This was a clear turning point in the case law, in which equal treatment rights were asserted *qua* EU citizen. It was the Advocate General who had explicitly argued for that paradigm shift, setting out an ambition for EU citizenship that went considerably beyond the arguments advanced by the EU Commission in that case. The Commission had argued that Ms Sala was entitled to protection from nationality discrimination because her residence rights derived from the Treaty and remained ‘fully intact until the host State avails itself of the possibility of limiting the exercise of that right under the directive’. Instead, AG La Pergola stated that ‘justification for equality of treatment lies rather, as I have explained, in the legal status of a citizen of the Union’.[[5]](#footnote-7)The Court came closer to the Advocate General’s proposal than the Commission’s; it was not necessary to show that Ms Sala was exercising a Treaty-based right to reside in order for her to benefit from equal treatment rights.[[6]](#footnote-8)

Since *Sala*, there have been several examples of occasion the Court initially going further than the AG suggested, but in later cases retreating from the more radical aspects of their own jurisprudence, while advocates general have held fast to those new principles, repeatedly breathing life back into them. In *Trojani* AG Geelhoed expressed some scepticism as to how an economically inactive EU migrant could claim social assistance in a host state, stating that ‘the basic principle of Community law is that persons who depend on social assistance will be taken care of in their own Member State’.[[7]](#footnote-9) This Opinion was not followed by the Court, which instead found that possession of a national residence permit was dispositive – it entitled Mr Trojani to equal treatment rights, and so to claim the minimex benefit.[[8]](#footnote-10) *Sala* and *Trojani* were variously hailed and decried as expansions of EU citizenship rights,[[9]](#footnote-11) or incursions in national welfare systems respectively.[[10]](#footnote-12) It confirmed that yes, the Court really meant what it said in *Sala* (without astonishingly, mentioning *Sala*); Mr Trojani was entitled to equal treatment because he was lawfully resident as per national law.

While it was the Court that established the *Trojani* principle, it has more frequently been advocates general attempting to keep it going. We have to go back to 2015[[11]](#footnote-13) before *Trojani* is actually used as authority in a judgment,[[12]](#footnote-14) but that was as part of the line of case law on defining work. We have to go further back to 2013 before we find either a reference to the case in the context of the rights of the economically inactive to claim benefits,[[13]](#footnote-15) or to the principle that EU nationals with a domestic right to reside are entitled to protection from discrimination.[[14]](#footnote-16) In contrast, the *Trojani* principle of national residence rights giving rise to EU equal treatment rights was discussed within AG Opinions as recently as 2020[[15]](#footnote-17) and 2021.[[16]](#footnote-18)

A similar pattern emerged with *Grzelczyk -* the Court went further than the AG’s original recommendations, then later gradually backed away from the more transformative of its own conclusions, while various advocates general try to keep them alive. AG Alber had noted an, at best, theoretical EU citizenship-based right to equal treatment *vis-à-vis* benefits, but the conclusion noted that mere recourse to the social assistance system could constitute grounds for terminating the right of residence, noting ‘strict limitations’ that applied to the principle of equal treatment.[[17]](#footnote-19) The Court instead reached a relatively simple conclusion, that equal treatment provisions meant that EU nationals could not, purely as a result of their nationality, be subject to extra conditions to access benefits not imposed on home-state nationals.[[18]](#footnote-20) Of course, Member States have since been able to get round this prohibition by simply introducing a new test which works as a proxy for nationality; in *Commission v UK*[[19]](#footnote-21) the CJEU approved of the UK’s right to reside test, notwithstanding that the Commission noted it created a ‘an automatic mechanism that systematically and ineluctably bars claimants’[[20]](#footnote-22) and operates along nationality lines; it seems using a codeword for nationality is enough to escape the obligations laid down in *Grzelczyk.*

In *Grzelczyk*, the Court devised a much-quoted,[[21]](#footnote-23) but ultimately nebulous, formulation, that Union citizenship is ‘destined to be the fundamental status of nationals of the Member States’.[[22]](#footnote-24) Even more significant was the finding that EU law ‘accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States’.[[23]](#footnote-25) There are considerably more references to a ‘certain degree of financial solidarity’ in subsequent AG Opinions than in judgments. The phrase appears in only 5 judgments, and in 14 AG Opinions – the most recent of which at the time of writing, was in February 2023,[[24]](#footnote-26) suggesting that Advocates General have continued to play a strong role in preserving the solidaristic idea of EU citizenship, even though the Court has not mentioned it since 2013, in *Brey*.[[25]](#footnote-27)

The centring of EU citizenship has been particularly important in the context of obstacles to movement imposed by *home* States; in many cases the focus is on the rights of *the citizen* (rather than the worker) to move, and various advocates general have come close to outlining a right to protection from discrimination on the grounds of EU citizenship-based migration, and by and large, the Court has fallen in step.[[26]](#footnote-28) In this context, AG Geelhoed in *Pusa* articulated the idea that Union citizenship *adds something extra* to traditional freedom movement rights, saying it was ‘clear that freedom of movement entails more than simply the abolition of restrictions on a person’s right to enter, reside in or leave a Member State’.[[27]](#footnote-29) The Court was a little more rhetorically reserved, restating the equal treatment-on-the-grounds of migration formulation from *D’Hoop*.[[28]](#footnote-30)

Also addressing obstacles imposed by the home state, (residential conditions attached to a war veterans’ benefit), AG Kokott emphasised that the rights of EU citizens to move subsist ‘irrespective of any economic activity’,[[29]](#footnote-31) further appealing to the idea that citizenship carries with it something more fundamental than the right to economic mobility. The Court did not mention the (ir)relevance of economic activity, but recognised that Member States imposing a “disadvantage” on its own nationals ‘simply because they have exercised their freedom to move and to reside in another Member State’, created an obstacle to movement, which to be justified must be proportionate.[[30]](#footnote-32)

The CJEU has since been kicking over the embers of the principle of proportionality in a citizenship/welfare benefits context – but once again, Advocates General have tried to keep the flame burning, as explored next.

III. Re-resuscitating the proportionality principle

A strict adherence to the limitations and conditions placed on rights to reside in Directive 2004/38,[[31]](#footnote-33) avoiding consideration of the underlying right created by primary law, results in a “law-as-lists” approach. However, applying the principle of proportionality to those conditions creates flexibility in the law, steering it closer to “law-as-fairness”, so that people might fall through the strict categories of permitted residence and yet still have rights as mobile EU citizens.[[32]](#footnote-34) Once again, it is an approach spearheaded by the Court, in two cases in particular (*Baumbast* and *Brey*) going beyond the suggested approaches of the advocates general, and again is an approach from which it has since resiled, while advocates general have kept fanning the flame.

In *Baumbast*, the Court pushed the AG’s conclusions about finding a citizenship-based right to reside even further. AG Geelhoed had argued that the then Article 18 para 1 EC [now Article 21 para 1 TFEU] created a directly effective right for EU citizens to move and reside in other Member States, and conditions and limitations should not rob that right of substantive content. However, the AG’s reasoning relied heavily on Mr Baumbast’s (non-EU) economic activity, so that the conditions and limitations imposed on freedom of movement for workers should apply by analogy.[[33]](#footnote-35) In contrast, the Court’s judgment did not apply analogous conditions and limitations. Rather, it required latitude in applying the *existing* conditions and limitations; they must observe ‘the general principles of that law, in particular the principle of proportionality’.[[34]](#footnote-36) Here, although Mr Baumbast’s work was viewed as helpful in the proportionality assessment, it was not a necessary condition. His primary right of residence was exercised ‘purely as a national of a Member State, and consequently a citizen of the Union,’[[35]](#footnote-37) and any limitations or conditions placed on that right were ‘subject to judicial review’.[[36]](#footnote-38) Five Advocate General Opinions have cited that specific caveat[[37]](#footnote-39) - no judgments have.

The Court further emboldened the duty of proportionality review in 2013 in *Brey* – long after Directive 2004/38 had come into force. The AG Opinion in that case did not even mention proportionality, adopting something of a “law-as-lists” approach, using the Directive to provide the relevant list, and finding that the applicant did not fit into any of the categories (the word “Directive”, referring to Directive 2004/38, appears 92 times).[[38]](#footnote-41) The judgment in contrast went proportionality-plus,[[39]](#footnote-42) requiring ‘an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned’, outlining a large range of circumstances that should be considered,[[40]](#footnote-43) and then concluded that it was for the referring court, in light of the relevant facts, to make the proportionality judgment.

The year after *Brey*, the Court backed off from proportionality-based judicial review of the Directive, suggesting that certain provisions sufficiently incorporated the proportionality principle itself, so national policies giving effect to them were essentially immune to such review. *Dano* is usually cited as the turning point, in which the Court conferred the Directive ‘with legal but also normative eminence in citizenship law’.[[41]](#footnote-44) In delivering the Opinion in *Dano*, AG Wathelet had concluded that ‘a final analysis must, in my view, be carried out in the light of the principle of proportionality’.[[42]](#footnote-45) The Court did not mention proportionality, and made the limitations and conditions placed on equal treatment rights *pre-conditions* for invoking them: ‘the applicants do not have sufficient resources [...] Therefore […] they cannot invoke the principle of non-discrimination’.[[43]](#footnote-46) It was however in *Almanovic* that the Court rather more explicitly dispensed with the requirement of a proportionality review, contrary to the recommendation of the advocate general. Addressing a blanket rule excluding EU nationals who had retained worker status having worked for less than 12 months, from accessing social assistance for more than six months, AG Wathelet noted the proportionality assessment required in *Brey*, and concluded that the authorities should take into account ‘inter alia, not only the amount and regularity of the income received by the citizen of the Union, but also the period during which the benefit applied for is likely to be granted to them’.[[44]](#footnote-48) The AG added that ‘the demonstration of a real link with that State ought to prevent automatic exclusion from those benefits’, and noted that the Member State ought not to use a single criterion to measure ‘the real and effective degree of connection between the applicant for the allowance and the geographic market in question’.[[45]](#footnote-50)

The Court instead concluded that the Directive did its own job of assessing proportionality; ‘Directive 2004/38… *itself takes into consideration various factors characterising the individual situation* of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity.’[[46]](#footnote-52) The Court then added rather blankly that the rule in question complied with the principle of proportionality.

It is largely through the medium of AG Opinions that the *Brey* proportionality principle has been kept (to some degree) alive. Four CJEU judgments[[47]](#footnote-53) have referenced the proportionality test in *Brey*, compared to seven AG Opinions[[48]](#footnote-54) which specifically reference it, and a further five AG Opinions[[49]](#footnote-55) which adopt it. In order to demonstrate the greater frequency with which AGs engaged with (i) the *Brey* proportionality test; (ii) more broadly, proportionality and restrictions on residence rights in Directive 2004/38; and (iii) more broadly still, proportionality and derogations from the equal treatment right in Article 18 TFEU, figure 1 represents the results of a textual analysis of the Court’s database of judgments and opinions. This is based on several structured searches using different combinations of keywords (and their typographical alternatives) indicative of a consideration of proportionality, to isolate cases in which the issues arose, and an analysis of each result to identify whether the case engaged substantively with the question.

Frequency is not the only difference. The richest analysis of the proportionality of derogations from EU citizenship rights also emerges from the AG Opinions. In *Bressol*, AG Sharpston gave the most lucid analysis of the relationship between direct and indirect nationality discrimination to have appeared in EU case law, followed by a methodical dissection of what the proportionality principle requires when Member States seek to discriminate on the ground of nationality. The Opinion invoked the Court’s own requirements as to the evidential burden[[50]](#footnote-56) concluding that ‘[u]nless the national court is presented with substantially stronger material than has been shown to this Court, the proportionality test cannot in my view be said to be satisfied.’[[51]](#footnote-57) AG Sharpston reflected on the particular problems posed by discrimination justifications based on something that has not yet happened, but might: ‘[w]here discriminatory treatment as a precautionary measure against a perceived future problem is concerned, the proportionality test *must be applied with particular vigilance*.’[[52]](#footnote-59) The Court implicitly (and less eloquently) took this on board in its judgment by setting out the steps the referring court would need to take to conduct a “prospective analysis”.[[53]](#footnote-60)

In *Prinz and Seeberger*, AG Sharpston again made clear the need to interrogate data presented by Member States which purported to back up their justification for discrimination*.* Germany had provided data on the number of German nationals living outside of Germany to justify its three-year past residence condition attached to funding for studies abroad. The AG noted that the figures ‘obviously say nothing about the existence of an actual or potential risk of an unreasonable financial burden’, adding dryly that it was ‘doubtful whether all Germans residing elsewhere in the EU, from babes in arms to old-age pensioners, intend to pursue further studies (and in particular outside Germany)’. Instead, ‘a more robust assessment of the likely risk’ of an unreasonable financial burden was required.[[54]](#footnote-61)

AG Sharpston has also emphasised the importance of the role of national referring courts in addressing proportionality questions where the question requires case-by-case assessment, using guidance proffered by the CJEU, because by its very nature, an assessment that takes account of individual circumstances requires close acquaintance with the facts. This is an approach of law-as-scrupulous-fairness rather than law-as-lists. For example, in *Sayn-Wittgenstien*, a case about an EU citizen’s desire to keep the prefix *Fürstin* - translated as “Princess” - as part of her name, which clashed with the national objective of scrapping the aristocracy, AG Sharpston recommended a rigorous regard to the facts; the ‘final decision on proportionality must be for the competent national court — there are, indeed, a number of legal and factual issues that may need to be verified.’[[55]](#footnote-63) The Court’s judgment was rather less careful, and provided an example of the Court effectively making its own proportionality judgment for the national court.[[56]](#footnote-64)

In 2021, AG Saugmandsgaard Øe addressed the right of an economically inactive Union migrant to be affiliated to the host state’s social security health care system, and drew upon the proportionality test in *Baumbast*,[[57]](#footnote-65) not used in a judgment since 2016,[[58]](#footnote-66) then proceeded to conduct an extremely thorough proportionality analysis, devoting 46 paragraphs to the concept of an “unreasonable burden”, and a further 18 paragraphs to discussing an assessment of individual circumstances and applying the analysis to Regulation 883/2004.[[59]](#footnote-67) After noting the Court’s findings that proportionality assessments were not necessary in *Dano/Alimanov* cases, the AG went on to find that for situations that do *not* fall within those cases:

the opposite approach is required, in my view. An examination of the individual situation of the person concerned must be carried out in order to ensure that he is indeed integrated in the host Member State… and, accordingly, that he can be affiliated to its social security system on the same conditions as nationals... The relevant elements include, in particular […] his family situation, how permanent his housing situation is, the Member State in which he is deemed to reside for taxation purposes or the reasons that led that citizen to move.[[60]](#footnote-68)

The same year, in *CG*, AG Richard de la Tour delivered an Opinion on the rights of EU nationals with a domestic right to reside, pre-settled status, in the UK, before the UK/EU withdrawal transition period ended so EU law was still applicable.[[61]](#footnote-69) The AG proposed a detailed proportionality assessment be conducted by the referring court ‘which alone has jurisdiction to assess the facts’. Noting ‘the systematic nature of the refusal of access to social assistance, without consideration of the individual situations of applicants’ the AG said the disputed measure did ‘not seem to me to be proportionate to the objective pursued’,[[62]](#footnote-71) and explicitly called upon the Court to provide guidance to the referring court – that the response ‘should contain indications of the various elements that may be taken into account in order to satisfy the requirement of proportionality, following the example of its decision in the judgment in *Brey*’.[[63]](#footnote-72) The AG outlined a number of factors that should be considered, and also suggested that a proportionality assessment should be informed by fundamental principles – the respect for family life, and the best interests of the child, and those principles provided ‘ample justification for an individual examination of the situation of the Union citizen’.[[64]](#footnote-73) The Court declined to follow this advice, finding that the people involved were not entitled to protection from discrimination, so no proportionality assessment was required, offering instead a last resort option of relying on the Charter of Fundamental Rights.[[65]](#footnote-74)

AG Szpunar has since characterised proportionality as “Ariadne’s clew” – the guiding thread running throughout the case law on the loss of citizenship, in January 2023 in *X*. Addressing a rule mandating the automatic loss of Danish nationality on reaching the age of 22, for dual nationals who were born abroad and never lived in Denmark,[[66]](#footnote-75) which necessarily entailed the loss of EU citizenship, the AG conducted a detailed proportionality analysis. The clew, according to the AG, was two-fold – first, Member States’ power of citizenship deprivation should be exercised with regard to EU law, and second, ‘judicial review must be carried out in the light of EU law and, in particular, in the light of the principle of proportionality’ taking account of several factors.[[67]](#footnote-76)

In *GV*, the Irish authorities contended that an EU national relying on their right to reside as a dependent, ascendant family member could not claim social assistance, because if it were awarded they would cease to be dependent upon their family-member. In delivering the Opinion, AG Ćapeta drew upon AG Sharpston’s analysis in *Prinz and Seeberger,* to argue not only in favour of a proportionality assessment, but also to require reliance upon robust evidence of ‘systemic threats to [the Member State’s] social assistance system’, and insisting that in spite of ‘a certain amount of academic criticism directed at the clarity of the Court’s case-law regarding such limitations’, it is still the case that ‘when choosing to rely on the unreasonable burden argument permitted by EU legislation, Member States must still observe the proportionality principle’.[[68]](#footnote-78)

AG Ćapeta further suggested reframing the discussion on unreasonable burdens around solidarity, ‘viewed as a readiness to participate in burden sharing. Such solidarity is usually based on belonging to a community, be it national, professional, family or European’.[[69]](#footnote-79) The AG suggested that treating ‘direct ascendants equally in respect of their access to social benefits actually promotes their own gradual integration in the society of the host Member State’.[[70]](#footnote-80) It is this element of AG reasoning – a focus on solidarity, and on citizens as people, not factors of production, that is explored next.

IV. Putting the citizen in citizenship case law: human beings, not robots

Advocates General have played a significant role in advancing ideas about the possible autonomous content of EU citizenship, with an emphasis on the human, solidaristic dimension of citizenship rights. There are three striking themes which emerge in citizen-focussed AG Opinions more prominently than in Court judgments; (i) a decoupling of citizenship from economic activity; (ii) a decoupling of citizenship from cross border movement; (iii) an emphasis upon European solidarity.

In *Petersen*, (in 2008) AG Ruiz-Jarabo Colomer described the concept of EU citizenship as having gathered ‘unprecedented momentum… affording individuals who exercise freedom of movement greater status than that attributed to economic operators.’[[71]](#footnote-82) The AG reached the optimistic conclusion that ‘the Court has transformed the paradigm of homo economicus into that of homo civitatis.’[[72]](#footnote-84) AG Mazák agreed in *Förster*, finding it ‘fair to say that the concept of Union citizenship, as developed by the case-law of the Court, marks a process of emancipation of Community rights from their economic paradigm’.[[73]](#footnote-86) With the increased primacy given to the limitations in Directive 2004/38,[[74]](#footnote-87) this paradigm shift has not quite come to pass in the eyes of the Court.

However, AGs have continued to find rights attaching to citizens rather than economic actors, for example, through focusing on fundamental rights and children’s rights. Children, as far as Directive 2004/38 is concerned, have no rights to reside in their own right; their rights are at best parasitic, leaving them dependent upon the migratory, employment and relationship choices and misfortunes of their parents. If Union citizenship is to mean anything beyond the economic paradigm, it has to mean something for them. AG Sharpston recognised this when reframing the questions in *Grunkin Paul* on cross border clashes in surname rules around the children affected:

The question is not whether parents may be dissuaded from exercising their rights of movement and residence, or hindered in the exercise of those rights, by any rules which may apply in determining the surname of their children, born or unborn. It is whether a child whose birth has been lawfully registered under a particular name in accordance with the law of the Member State of the place of that birth — and who has not himself exercised any choice with regard to that registration — suffers inconvenience or hardship when exercising his own rights as a citizen of the Union if the Member State of his nationality refuses to recognise the name thus registered.[[75]](#footnote-88)

In *Chavez-Vilchez* the Court ruled that when making decisions about whether or not a child’s Article 20 TFEU right based right to reside would be at risk should their third country national parent be removed, given the presence of another parent somewhere in the EU, national authorities had to take account of the child’s best interests.[[76]](#footnote-89) This has been described as the probable “culmination” of the CJEU’s centring of the Charter of Fundamental Rights, contributing to the “growing role” of the best interests of the child, which is ‘gradually becoming, if not a general principle, at least a safeguard principle for the genuine enjoyment of the substance of children’s rights’.[[77]](#footnote-91) But what is perhaps overlooked is the pivotal role advocates general played in helping that to happen. In *Chavez-Vilchez* itself, the Court accepted without much analysis or reflection, the idea that the Charter requirement to make the best interests of the child a primary consideration should inform the interpretation of Article 7 of the Charter, on the right to family life, which should in turn inform the interpretation of Article 20 TFEU rights. This followed a detailed analysis of the role the best interests of the child should play in Advocate General Szpunar’s Opinion, which argued that ‘the principle of the primacy of the best interests of the child is the prism through which the provisions of EU law must be read’.[[78]](#footnote-93) The AG there cited the *O & S* judgment, though the passage referred to was arguably rather less expansive – the Court had in *O & S* noted that Article 7 of the Charter of the Charter ‘must also be read in conjunction with the obligation to have regard to the child’s best interests, recognised in Article 24(2),’ and Member States must ‘“make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights’.[[79]](#footnote-95) It is instead in an Opinion of AG Sharpston that we first find the Charter/fundamental rights being used as a “prism” for EU law,[[80]](#footnote-96) wording repeated in six other Advocate General Opinions (but no judgments).[[81]](#footnote-97)

AG Szpunar also took from *Chen –* a case about a child’s purported self-sufficiency – the line that ‘the capacity of a national of a Member State to be the holder of rights guaranteed by the Treaty… cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally’[[82]](#footnote-99) and applied that logic to Article 20 and 21 TFEU, so applying it to children as Union citizens, regardless of economic status, and made that principle ‘the starting point of [this] analysis’.[[83]](#footnote-101)

Moreover, the AG referred to *Zambrano* and stated that ‘the principle of the best interests of the child was undoubtedly taken into account’ by the Court,[[84]](#footnote-102) though while this may well be true on an implicit level, the Court in *Zambrano* did not mention the principle once. In short, it seems highly unlikely that without such painstaking and persuasive centring of the best interests principle by AG Szpunar, in turn informed by insights of AG Sharpston, that the Court would have adopted it so matter-of-factly in *Chavez Vilchez*.

When it comes to decoupling EU citizenship from cross-border mobility, AG Sharpston has repeatedly shone a piercing light on the inherent contradiction in a citizenship status that only gives rights when moving between Member States. Her analysis in *Zambrano* of the “paradoxical” proposition that EU citizenship might protect the right to move between Member States but not the right to simply reside in one, was elegant and forensic. Noting that EU law would protect a national of one Member State who had been born in and always lived in another Member State, she suggested that this ‘implies that the ‘right to reside’ is a free-standing right, rather than a right that is linked by some legal umbilical cord to the right to move’.[[85]](#footnote-104) When discussing the incidental ways that people could engage EU law, she noted that insisting on physical movement between Member States before residence rights as a citizen of the Union could be invoked, ‘risks being both strange and illogical’[[86]](#footnote-106) such that ‘[l]ottery rather than logic would seem to be governing the exercise of EU citizenship rights’.[[87]](#footnote-108)

The Opinion noted that other citizenship rights had been invoked independently of cross-border movement, (in e.g. *Garcia Avello*, *Chen* and *Rottmann*)[[88]](#footnote-109) in order to ‘recommend that the Court now recognise the existence of that free-standing right of residence’.[[89]](#footnote-111) The Court took up this invitation (albeit in notoriously brief and laconic fashion).[[90]](#footnote-112) Sharpston’s tour de force of an Opinion was thus hugely influential in persuading the Court that if it followed its own logic in *Rottmann,* the EU citizenship-based right to reside in the EU must not be contingent upon having exercised the right to move, creating a watershed moment in EU citizenship case law, and a whole new genre of rights (and rights restrictions).[[91]](#footnote-113) The Opinion issued a second invitation to the Court, but this one was ignored. Having noted that EU citizens exercise their rights ‘as human beings, not robots’, AG Sharpston stated that it was ‘time to invite the Court to deal openly with the issue of reverse discrimination’.[[92]](#footnote-115)

In *Ruiz Zambrano*, noting that a radical change was ‘not going to happen overnight’,[[93]](#footnote-117) she proposed a carefully circumscribed revision of the approach of the Court; it should find that Article 18 TFEU prohibited discrimination by a Member State against its own nationals ‘caused by the interaction of Article 21 TFEU with national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law’.[[94]](#footnote-119) The Court did not attempt to tackle the issue of reverse discrimination, and at the time of writing, has yet to do so.

In focusing on the human dimension of EU citizenship, AG Opinions have also reflected on the relevance of EU solidarity, and the duties Member States and EU citizens owe to each other in times of need. As noted above, AG Ćapeta reframed the discussion on unreasonable burdens around solidarity, burden sharing and integration.[[95]](#footnote-120) In *NA*, AG Wathelet argued for a recognition of where EU citizens had ‘constructed their citizenship’, and of attachment, ‘and of being integrated not only into the administrative and economic life of the host country but also into its social and cultural life’.[[96]](#footnote-122)

The Court has not engaged closely with questions of financial and social solidarity, especially in the context of subsistence benefits, since *Brey*. The rights of EU citizenship are still unequally enjoyed, with recent cases laying ‘bare once again the tensions inherent to EU citizenship, which entrenches inequalities against a class of “unwanted” persons, whose legal status is less fundamental and more precarious than that of other persons’,[[97]](#footnote-124) and illustrating ‘the illogical nature of the judicially constructed access to social security benefits by non-economically active Union citizens’.[[98]](#footnote-126) When considering the rights of those deemed non-economically active, interestingly, AG Ćapeta has criticised the argument that dependant ascendant family members cannot claim benefits because they would cease to be dependant, on the ground that it would create ‘an infinite loop, which cannot be allowed’, because they would lose eligibility for benefit as soon as it was claimed, then lose access to the benefit and so become eligible again, ‘and so on, ad infinitum*.*’[[99]](#footnote-128)

It is hard to disagree with this reasoning, but we should remember that this is exactly the infinite loop the Court (and, of course, the legislature) have willingly tolerated in the context of e.g. self-sufficiency. The AG’s call for the conditions of the Directive to be mediated by considerations that “reflect the gradation of solidarity,”[[100]](#footnote-129) is at least a message that although the ideas and aspirations of Union citizenship may have been thwarted, they have not yet been abandoned.

V. Conclusion

Advocates General have played an integral role in the evolution of EU citizenship. An exhaustive review of the constitutional role Advocates General play in the EU legal order is, to put it mildly, beyond the scope of this chapter, but hopefully what it has done is to shine some light on the value of AG Opinions when it comes to providing visionary, ambitious input, and also, to providing an element of consistency. A Court not bound by precedent can sometimes seem erratic to the point of showing disdain for its own authorities, but various Advocates General have kept emphasising core principles, even long after commentators have assumed they have fallen into disuse. Without the constructive and creative insights from advocates general, EU citizenship would not have developed in the way that it has. Various innovations – the “prism” of fundamental rights and the best interests of the child; the creation of a standalone citizenship-based residence right – can be directly traced back to the influence of one or more AGs. And AGs have repeatedly centred EU citizenship; resurrected the proportionality principle; and emphasised the human dimension of EU law, and the importance of EU solidarity. Indeed, the “Ariadne’s clew” AG Szpunar mentioned might not actually be the Court’s attention to proportionality; rather, the golden thread might be the consideration AGs have given to proportionality, and their role in repeatedly bringing it back to the judicial table.

The nature and format of AG Opinions compared to judgments, which must be written by committee, likely means that they lend themselves better to detailed reasoning, thoughtful analysis, and opportunities to inspire. Few judicial calls to value European solidarity have rung as clearly and piercingly as AG Sharpston’s 2019 Opinion in *Commission v Poland & Others*:

Solidarity is the lifeblood of the European project. Through their participation in that project and their citizenship of European Union, Member States and their nationals have obligations as well as benefits, duties as well as rights. Sharing in the European ‘demos’ is not a matter of looking through the Treaties and the secondary legislation to see what one can claim. It also requires one to shoulder collective responsibilities and (yes) burdens to further the common good.

Respecting the ‘rules of the club’ and playing one’s proper part in solidarity with fellow Europeans cannot be based on a penny-pinching cost-benefit analysis along the lines (familiar, alas, from Brexiteer rhetoric) of ‘what precisely does the EU cost me per week and what exactly do I personally get out of it?’ Such self-centredness is a betrayal of the founding fathers’ vision for a peaceful and prosperous continent. It is the antithesis of being a loyal Member State and being worthy, as an individual, of shared European citizenship. If the European project is to prosper and go forward, we must all do better than that.[[101]](#footnote-131)

The power of the “influence of ideas” means that AGs provide not only technical legal guidance, but help shape the foundations, principles, and direction of the law. When it comes to Union citizenship case law, AG Sharpston in particular has contributed a theoretical richness, an imaginative intellectualism, and a compelling constitutional call to arms.

1. A few examples: D Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ (2005) 68 *MLR* 233; D Thym, *Questioning EU citizenship: Judges and the limits of free movement and solidarity in the EU* (Hart Publishing 2017); F Wollenschläger, ‘The judiciary, the legislature and the evolution of Union citizenship’ in P Syrpis (ed) *The judiciary, the legislature and the EU internal market* (CUP 2012); M Blauberger, A Heindlmaier, D Kramer, D Sindbjerg Martinsen, J Sampson Thierry, A Schenk and B Werner, ‘ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence’ (2018) 25 *Journal of European Public Policy* 142; G Davies, ‘Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication’ (2018) 25 *Journal of European Public Policy* 144; D Kochenov, ‘EU Citizenship: Some Systemic Constitutional Implications’ (2019) 3 *European Papers* 1061; C O’Brien, ‘Acte cryptique? Zambrano, welfare rights, and underclass citizenship in the tale of the missing preliminary reference’ (2019) 56 *CML Rev* 1697. [↑](#footnote-ref-1)
2. An approach with quantitative and qualitative elements – using structured searches to survey databases, then conducting a documentary analysis of each text to identify the number and nature of substantive mentions. [↑](#footnote-ref-2)
3. Case C-168/91 *Konstantinidis* ECLI:EU:C:1992:504, Opinion of AG Jacobs, para 46. [↑](#footnote-ref-4)
4. AG Poiares Maduro in Case C-380/05 *Centro Europa 7 Srl* ECLI:EU:C:2007:505, para 16; AG Ruiz Jarabo Colomer in Case C-228/07 *Petersen* ECLI:EU:C:2008:281, para 16; AG Sharpston in Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2010:560, para 83; AG Wahl in Case C-140/12 *Brey* ECLI:EU:C:2013:337, para 1; and AG Bobek in Case C-195/16 *Criminal proceedings against I* ECLI:EU:C:2017:374, fn 24. [↑](#footnote-ref-5)
5. Case C-85/96 *Martinez Sala* ECLI:EU:C:1997:335,Opinion of AG La Pergola, para 23. [↑](#footnote-ref-7)
6. Case C-85/96 Martinez Sala ECLI:EU:C:1998:217. [↑](#footnote-ref-8)
7. Case C-456/02 *Trojani* ECLI:EU:C:2004:112, Opinion of AG Geelhoed, para 70. [↑](#footnote-ref-9)
8. Case C-456/02 *Trojani* ECLI:EU:C:2004:488. [↑](#footnote-ref-10)
9. E.g. D Kostakopoulou, ‘The Evolution of European Union Citizenship’ (2008) 7 *European Political Science* 285; and H Verschueren, ‘European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems’ (2007) 9 *European Journal of Migration and Law* 307. [↑](#footnote-ref-11)
10. K Hailbronner, ‘Union Citizenship and Access to Social Benefits’ (2005) 42 *CML Rev* 1245; C Tomuschat, ‘Annotation of Martínez Sala’ (2000) 37 *CMLRev* 449; A Somek, ‘Solidarity Decomposed: Being and Time in European Citizenship’ (2007) 32 *ELRe*v 787. [↑](#footnote-ref-12)
11. Case C-432/14 *O v Bio Philippe Auguste* *SARL* ECLI:EU:C:2015:643, para 22. [↑](#footnote-ref-13)
12. In Case C-709/20 *CG* ECLI:EU:C:2021:602, the Court noted that the parties had raised *Trojani*, then said nothing about it, then appeared to reach a conclusion at odds with *Trojani* without even acknowledging it was doing so. [↑](#footnote-ref-14)
13. Case C-140/12 *Brey* ECLI:EU:C:2013:565, paras 44 and 46. [↑](#footnote-ref-15)
14. Case C‑45/12 *Radia Hadj Ahmed* ECLI:EU:C:2013:390, para 40. [↑](#footnote-ref-16)
15. Case C-181/19 *Krefeld* ECLI:EU:C:2020:377, Opinion of AG Pitruzzella, fn 59. [↑](#footnote-ref-17)
16. Case C-709/20 *CG* ECLI:EU:C:2021:515 Opinion of AG Richard de la Tour. [↑](#footnote-ref-18)
17. Case C-184/99 *Grzelczyk* ECLI:EU:C:2000:518, Opinion of AG Alber, para 126. [↑](#footnote-ref-19)
18. Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458. [↑](#footnote-ref-20)
19. Case C-308/14 *Commission v UK* ECLI:EU:C:2016:436*.* [↑](#footnote-ref-21)
20. Ibid, para 47. See C O’Brien, ‘The ECJ sacrifices EU citizenship in vain: Commission v. United Kingdom’ (2016) 54 *CMLRev* 209. [↑](#footnote-ref-22)
21. Not least, quoted in 39 CJEU judgments and 43 AG Opinions. [↑](#footnote-ref-23)
22. Para 31 of the Judgment in *Grzelczyk*. [↑](#footnote-ref-24)
23. Ibid, para 44. [↑](#footnote-ref-25)
24. Case C‑488/21 *GV* ECLI:EU:C:2023:115, Opinion of AG Ćapeta, para 138, judgment not yet delivered. [↑](#footnote-ref-26)
25. Para 72 of the Judgment in *Brey*. [↑](#footnote-ref-27)
26. Case C-224/98 *D’Hoop* ECLI:EU:C:2002:103, Opinion of AG Geelhoed, para 57, and C-224/98 *D’Hoop* EU:C:2002:432, para 35. [↑](#footnote-ref-28)
27. Case C-224/02 *Pusa* ECLI:EU:C:2003:634, Opinion of AG Jacobs, paras 20-21. [↑](#footnote-ref-29)
28. Case C-224/02 *Pusa* ECLI:EU:C:2004:273. [↑](#footnote-ref-30)
29. Case C-192/05 *Tas Hagen and Tas* ECLI:EU:C:2006:223, Opinion of AG Kokott, para 38, emphasis added. [↑](#footnote-ref-31)
30. Case C-192/05 *Tas Hagen and Tas* ECLI:EU:C:2006:676, para 31. [↑](#footnote-ref-32)
31. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77. [↑](#footnote-ref-33)
32. On the framing of law-as-lists, and an alternative approach of law-as-justice (or law as fairness), see C O’Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing 2017). [↑](#footnote-ref-34)
33. Case C-413/99 *Baumbast* ECLI:EU:C:2001:385, Opinion of AG Geelhoed. [↑](#footnote-ref-35)
34. Case C-413/99 *Baumbast* ECLI:EU:C:2002:493, para 91. [↑](#footnote-ref-36)
35. Ibid, para 84. [↑](#footnote-ref-37)
36. Ibid, para 86. See M Dougan, ‘The constitutional dimension to the case law on Union citizenship’ (2006) 31 *ELRev* 613. [↑](#footnote-ref-38)
37. Case C-209/03 *Bidar* ECLI:EU:C:2004:715, Opinion of AG Geelhoed, para 32; para 62 of Opinion of AG Geelhoed in *Trojani*; Case C-215/03 *Oulane* ECLI:EU:C:2004:653, Opinion of AG Léger, fn 11; Case C-138/02 *Collins* ECLI:EU:C:2003:409, Opinion of AG Ruiz-Jarabo Colomer, para 58; Case C-291/05 *Eind* ECLI:EU:C:2007:407, Opinion of AG Mengozzi, para 123. [↑](#footnote-ref-39)
38. Excluding: mentions in the headnote; repetition when specifying an abbreviation; repetition within the body of the title of the Directive; mentions of multiple ‘directives’; and references to other Directives. [↑](#footnote-ref-41)
39. Critically analysed in H Verscheuren, ‘Free Movement or Benefit Tourism: The Unreasonable Burden of Brey’ (2014) 16 *European Journal of Migration and Law* 147. [↑](#footnote-ref-42)
40. Para 78 of the Judgment in *Brey*. [↑](#footnote-ref-43)
41. N Nic Shuibhne, ‘What I tell you three times is true: lawful residence and equal treatment after *Dano’* (2016) 23 *Maastricht Journal of European and Comparative Law* 908, 918. [↑](#footnote-ref-44)
42. Case C-333/13 *Dano* ECLI:EU:C:2014:341, Opinion of AG Wathelet, para 126. [↑](#footnote-ref-45)
43. Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 81. Thym noted this left open an ‘important question: when precisely do citizens who are economically inactive pass the threshold for lawful residence?’: see D Thym, ‘When Union citizens turn into illegal migrants: the *Dano* case’ (2015) 40 *ELRev* 249, 259. [↑](#footnote-ref-46)
44. Case C-67/14 *Alimanovic* ECLI:EU:C:2015:210*,* Opinion of AG Wathelet, para106. [↑](#footnote-ref-48)
45. Ibid, para 108. [↑](#footnote-ref-50)
46. Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597, para 60 (emphasis added). [↑](#footnote-ref-52)
47. Judgments in Case C-308/14 *Commission v UK* ECLI:EU:C:2016:436, para 47; Case C-93/19 *Bajratari* ECLI:EU:C:2019:809, para 35; C-299/14 *Recklinghausen* ECLI:EU:C:2016:114, para 46; para 59 of the Judgment in *Alimanovic.* [↑](#footnote-ref-53)
48. AG Opinions in: Case C-308/14 *Commission v UK* ECLI:EU:C:2015:666, Opinion AG Cruz-Villalón, para 35; Case C-93/19 *Bajratari* ECLI:EU:C:2019:512, Opinion of AG Szpunar, para 62; para 56 of Opinion of AG Richard de la Tour in *CG*; paras 104-109 of Opinion of AG Wathalet in *Alimanovic*; Case C-507/12 *Saint Prix* ECLI:EU:C:2013:841, Opinion of AG Wahl, para 48; Joined Cases C-316/16 and C-424/16 *B & Vomero* ECLI:EU:C:2017:797, Opinion of AG Szpunar, para 58; para 99 of the Opinion of AG Wathalet in *Dano*. [↑](#footnote-ref-54)
49. C-488/21 *GV* ECLI:EU:C:2023:115, Opinion of AG Ćapeta, para 126; Case C-491/21 *WA* ECLI:EU:C:2023:362, Opinion of AG Szpunar, para 36; Case C-491/21 *SV Familienkasse* ECLI:EU:C:2023:362, Opinion of AG Szpunar, paras 103-104; Case C-535/19 *A v Latvijas Republikas Veselības ministrija* ECLI:EU:C:2021:114, Opinion of AG Saugmandsgaard Øe, para 100; Case C-181/19 *Krefeld* ECLI:EU:C:2020:37767, Opinion of AG Pitruzzella. [↑](#footnote-ref-55)
50. Case C-73/08 *Bressol* ECLI:EU:C:2009:396, Opinion of AG Sharpston, para 84: such measures ‘must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State and specific evidence substantiating its arguments’ – quoting Case C‑147/03 *Commission v Austria* ECLI:EU:C:2005:427, para 63. [↑](#footnote-ref-56)
51. Ibid, para 125. [↑](#footnote-ref-57)
52. Ibid. [↑](#footnote-ref-59)
53. Para 69 of the Judgment in *Bressol*. [↑](#footnote-ref-60)
54. Joined Cases C‑523/11 and C‑585/11 *Prinz and Seeberger* ECLI:EU :C:2013:90, para 62. [↑](#footnote-ref-61)
55. Case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:608, Opinion of AG Sharpston, para 68. [↑](#footnote-ref-63)
56. Ibid, para 93. [↑](#footnote-ref-64)
57. Case C-535/19 *A v Latvijas Republikas Veselības ministrija* ECLI:EU:C:2021:114, paras 99 and 128. [↑](#footnote-ref-65)
58. Case C-165/14 *Rendón Marín* ECLI:EU:C:2016:675, para 45. [↑](#footnote-ref-66)
59. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1. [↑](#footnote-ref-67)
60. Case C-535/19 *A v Latvijas Republikas* ECLI:EU:C:2021:114,Opinion of AG Saugmandsgaard Øe, para 132. [↑](#footnote-ref-68)
61. The EU/UK Withdrawal Agreement provided for a transition period after the UK left the EU on 31 January 2020, until 31 December 2020, during which EU law would still apply within the UK. See C. Barnard ‘The Status of the Withdrawal Agreement in UK Law’ in C. McCrudden (ed) *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge: CUP, 2022); C. O’Brien ‘Between the devil and the deep blue sea: Vulnerable EU citizens cast adrift in the UK post-Brexit’ (2021) 58(2) CML Rev 43. [↑](#footnote-ref-69)
62. Para 97 of the Opinion of AG Richard de la Tour *CG*. [↑](#footnote-ref-71)
63. Ibid, para 98. [↑](#footnote-ref-72)
64. Ibid, para 109. [↑](#footnote-ref-73)
65. C-709/20 *CG* ECLI:EU:C:2021:60.See H Verschueren, ‘The right to social assistance for economically inactive migrating Union citizens: the Court disregards the principle of proportionality and lets the Charter appease the consequences’ (2022) 4 *Maastricht Journal of European and Comparative Law* 483. [↑](#footnote-ref-74)
66. Case C‑689/21 *X* ECLI:EU:C:2023:53*,* paras 44-46. [↑](#footnote-ref-75)
67. Ibid. [↑](#footnote-ref-76)
68. Case C‑488/21 *GV* ECLI:EU:C:2023:115, Opinion of AG Ćapeta, para 126. [↑](#footnote-ref-78)
69. Ibid, para 134. [↑](#footnote-ref-79)
70. Ibid, para 137. [↑](#footnote-ref-80)
71. Case C-228/07 *Petersen* ECLI:EU:C:2008:281, Opinion of AG Ruiz-Jaramo Colomer, para 15. [↑](#footnote-ref-82)
72. Ibid. [↑](#footnote-ref-84)
73. C-158/07 *Förster* ECLI:EU:C:2008:399, Opinion of AG Mazák, para 54. [↑](#footnote-ref-86)
74. Nic Shuibhne (n 44); O’Brien (n 34). [↑](#footnote-ref-87)
75. Case C-353/06 *Grunkin and Paul* ECLI:EU:C:2008:246, Opinion of AG Sharpston, para 77. [↑](#footnote-ref-88)
76. Case C-133/15 *Chavez-Vilchez* ECLI:EU:C:2017:354. [↑](#footnote-ref-89)
77. E Frasca and J Carlier, ‘The best interests of the child in ECJ asylum and migration case law: Towards a safeguard principle for the genuine enjoyment of the substance of children’s rights?’ (2023) 60 *CMLRev* 345, 385. [↑](#footnote-ref-91)
78. C-133/15 *Chavez-Vilchez* ECLI:EU:C:2016:659, Opinion of AG Szpunar, para 45. [↑](#footnote-ref-93)
79. Joined Cases C‑356/11 and C‑357/11 *O and S* ECLI:EU:C:2012:776, paras 76-78. [↑](#footnote-ref-95)
80. Joined Cases C-456/12 and C-457/12 *O* and *S* ECLI:EU:C:2013:837, Opinion of AG Sharpston, para 61. [↑](#footnote-ref-96)
81. Specifically using the Charter, rather than the ECHR as a “prism”: AG Bobek in Case C-132/20 *BN* ECLI:EU:C:2021:557, para 133; AG Sharpston in Case C-82/16 *KA* ECLI:EU:C:2017:821, para 71; AG Sharpston in Case C-634/18 *Criminal proceedings against JI* ECLI:EU:C:2020:29, para 63; AG Szpunar in Case C-335/17 *Valcheva* ECLI:EU:C:2018:242, paras 3 and 37; AG Wathelet in Case C‑115/15 *NA* ECLI:EU:C:2016:259,fn 54; para 45 of Opinion of AG Szpunar in *Chavez-Vilchez*. [↑](#footnote-ref-97)
82. Para 46 of Opinion of AG Szpunar *Chavez-Vilchez*, quoting Judgment in C-200/02 *Chen* ECLI:EU:C:2004:639, para 20. [↑](#footnote-ref-99)
83. Para 47 of Opinion of AG Szpunar in *Chavez-Vilchez*. [↑](#footnote-ref-101)
84. Ibid, para 3. [↑](#footnote-ref-102)
85. Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2010:560, Opinion of AG Sharpston, para 84. [↑](#footnote-ref-104)
86. Ibid, para 86. [↑](#footnote-ref-106)
87. Ibid, para 88. [↑](#footnote-ref-108)
88. Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539; Case C-200/02 *Chen* ECLI:EU:C:2004:639; Case C-135/05 *Rottmann* ECLI:EU:C:2010:104. [↑](#footnote-ref-109)
89. Para 101 of the Opinion of AG Sharpston in *Ruiz Zambrano*. [↑](#footnote-ref-111)
90. AG Sharpston later noted in a separate opinion that in the *Ruiz Zambrano* judgment, ‘no mention was made of fundamental rights. Nor was the rationale for the conclusion explained’. Case C-457/12 *S* EU:C:2013:842, fn 22. See also: N Nic Shuibhne, ‘Seven questions for seven paragraphs’ (2011) 36 *ELRev* 161. [↑](#footnote-ref-112)
91. The “substance of rights” doctrine, based on the finding that EU law should protect ‘the substance of the rights conferred on them by virtue of their status as citizens of the Union’, Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124, para 44 has been subject to considerable academic analysis: D Kochenov, ‘The Right to Have What Rights? EU Citizenship in Need of Clarification’ (2013) 19 *European Law Journal* 502; H Kroeze and P Van Elsuwege, ‘Revisiting *Ruiz Zambrano*: A Never Ending Story?’ (2021) 23 *European Journal of Migration and Law* 1; M van den Brink, ‘Is It Time to Abolish the Substance of EU Citizenship Rights Test? (2021) 23 *European Journal of Migration and Law* 13. The Opinion itself has been cited in eight other AG Opinions. [↑](#footnote-ref-113)
92. Para 139 of Opinion of AG Sharpston in *Ruiz Zambrano*, having previously raised the issue in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* ECLI:EU:C:2007:398, para 153. [↑](#footnote-ref-115)
93. Para 140 of Opinion of AG Sharpston in *Ruiz Zambrano*. [↑](#footnote-ref-117)
94. Ibid, para 150. [↑](#footnote-ref-119)
95. Paras 134 and 137 of Opinion of AG Ćapeta in *GV*. [↑](#footnote-ref-120)
96. Para 113 of Opinion of AG Wathelet in *NA*. [↑](#footnote-ref-122)
97. Ristuccia, analysing Case C-719/19 *FS* ECLI:EU:C:2021:506, in F Ristuccia, ‘“Cause tramps like us, baby we were born to run”: Untangling the effects of the expulsion of “undesired” Union citizens: FS’ (2022) 59 *CMLRev* 889, 914. [↑](#footnote-ref-124)
98. Haag, analysing C-411/20 *S v Familienkasse Niedersachsen-Bremen* ECLI:EU:C:2022:602in M Haag ‘Familienkasse: The muddle about the Union citizen's equal access to social security benefits’ (2023) 48 *ELRev* 206, 219. [↑](#footnote-ref-126)
99. Para 73 of Opinion of AG Ćapeta in *GV*. [↑](#footnote-ref-128)
100. Ibid, para 136. [↑](#footnote-ref-129)
101. Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland*, *Commission v Hungary*, *Commission v Czech Republic* ECLI:EU:C:2019:917, Opinion of AG Sharpston, paras 253-254. [↑](#footnote-ref-131)