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Legal Fiction and Genuine Link in Pending Case C-816/26, *Picuso*

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SUMMARY: 1. Introduction. – 2. The Italian Citizenship Saga. – 3. The First Fiction: A Sleight of Hand with Labels. – 4. The Second Fiction: Genuine Link vs Formal Title. – 5. Conclusion.

1. The newest law on Italian citizenship, which last year abruptly put an end to the long-standing anomaly of citizenship by unlimited descent, is currently under scrutiny before the Court of Justice, as Case C-816/26, *Picuso* is now pending, stemming from Italian Constitutional Court order No. 147/2026, delivered on 23rd July 2026.

In the main proceeding, Brazilian and Argentinian nationals claimed Italian citizenship as distant descendants, five and four generations removed, of emigrants born in Italy in 1869 and 1889. Order No. 147/2026 largely echoes and dialogues with a previous judgment of the same Italian Constitutional Court, No. 63/2026, delivered on 30th April 2026, in which the Court declared unfounded the question of constitutionality regarding the new law raised by applicants claiming citizenship by virtue of an ancestor born in 1837. In judgment No. 63/2026 (para. 10) the Court refused the referring court's request to make a reference for a preliminary ruling to the CJEU concerning the interpretation of Articles 9 TEU and 20 TFEU in relation to the new rules on citizenship. In the subsequent order No. 147/2026 (para 9.3) it takes the view that, although in its previous judgment it had conformed to the case law of the Court of Justice, a reference for preliminary ruling is due in a spirit of sincere cooperation. It therefore asks whether Articles 9 TEU and 20 TFEU preclude the adoption of a rule such as that laid down in Article 3 bis of law No. 91/1992 (New rules on nationality), introduced by Article 1(1) of decree-law No. 36/2025 (Urgent provisions on nationality), converted, with amendments, into law No. 74/2025.

This contribution argues that the *Picuso* case, which shares with most EU citizenship controversies a strong symbolic and political charge, is marred by a double layer of fiction. Those fictions need to be unmasked in order to be duly addressed, especially after the judgment of the Court of Justice of 29th April 2025, Case C-181/23, *Commission v Malta* moved towards a shared common minimum definition of national citizenship, vague though it is, by imposing a special relation of solidarity and good faith between the Member State and its nationals (F. CASOLARI, *«To be or not to be: that is the question». Notes on the Idea of European Union Citizenship in Commission/Malta*, in this *Journal*, 2026, p. 12). The first fiction is embedded within the formulation of the question by the Italian Constitutional Court which, by questionably framing Article 3 bis as an *ab initio* bar to acquisition rather than a revocation of nationality, seeks to place it beyond the reach of the case law on loss of nationality, thereby steering the answer. The second fiction hides behind the first, and confronts us with a fundamental question: what link must exist between social facts and legal statuses? We suggest that a substantive conception of (national and EU) citizenship, reflective of a person's actual life experience and paired with a tempered return to the genuine link, may be better suited to accommodate unprecedented contemporary human mobility, by granting membership of a political community on the grounds of residence and active participation rather than mere descent.

2. Since time immemorial, up to 28th March 2025, the transmission of Italian nationality to descendants had no limitations in time, nor did the acquisition of another (dual) citizenship halt it. The long-standing regime has come to be problematic as strict adherence to *ius sanguinis* did not meet any limitation even in the case in which the forebears of the applicant had not asked for recognition of Italian citizenship nor acted as if they were aware of it. This situation generated –as the Italian Constitutional Court says– a mass of foreigners holding a "virtual" (i.e. potential) Italian citizenship, which could be activated by the holders upon request, by providing proof of direct descent from an Italian emigrant, through either the paternal or the maternal line, or of marriage to one. The Italian government estimates that there are between 60 and 80 million Italian descendants abroad, who could potentially claim national and EU citizenship at any time.

Despite the current Italian government wariness towards immigrants, Italy once was a country characterized by heavy emigration. With the economic and institutional crises of South American countries, the emigrants' offspring started claiming back Italian citizenship, obtaining at once one of the strongest passports in the world and Union citizenship: the Italian citizens residing abroad increased by 3.5 million in the last twenty years. This growth has been driven mainly by the acquisition of citizenship by foreigners *iure sanguinis*, whose procedure simply required applicants to present a birth certificate of their long-deceased Italian

ancestor. Just a few days ago, the runner-up in the Brazilian presidential election Flávio Bolsonaro fled the country using his Italian passport, obtained in 2023.

The rules set out in law No. 91/1992 (New rules on nationality), which essentially reproduced the provisions of the earlier law No. 555/1912 (On Italian nationality), had been spared by the Italian Constitutional Court in judgment No. 142/2025, delivered on 31st July 2025, as it deemed that it fell within the legislative body's broad margin of discretion to enact the provisions governing the award of citizenship and elect which ties should matter to that end (para. 11.1).

However, the Government itself then intervened with decree-law No. 36/2025, later converted into law by the Parliament (law No. 74/2025), which introduced Article 3 bis into Italian law No. 91/1992. According to Article 3 bis any person born abroad, even before the entry into force of the new law, and having another nationality "shall be considered to have never acquired Italian nationality" unless a parent or grandparent has, or had at the time of death, exclusively Italian citizenship, or if a parent resided in Italy for two years before their birth; or if they had filed an application for "recognition" of their Italian citizenship before 23:59, Rome time, on 27th March 2025. The provisions introduced by decree-law No. 36/2025, converted into law No. 74/2025, are far from satisfactory, as they focus on preventing dual citizenship rather than on drawing a clear line on intergenerational transmission and thus promise future uncertainty (F. STRUMIA, *Neither Soil, Nor Blood, Nor Money: Disquiet over citizenship in the US, Italy, the UK, and at the CJEU*, in *VBlog*, 2025). Article 3 bis leaves many gaps open, such as the fragmentation of status among siblings, the relevance of a grandparent's naturalisation, and a very thin residence requirement for parents; furthermore, the newly amended version of Article 4 of the same law, not at issue in *Picuso*, imposes a questionable differentiation between citizens by birth and citizens by naturalisation as regards the possibility and the means of transmitting their status (M. BARONE, *Il "nuovo paradigma della cittadinanza": problemi e prospettive di attuazione dei «vincoli effettivi con la Repubblica» (Decreto-Legge N. 36 del 2025*), in *Costituzionalismo.it*, 2026).

3. The first fiction regards the legal qualification used in the request for preliminary ruling. The referring judge asks whether Articles 9 TEU and 20 TFEU preclude Article 3 bis of law No. 91/1992 "in so far as it represents a bar *ab initio* to the acquisition of Italian nationality by a person who was born abroad, even before the entry into force of that Article 3 bis, and who has another nationality, unless one of the conditions set out subsequently in that Article is satisfied". The question is framed in terms of a bar *ab initio* to the acquisition (it. '*preclusione originaria all'acquisto*' / fr. –verbal rather than nominal translation– '*empêche d'emblée l'acquisition*'), rather than in terms of revocation (it. '*revoca*' / fr. '*retrait*'). According to the Italian Constitutional Court, revocation affects *ex nunc* a status already officially acquired by a single individual, whereas the provisions

at issue affect *ex tunc* (i.e. retroactively) the not officially recognised status of a multitude of persons.

The qualification in terms of *ab initio* bar has been contested by the referring Italian domestic Courts in the proceedings leading to judgment No. 63/2026 (the Tribunal of Turin) and order No. 147/2026 (the Tribunals of Mantua and Campobasso), which described it as an implicit revocation of an acquired right. The same has been held by Italian scholarship, which argues that the Constitutional Court's qualification amounts to a sleight of hand with labels, a *quid pro quo* misleadingly maintaining that there is no revocation of the status of Italian citizens, as this status is to be treated as if it had never existed, because of the retroactive effect of the law (E. GROSSO, *Limitare per legge l'acquisto della cittadinanza "iure sanguinis"? Obiettivo condivisibile, metodo discutibile*, in *Quaderni costituzionali*, 2025; C. PANZERA, *C'era una volta il cittadino italiano*, in *Diario di Diritto Pubblico*, 2026).

The wording of the law itself betrays the fiction: according to Article 3 bis a person "shall be considered to have never acquired" Italian citizenship. Something "shall be considered" differently from how it is or how it was. The bar cannot be *ab initio*, since it was not in force at the time when citizenship was dormant: the bar is valid *ex nunc*, from now on, and implies a factual revocation of citizenship, i.e. a loss of status, under whatever name. To be sure, a provision may purport to affect a status retroactively, but it does not have the power to change the past: it can only prescribe a different treatment of it from now on. The Constitutional Court itself conceded as much in judgment No. 63/2026, describing the rule as a case of genuine retroactivity (para. 8.3). Since citizenship *iure sanguinis* was acquired at birth, and its recognition was merely declaratory in nature, Article 3 bis bar will apply to future recognitions, as might be deduced from the fictive "shall be considered" formula. But the past (virtual) citizenship was not non-existent: it was simply unascertained.

Even more blatantly, the Italian Constitutional Court, after having declared that the recognition of citizenship is subject to an original bar, denies that the rule's addressees were citizens at all, as their status was indeed legally uncertain (order No. 147/2026, paras. 7 and 9.3, not translated in the English summary of the request for preliminary ruling). The explanation for this intricate reasoning lies in the delicate dialogue with the CJEU: at least before *Commission v Malta*, while the loss of nationality entailed the loss of Union citizenship and therefore fell within the scope of EU law, the same did not hold for national measures regarding the conferral of nationality (S. POLI, *Revoca e attribuzione della cittadinanza: quali condizionamenti impongono le disposizioni dei Trattati sulla cittadinanza europea e quelle sulla Politica Estera e di Sicurezza Comune?*, in this *Journal*, 2024, p. 21). Then again, according to the Italian request for preliminary ruling (para. 20), EU case-law from *Rottmann* (Court of Justice, judgment of 2nd March 2010, Case C-135/08) to *Stadt Duisburg* (Court of Justice,

judgment of 25th April 2024, Joined Cases C-684/22 to C-686/22) concerns cases in which a Member State has deprived a person of an established status: that case law thus does not apply here, as the status of Union citizen was not legally certain for any of the people subject to the contested provision, and so, in short, the contested provisions do not provide for the loss of Italian nationality (para. 21). One cannot fail to note that, if Article 3 bis were to be characterised as a loss of nationality, *Tjebbes* (Court of Justice, judgment of 12th March 2019, Case C-221/17) and *Udlændinge- og Integrationsministeriet* (Court of Justice, judgment of 5th September 2023, Case C-689/21) would impose an individual examination of proportionality and a reasonable time to apply for the retention of citizenship, both absent from the new Italian legislation. Admittedly, carrying out an individualized proportionality assessment across a potential pool of tens of millions of people would be practically impossible. However, granting Italian descendants abroad a reasonable period within which to apply for recognition would lead to a far more manageable situation, reserving the proportionality assessment for those who have shown a conscious interest in maintaining legal ties with the Italian Republic.

4. It might come as a surprise, but despite the criticism of the question, we hope that, at the end of a dialogue possibly in several episodes, the outcome will be the closure of the old loophole. The original sin of the Italian law on citizenship, we argue, stemmed from a confusion between *Staatsangehörigkeit*, the formal belonging to the State, and *Staatsbürgerschaft*, the participation in a political community. It is not the first time that Italian citizenship puts Union citizenship in crisis. In the year of the Maastricht Treaty, in the judgment of 7th July 1992, Case C-369/90, *Micheletti*, the Court of Justice protected an Argentinian national, who also held Italian citizenship by virtue of *ius sanguinis*, from the Spanish refusal to grant him a permanent residence permit. Under Spanish law, where a person held multiple nationalities, only the one corresponding to the habitual place of residence was to be considered; already at the time, legal scholarship noticed that the ruling was disregarding the effectiveness or genuine link principle of citizenship (G. DI FEDERICO, *Union Citizenship and National Identity. The Constitutional Conundrums Raised by Commission/Malta*, in this *Journal*, 2026, p. 7). Things have moved fast since then, global movements of people have grown in both speed and scale, and the statements contained therein have come to be increasingly troubling for the comprehensive framework of EU law.

Commission v Malta by requiring a special relationship of solidarity may render unacceptable many other nationality schemes, including the one previously in force in Italy. Indeed, in *Commission v Malta* the genuine link principle, albeit invoked by the applicant Commission, was firmly rejected by Advocate General Collins's opinion and carefully avoided by the Court, which preferred to ground its reasoning in the principles of sincere cooperation and mutual trust. However,

it is undeniable that the judgment clearly reflects a (disguised) genuine link paradigm (A. ADINOLFI, *The Concept of Citizenship after Commission/Malta: Towards a New Narrative on the Abuse of EU Law?*, in this *Journal*, 2026, pp. 8-9). The apparent centrality of the arguments based on the relationship of solidarity and mutual trust between the legal orders of the Member States cannot, in fact, obscure that the subject matter of the dispute is the link between the individual and the Member State conferring citizenship on her. Regarding the Italian legislation under scrutiny in the C-816/26 *Picuso* case, substance of Article 3 bis, implementing the genuine link principle, is in fact consistent with the vision of nationality outlined by the CJEU in its judgment in *Commission v Malta*. It is also consistent with Italian constitutional principles, which contribute to the creation of a genuine link between the national and the national community, and overlap to a large extent and, in any event, are consistent with the values listed in Article 2 TEU (request for preliminary ruling in *Picuso*, para. 18).

Thus, another sleight of hand with labels would come if we pretended that citizenship could be acquired through a doorway that clearly contradicts its fundamental nature of a true linkage between a State and a person. Democratic participation, which gives rise to a shared political future, is based on a genuine link among nationals and on the exercise of voting rights by those who are affected by the laws. Adopting a more substantive understanding of citizenship, does not necessarily involve a collapse into an ethno-nationalist or exclusionary conception. The exclusionary logic can be countered by an inclusive conception of thicker citizenship, reflective of one's own life history, rather than blood or birthplace "ID data".

5. Jealousy and diffidence on the part of domestic courts in matters of citizenship sometimes result, whether deliberately or unwittingly, in leading questions. In the present case, the Italian Constitutional Court seems to be trying to steer the answer of the Court of Justice. Nevertheless, the Kirchberg judges can rephrase them: they did so in judgment of 4th June 2026, Case C-147/24, *Safi* involving EU citizenship and free movement rights (V. SALESE, *I confini della dottrina Zambrano alla luce dei diritti del minore: CGUE del 4 giugno 2026, causa C-147/24, Safi*, in this *Journal*, 2026, p. 11) and they could do so now, by re-framing the question in terms of loss of citizenship. While doing so would run counter to the Italian Constitutional Court's own reading of domestic law, the Court of Justice would adopt its recharacterisation strictly for the purposes of the preliminary ruling, looking to the effects of the measure on EU citizenship, leaving it to the Constitutional Court to adapt its domestic case law accordingly, in the very spirit of sincere cooperation that it has itself invoked. As *Tjebbes* (para. 35) recognized, it is legitimate for a Member State to take the view that nationality is the expression of a genuine link between it and its nationals, and therefore to prescribe that the absence, or the loss, of any such genuine link entails the loss of

nationality. On these grounds, the case ought to be judged upholding the Italian provisions in order to embrace a substantive conception of *Unionsbürgerschaft*, although Italy may be called upon to revise the provisions not granting the right to an examination of proportionality to the ex-(virtual)citizens abruptly dispossessed of a potential status (B. NASCIMBENE, *Cittadinanza italiana ed europea. Un film a più tempi con un finale ancora da scrivere*, in *federalismi.it*, 2026, p. 170). The criticisms advanced above target the fictions surrounding Italian nationality loss and the sidestepping of the substantive nature of citizenship, not the aim of ensuring a genuine link between a State and its nationals. Indeed, grounded in the common values enshrined in Article 2 TEU and in the bond of solidarity and mutual trust between the Member States (*Commission v Malta*, para. 95), and in the special relationship of solidarity and good faith between each Member State and its nationals, which forms the basis of the rights and obligations reserved to Union citizens by the Treaties (*ivi*, para. 97), Union citizenship might become more concrete and thicker, and thus better able to function as the fundamental status of nationals of the Member States.

ABSTRACT (ITA)

Il contributo esamina la causa pendente C-816/26 *Picuso*, che scaturisce dal rinvio pregiudiziale della Corte costituzionale italiana (ordinanza 147/2026) in materia di perdita della cittadinanza nazionale e, di riflesso, dell'Unione. Si sostiene che, per un verso, la formulazione del quesito in termini di "preclusione originaria" non sia del tutto convincente, e che una riqualificazione nel senso di "revoca" da parte della Corte di giustizia potrebbe rivelarsi decisiva, poiché essa imporrebbe un vaglio di proporzionalità. Malgrado ciò, per altro verso, si condividono le intenzioni della Corte costituzionale, nella misura in cui cercano di sostenere la necessità di un legame effettivo, in parziale accordo con C-181/23, *Commissione/ Malta*.

ABSTRACT (ENG)

This contribution examines pending Case C-816/26, *Picuso*, which stems from the request for a preliminary ruling made by the Italian Constitutional Court (order No. 147/2026) concerning the loss of national citizenship and, consequently, of Union citizenship. It argues, on the one hand, that framing the question in terms of a "bar *ab initio*" is not entirely convincing, and that recharacterization as "revocation" could prove decisive for the outcome of the case, since it would require a proportionality review. On the other hand, it nonetheless shares the intentions of the Constitutional Court, insofar as they seek to support the need for a genuine link, partly endorsed by judgment in C-181/23 *Commission v Malta*.