

22

CITIZENSHIP OF THE EU

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CHAPTER OUTLINE

1. The concept of EU citizenship was established by the Treaty of Maastricht. The ToL emphasises the importance of creating closer ties between the EU and its citizens and that of ensuring that they fully participate in the democratic life of the Union. In particular, Part Two of the TFEU on “Non-discrimination and Citizenship of the Union” lists the most important rights attached to EU

citizenship whilst Title II of the TEU on “Provisions on Democratic Principles” acknowledges that the participation of EU citizens in the decision making process in the EU is central to the creation of a democratic Union.

2. EU citizenship flows from national citizenship: every person holding the nationality of a Member State is an EU citizen. EU citizenship is thus derivative, rather than a right independent of, or autonomous from, national law. Although Member States have exclusive competence to determine who are to be considered their nationals, and such a determination cannot be challenged either by the EU or by other Member States, they must pay due regard to EU law, i.e. take it into account when nationality matters are within the scope of the Treaties.

3. In Case C-184/99 *Grzelczyk* the ECJ emphasised that EU citizenship “is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation [as nationals of a host Member State] to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for”.

The ECJ has greatly contributed to the development of the content of EU citizenship by requiring the Member States to remove all directly and indirectly discriminatory national measures as well as those which, whilst being non-discriminatory, restrict the exercise of rights deriving from EU citizenship. In Case C-34/09 *Zambrano* the ECJ introduced a new doctrine which may be called the doctrine of the “substance of rights”, under which national measures are in breach of EU law if they deprive an EU citizen of enjoyment of the substance of the rights conferred on him by virtue of the status of EU citizen. The doctrine applies in situations where an EU citizen has not exercised his right to free movement and thus gives him an entitlement against his home Member State.

4. Part Two of the TFEU on “Non-discrimination and Citizenship of the Union” lists the most important rights attached to EU citizenship.

- A. Article 21(1) TFEU guarantees EU citizens and their families the right to move freely and reside within the territory of the Member States provided they are engaged in the internal market economic activity or are financially self-sufficient. Directive 2004/38 constitutes a response to problems encountered by EU citizens wishing to exercise the rights guaranteed under Article 21(1) TFEU.
- B. Article 22(1) TFEU confers on EU citizens the right to vote and stand for municipal elections in a host Member State, under the same conditions as nationals of that Member State. Directive 94/80/EC implements this Article.
- C. Article 22(2) TFEU confers on EU citizens voting rights in a host Member State for elections to the EP.
- D. Under Article 23 TFEU, EU citizens have the right to obtain diplomatic and consular protection in a third State, where their own Member State is not represented by a permanent consular or diplomatic mission, from any other EU Member State having a diplomatic establishment there, on the same conditions as nationals of that Member State. This right is confirmed in Article 46 of the Charter of Fundamental Rights.
- E. Article 24(1) TFEU sets out the procedure for implementing the right of EU citizens (i.e. at least one million citizens who are between them nationals of a significant number of Member States) to invite the European Commission to bring forward legislative proposals in areas where the Commission has the power to do so (see [Chapter 5.2.2](#)).
- F. Article 24(2) and (3) TFEU concerns the right to petition the EP and to complain to the EU Ombudsman. Anyone living within the territory of the EU or operating a business

there can rely on this right. A petition to the EP must relate to a subject falling within the sphere of activity of the EU and concern the petitioner directly. A complaint to the Ombudsman must relate to a matter of “maladministration” by an EU institution, body, office or agency other than the EU courts, but it is not necessary that the complainant is personally affected by it.

- G. Article 24(4) TFEU provides that every citizen of the EU has the right to write to any EU institution, body, office or agency in one of the official languages of the EU and to receive an answer in the same language. It should be read in a broader perspective in that it gives EU citizens the right to information and thus enhances the principle of transparency.

5. Article 25 TFEU emphasises that EU citizenship is a dynamic concept. Indeed, since its establishment it has evolved from a not very coherent bundle of rights into a more cohesive and meaningful concept.

22.1 Introduction

Citizenship of the EU was established by the Treaty of Maastricht¹⁷⁸⁷ and has, since then, evolved considerably so that it has become “the fundamental status of nationals of the Member States”.¹⁷⁸⁸ On the basis of this status alone, EU citizens, who reside lawfully in a host Member State, are able to claim important social, cultural and other rights (see [Chapter 22.3](#)) and citizens who have not exercised their right to free movement may challenge national measures which deprive them of enjoyment of the substance of the rights conferred on them by virtue of that status (see [Chapter 22.3.1](#)).

The ToL contains numerous provisions aimed at creating closer ties between the EU and its citizens and ensuring that they fully participate in the democratic life of the Union. Article 1 TEU, which contains the over-reaching objectives of the EU, states that “This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen”. The new approach to EU citizenship is emphasised in the Preamble to the Charter of Fundamental Rights, which has the same binding force as the Treaties (see [Chapter 8.4](#)), and which states that “the individual is at the heart of” the Union. Further, the Treaties ensure that fundamental rights of EU citizens are respected and promoted (e.g. Articles 2 and 6 TEU). Probably, the most striking feature of the ToL is that many of its provisions are no longer addressed to the Member States but to citizens of the EU, e.g. Article 3(2) TEU offers to its citizens the AFSJ, and Article 9 TEU ensures equal treatment of its citizens, who shall receive equal attention from EU institutions, bodies, offices or agencies.

Part Two of the TFEU on “Non-discrimination and Citizenship of the Union” lists the most important rights attached to EU citizenship whilst Title II of the TEU on “Provisions on Democratic Principles” acknowledges that EU citizens’ participation in the decision making process in the EU is central to the creation of a democratic Union.

¹⁷⁸⁷ For the historical background see D. O’Keeffe, “Union Citizenship”, in D. O’Keeffe and P. M. Twomey (eds), *Legal Issues of the Maastricht Treaty*, 1994, London: Chancery Law Publishing, 87–9.

¹⁷⁸⁸ Case C-184/99 *Rudy Grzelczyk v Centre Public d’Aide Sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193 and Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

With regard to Part Two of the TFEU on “Non-discrimination and Citizenship of the Union” it confirms a close relationship between EU citizenship and the prohibition of discrimination based not only on nationality (Article 18 TFEU) but also on other factors mentioned in Article 19 TFEU such as sex, racial or ethnic origin, religion, belief, disability, age or sexual orientation. It is important to note that rights of EU citizens are not limited to Articles 18–25 TFEU, but are also contained in other provisions of the Treaties and can have effect in situations where EU citizens are taxpayers, welfare recipients, consumers, workers, recipients of services, etc.

The issue of whether EU law imposes any duties on EU citizens, bearing in mind that Article 20(2) TFEU states that “Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties”, has to be answered in the negative. It seems that apart from an implied civic duty to vote in the elections to the EP, no duties are imposed on EU citizens, i.e. they are neither required to pay taxes to the EU nor to perform compulsory military service for the EU, nor do they have any duty of loyalty towards the Union. As Kadelbach stated:

“despite surrounding itself with attributes of statehood, such as a flag or an anthem, the Union does not expect personal duties of loyalty. The Union courts its citizens not because it expects them to perform duties but because it wishes to be accepted as a body politic for which everyone feels a sort of ethical responsibility.”¹⁷⁸⁹

With regard to “Provisions on Democratic Principles” they refer to the principle of equality (Article 9 TEU), the principle of representative democracy (Article 10 TEU) and the principle of participatory democracy (Article 11 TEU) which includes the right of “citizens’ initiative”, i.e. the possibility for at least one million citizens, who are between them nationals of a significant number of Member States, to ask the Commission to prepare a proposal for a legal act necessary to implement the Treaties (see Chapter 5.2.2). Further, Article 11 acknowledges the importance of a dialogue between EU citizens, civil society and the EU institutions, and ensures transparency in the working of EU institutions.

22.2 EU citizenship as a complement to citizenship of a Member State

EU citizenship is based on nationality¹⁷⁹⁰ of a Member State. Article 20(1) TFEU states that “Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.” This point is enhanced in Declaration 2 on Nationality of a Member State attached to the Treaty of Maastricht, which provides that:

“wherever in the Treaty establishing the European Community reference is made to nationals of the Member State, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.”

Consequently, matters relating to nationality are within the exclusive prerogative of a Member State. This was confirmed by the ECJ in Case C-369/90 *Micheletti*,¹⁷⁹¹ where the ECJ held that the determination of conditions governing the acquisition and loss of nationality were, according to international law, matters which fell within the competence of each Member State, whose decision must be respected by

¹⁷⁸⁹ P. S. Kadelbach, “Union Citizenship”, in A. Von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law*, 2nd edn, 2010, Oxford: Hart Publishing, 467.

¹⁷⁹⁰ For a discussion on the difference between nationality and citizenship see S. Kadelbach, *ibid.*, 449–51.

¹⁷⁹¹ [1992] ECR I-4239. See also: P. C. Jiménez Lobeira, “EU Citizenship and Political Identity: The Demos and Telos Problems”, (2012) ELJ, 504.

other Member States. However, in *Micheletti*, the ECJ also stated that the Member States must, when exercising their powers in the sphere of nationality, have due regard to EU law. This statement was the subject of a preliminary reference in Case C-135/08 *Rottmann*¹⁷⁹² in which the ECJ was asked whether Article 20 TFEU allows a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality was obtained by deception. In the referred case, the result of withdrawal would have been that the person concerned would become a stateless person, i.e. without nationality. The Austrian and German governments, supported by the Commission, argued that the situation was purely internal, i.e. it concerned a German national, living in Germany, who as a result of his deception (he did not mention in the naturalisation procedure that criminal investigations were commenced against him in his native country, Austria, on account of alleged serious fraud which caused him to move to Germany and subsequently apply for German nationality, the acquisition of which resulted in the automatic loss of his Austrian nationality) was facing the withdrawal of naturalisation. The ECJ found that the link between the situation of the person concerned and EU law was based on the citizenship of the EU and not on the fact that the person concerned had exercised his right to free movement when moving from Austria to Germany. The Court held that because the withdrawal of naturalisation would entail the loss of EU citizenship, and therefore the loss of important rights attached to the status of EU citizenship such withdrawal was within the scope of the Treaties and could only be effected if the requirements of the principle of proportionality were satisfied. In this respect the ECJ held:

“it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.”¹⁷⁹³

It can be said that although a Member State has to accept as an EU national anyone who has nationality of another Member State regardless of the conditions of acquisition of that nationality,¹⁷⁹⁴ the fundamental importance that EU law attaches to the status of EU citizenship allows EU law to interfere in nationality laws of the Member States when a situation under consideration is within the scope of the Treaties.¹⁷⁹⁵

The requirement of nationality of a Member State as a prerequisite of EU citizenship means that nationals of third countries, refugees and stateless persons legally residing in a Member State do not acquire any rights under Article 20 TFEU. To remedy this situation two directives were adopted:

- Directive 2003/109/EC concerning the Status of Third-Country Nationals who are Long-term Residents in the EU.¹⁷⁹⁶ Under the Directive a Member State of residence of non-EU nationals and dependent members of their families is required to confer on such persons a set of rights which are as near as possible to those enjoyed by EU citizens. The status of a long-term resident

¹⁷⁹². Case C-135/08 *Janko Rottmann v Freistaat Bayern* [2010] ECR I-149.

¹⁷⁹³. Ibid, para. 56.

¹⁷⁹⁴. Case C-192/99 *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur* [2001] ECR I-1237; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

¹⁷⁹⁵. See R. Morris, “European Citizenship: Cross-border Relevance, Deliberate Fraud and Proportionate Responses to Potential Statelessness, Case Note on *Janko Rottmann v Freistaat Bayern*,” (2011) 17 EPL, 417.

¹⁷⁹⁶. [2004] L16/44.

can be claimed by those who have lawfully and continuously resided in the territory of the Member State concerned for a period of at least five years; are not a burden on that Member State's social assistance system; have appropriate medical insurance; and, represent no threat to its public policy, public security and public health. Students, asylum seekers, diplomats and other persons who have not been granted permanent leave to remain in a Member State are excluded. The status confers the entitlement to settle in another EU State in order to work. However, both a home Member State and a host Member State may impose some limitations, in particular in respect of access to social benefits or, in the case of a host Member State, of access to employment.

- Directive 2003/86/EC on the Right to Family Reunification. By virtue of Article 3 of the Directive this right is conferred on any national of a third country who “is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence” in that Member State. Under the Directive such a person is entitled to be reunited with members of his/her nuclear family if they are also third-country nationals – in other words, the Member State must allow the person's family members to join them in that Member State. However, this obligation is subject to derogations set out exhaustively in the Directive.¹⁷⁹⁷

It should be noted that the UK, Ireland and Denmark are not bound by the above directives. Those Member States did not participate in their adoption as they had exercised their right to opt-out under the relevant Protocols attached to the Treaties (see [Chapter 31.2](#)).

22.3 Judicial developments of the concept of EU citizenship

Article 20 TFEU establishes EU citizenship. Its paragraph 2 lists the four rights granted to EU citizens, which are further elaborated in Articles 21–24 TFEU.

Article 21(1) TFEU states:

“Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.”

The right to free movement of a member of an EU citizen's family is not an independent right but derives from the right conferred upon the EU citizen, unless the family member himself/herself has rights as a national of a Member State. A member of an EU citizen's family who is a national of a third country cannot exercise the right to free movement unless this is done in parallel with the EU citizen.¹⁷⁹⁸

The ECJ has greatly contributed to the development of the concept of citizenship by interpreting Articles 20(1) and 21(1) TFEU broadly. The teleological interpretation of Articles 20(1) and 21(1) TFEU has been verging on judicial revision of the Treaties. As A-G Jacobs stated the ECJ has been able to “give the concept a more substantial content than the authors of the Treaties may have envisaged”.¹⁷⁹⁹

The case law shows that the concept of EU citizenship is most relevant to persons who are not economically active, and thus are not within the scope of more generous provisions of the Treaties

¹⁷⁹⁷ Both directives are comprehensively examined by S. Peers in *EU Justice and Home Affairs Law*, 3rd edn, 2011, Oxford: OUP, 459–85. See also S. Peers, “Implementing Equality? The Directive on Long-term Resident Third Country Nationals,” (2004) 29 *ELRev.*, 437, at 437.

¹⁷⁹⁸ Cases C-297/88 and 197/89 *Dzodzi v Belgium* [1990] ECR I-3763; Joined Cases C-64 and 65/96 *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-3171.

¹⁷⁹⁹ F.G. Jacobs, “Citizenship of the European Union – A Legal Analysis,” (2007) 13 *ELJ*, 591, at 592.

relating to the free movement of workers, self-employed persons and providers of services. It is well established that there is no need to examine the applicability of Articles 20(1) and 21(1) TFEU if other, more specific articles of the Treaties are applicable, e.g., Articles 49 or 45 TFEU, unless they only cover some aspects and not the whole matter under consideration.¹⁸⁰⁰ Consequently, Articles 20(1) and 21(1) TFEU have been used mainly to grant rights to EU citizens, who are not economically active, i.e. unemployed persons (see [Chapter 23.7.3](#)), students (see [Chapter 22.3.4](#)), children (see below and [Chapter 23.5.1](#)), carers of children (see below and [Chapter 23.5.1](#)), retired persons and those incapable of work due to illness.¹⁸⁰¹ The ECJ held in Case C-413/99 *Baumbast*¹⁸⁰² that Article 21(1) TFEU has direct effect so allowing EU citizens to rely on it before national courts.

THE FACTS WERE:

In 1990 Mrs Baumbast, a Colombian national, married Mr Baumbast, a German national, in the UK where they decided to establish a family home. They had two daughters; the elder was a daughter of Mrs Baumbast from a previous relationship and possessed Colombian nationality, and the younger had dual German and Colombian nationality. The British authority granted a residence permit to the Baumbast family in 1990 valid for five years.

From 1990 to 1993 Mr Baumbast worked in the UK, initially as an employed person and subsequently he worked as head of his own company. Following the failure of his company he tried to obtain employment in the UK to no avail. From 1993 onwards he was employed by German companies in China and Lesotho.

During the relevant period the Baumbast family owned a house in the UK and the daughters went to a UK school. The family did not receive any social benefits and was covered by comprehensive medical insurance in Germany, to which country they travelled for medical treatment when necessary.

In May 1995 Mrs Baumbast applied for indefinite leave to remain in the UK for her family. In January 1996 the Secretary of State refused to renew a residence permit for the Baumbast family. His decision was challenged by the Baumbast family before the UK Immigration Adjudicator, who decided that:

- *Mr Baumbast had no right to reside in the UK as he was neither a worker nor a person entitled to reside in the UK under Directive 2004/38¹⁸⁰³ (see [Chapter 22.4](#));*
- *the daughters had independent rights of residence in the UK under Article 10 of Regulation 492/11 (see [Chapter 23.5.1](#)); and,*
- *Mrs Baumbast's right to reside in the UK derived from her children's rights and consequently she was allowed to stay in the UK for a period coterminous with that during which her daughters were benefiting from rights of residence under Article 10 of Regulation 492/11.*

Mr Baumbast appealed against the Adjudicator's decision to the Immigration Tribunal, which asked the ECJ for guidance under the preliminary ruling procedure, in particular on the

^{1800.} Case C-193/94 *Criminal Proceedings against Skanavi and Chrysanthakopoulos* [1996] ECR I-929; Case C-470/04 *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* [2006] ECR I-7409.

^{1801.} Case C-499/06 *Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* [2008] ECR I-3993.

^{1802.} Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

^{1803.} [2004] OJ 158/77.

question whether a citizen of the Union who has ceased to be a migrant worker in a host Member State is still entitled to reside there because of his citizenship of the EU, that is, on the basis of Article 21(1) TFEU.

Held:

The ECJ confirmed the decision of the UK Immigration Adjudicator in respect of Mrs Baumbast and the children and held that Mr Baumbast should not be refused a residence permit in the UK. The Court stated that Article 21(1) TFEU has direct effect in that

“the right to reside within the territory of the Member States under [Article 21(1) TFEU] . . . is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely, as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on [Article 21(1) TFEU].”¹⁸⁰⁴

Comment:

Notwithstanding the confirmation by the ECJ that Article 21(1) TFEU has direct effect, it remains that in order to produce direct effect, a provision of EU law must not only be clear and precise but must also be unconditional in that it must not require the taking of any implementing measures by EU institutions or by Member States. On this point the ECJ did, however, acknowledge that the right granted under Article 21(1) TFEU was conditional on the limitations and conditions laid down by the Treaty and by measures adopted to give it effect. According to the ECJ Article 21(1) TFEU is directly effective, notwithstanding the fact that some implementing measures are still necessary, and therefore, in their absence, Article 21(1) TFEU can only be directly effective to some extent. The ECJ tackled this problem in the following manner:

“respect of the exercise of that right of residence is subject to judicial review. Consequently, any limitations and conditions imposed on that right do not prevent the provisions of [Article 21(1) TFEU] from conferring on individuals rights which are enforceable by them and which the national courts must protect.”¹⁸⁰⁵

Consequently all limitations and conditions set out in Article 21(1) TFEU must be applied in compliance with EU law and in accordance with the general principles of law, in particular the principle of proportionality. The ECJ, when assessing the situation of Mr Baumbast in the light of the principle of proportionality, took into account the facts that:

- *he had sufficient resources;*
- *he had worked and resided for a number of years in the UK;*
- *his family resided with him during his stay in the UK as a worker and subsequently as a self-employed person;*
- *he had remained there even after his activities as an employed and self-employed person came to an end;*
- *neither Mr Baumbast nor his family had ever become burdens on the public finances of the host Member State; and,*

¹⁸⁰⁴. Supra note 1804, para. 84.

¹⁸⁰⁵. Ibid, para. 86.

- the Baumbast family including Mr Baumbast had comprehensive sickness insurance in Germany.

In those circumstances the refusal of the UK to grant Mr Baumbast a residence permit was considered by the ECJ as being disproportionate.

In Case C-200/02 *Chen*,¹⁸⁰⁶ the claimant was allowed to rely on Article 21(1) in proceedings before a national court.

THE FACTS WERE:

Mr and Mrs Chen, both Chinese nationals, deliberately took advantage of Irish law which granted Irish citizenship to a child born in Ireland (including Northern Ireland) if such a child was not entitled to citizenship of any other country. Mr Chen often travelled to the UK for business purposes. His wife joined him in the UK when she was six months pregnant and two months later travelled to Northern Ireland to give birth to her daughter Catherine in order for her child to acquire Irish citizenship and, consequently, to secure for herself and her daughter the right to reside in the UK. When Catherine was eight months old Mrs Chen, who had resided in the UK, applied for a long-term residence permit in the UK. It was clear from the submission of Mrs Chen that she and her child had the necessary financial resources and the relevant health insurance so as not to be a burden on the social assistance system of the UK. The application was refused by the UK Secretary of State for the Home Department. Mrs Chen appealed to the Immigration Appellate Authority, which referred the matter to the ECJ.

Held:

The ECJ held that:

- *Children can exercise the right of free movement;*
- *It is not necessary that an EU citizen possesses personally sufficient resources to avoid being a burden on the social assistance system of the Member State of residence. What is required is that such a person has the necessary resources whatever their origin (but obviously not of criminal origin);*
- *There was no abuse of EU law when Mrs Chen deliberately went to Ireland in order to enable the child she expected to acquire Irish nationality, and consequently to enable her to acquire the right to reside with her child in the UK;*
- *Mrs Chen could not be regarded as a dependent relative within the meaning of EU law (see [Chapter 22.4.1](#)), bearing in mind that her child was dependent on her; and,*
- *Mrs Chen, as a primary carer for Catherine to whom EU law granted a right of residence in a host Member State, was entitled to reside with her child in the host Member State.*¹⁸⁰⁷

¹⁸⁰⁶. Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

¹⁸⁰⁷. Subsequent to the judgment in *Chen*, Ireland changed its generous law on nationality to ensure that such cases could not happen again. See: B. Ryan, "The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland," (2004) *European Journal of Migration and Law*, 173.

22.3.1 The doctrine of “substance of rights” and internal situations

Recent case law shows that the status of EU citizen can be relied upon in the citizen’s home Member State, even though the citizen has not exercised his right to free movement. The ECJ emphasised that there is a difference between “purely internal” situations, which have no connection whatsoever with EU law, and situations which have factors linking them with EU law. Accordingly, a situation of an EU citizen who has not exercised his right to free movement, for that reason alone cannot be assimilated with a “purely internal situation”.¹⁸⁰⁸ The citizenship is intended to be the fundamental status of EU citizens and thus of relevance when national measures deprive an EU citizen of enjoyment of the substance of the rights conferred on him by virtue of that status. This new approach, which can be called the doctrine of the “substance of rights”, was introduced by the ECJ in Case C-34/09 *Zambrano*.¹⁸⁰⁹

THE FACTS WERE:

Mr and Mrs Zambrano, both Colombian nationals, arrived in Belgium in 1999 and upon their arrival applied for political asylum there. Their application was rejected and an order was made requiring them to leave Belgium. However, the order contained a non-refoulement clause, stating that Mr Zambrano and his family could stay in Belgium in view of the civil war in Colombia. Mr Zambrano applied many times to regularise his stay in Belgium but his applications were consistently rejected. In 2001, Mr Zambrano, despite the lack of a work permit, found full time employment. His work was declared to the relevant authorities and his pay was subject to statutory social deductions duly paid by his employer. However, as a result of Mr Zambrano applying for temporary unemployment benefit (which was rejected) when his contract was suspended in 2005 an inspection was carried out in his place of work revealing that Mr Zambrano had no work permit. As a result of this he was dismissed from work without compensation. He applied for full-time unemployment benefit which was refused. Mr Zambrano challenged this decision and the previous decision refusing temporary unemployment benefit which constituted the subject matter of the proceedings before the referring court,

The link between EU law and the situation of Mr Zambrano had been that his wife had given birth to two children in Belgium. Mr Zambrano had failed to register their birth with the Colombian embassy in Belgium. As a result, his children were stateless persons (i.e. without any nationality). Under Belgian law aimed at reducing statelessness they had been granted Belgian nationality.

Mr Zambrano argued that as the father of minor children who were EU citizens, he was entitled to reside and work in Belgium.

Held:

The ECJ held that minor children who are nationals of a Member State but whose parents are citizens of third countries would be deprived of the genuine enjoyment of the substance

¹⁸⁰⁸ See Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* (judgment of 15/11/11 (NYR)) paras 60–64.

¹⁸⁰⁹ Case C-34/09 *Gerardo Ruiz Zambrano v Office National de l’Emploi (ONEM)* (judgment of 8/3/11 (NYR)). See A. Lansbergen and N. Miller, “European Citizenship Rights in Internal Situations: An ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 *Gerardo Ruiz Zambrano v Office National de l’Emploi (ONEM)*” (2011) 7 *European Constitutional Law Review*, 287.

of the rights conferred on them by the status of EU citizenship if their parents were forced to leave the territory of the EU bearing in mind that the children would also have to leave the territory of the EU in order to accompany their parents. Similarly, if a work permit were not granted to the father, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. Accordingly, Mr Zambrano was entitled to stay and work in Belgium

Comment:

In paragraph 42 of the judgment the ECJ held that: “Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.” This new approach to the interpretation of the concept of EU citizenship entails that no cross-border element is required when national measures affect the “substance of the right” of an EU citizen. The situation in *Zambrano* must be distinguished from that in *Chen*. In *Zambrano* there was no cross-border movement. The children were Belgian nationals living in Belgium. In *Chen* the child was an Irish national living in the UK. Further in *Chen* the child and the dependent parent had independent means of support originating in China and appropriate medical insurance. Accordingly, the child had the right to reside in the host Member State only in such circumstances as would not place on the host Member State a financial burden arising out of her residence. The right of the child to remain in the host Member State did not entitle her parents to take up employment there. The Court of Appeal of England and Wales in *W (China)* and *X (China)*¹⁸¹⁰ held that the judgment in *Chen* could not be used to “create” a right to work for a parent that did not previously exist independently. According to Lord Justice Sedley “Neither the child nor the parents can lawfully work here,¹⁸¹¹ i.e. in the UK.” In *Zambrano*, the ECJ expressly stated that a parent of children who are EU citizens can claim a derivative right to work, i.e. the child’s status makes it unlawful to deny the parent the right to work. This judgment also strongly implies that the *Zambrano* children were entitled to reside in Belgium even though the entire family was likely to become an unreasonable burden on Belgium’s social security system. This is indeed a far-reaching judgment.

In Case C-434/09 *McCarthy*¹⁸¹² the ECJ provided some clarifications relating to the application of the doctrine of the “substance of rights”.

THE FACTS WERE:

Mrs McCarthy, a holder of dual British and Irish citizenship, who was born and had always lived and worked in the UK, married a third State national, who under UK immigration law had no right to reside in the UK. In order to ensure that Mrs McCarthy’s husband was entitled to reside with her in the UK, Mrs McCarthy applied for an Irish passport, which she obtained.

¹⁸¹⁰. *W (China) and X (China) v Secretary of State for the Home Department* [2006] EWCA Civ 1494; [2007] 1 WLR 1514.

¹⁸¹¹. Para. 27.

¹⁸¹². Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* (judgment of 5/5/11 (NYR)).

Subsequently, she tried to assert her EU citizenship (based on her Irish citizenship) to bring her spouse into the UK to live with her.

Held:

The ECJ held that neither Directive 2004/36 nor Article 21 TFEU applied to the situation of Mrs McCarthy

Comment:

The ECJ held that Article 3(1) of Directive 2004/38 did not apply to Mrs McCarthy because she had never exercised her right of free movement and had always resided in a Member State of which she was a national. A literal, teleological and contextual interpretation of Article 3(1) of Directive 2004/38 supported the conclusion of the ECJ. The fact that Mrs McCarthy was a national of another Member State was irrelevant.

With regard to Article 21 TFEU, the ECJ held that it applies to EU citizens who reside in their home Member State in a situation where a national measure has the effect of depriving them of the genuine enjoyment of the substance of that right or of impeding the right to move and reside freely within the territory of the Member State. Mrs McCarthy was not in such a situation bearing in mind that: “the failure by the authorities of the United Kingdom to take into account the Irish nationality of Mrs McCarthy for the purposes of granting her a right of residence in the United Kingdom in no way affects her in her right to move and reside freely within the territory of the Member States, or any other right conferred on her by virtue of her status as a Union citizen.”¹⁸¹³

The difficulty in application of the doctrine of “substance of rights” is well illustrated in Case C-256/11 *Dereci*,¹⁸¹⁴ in which the issue was whether Article 20 TFEU prevents a Member State from refusing residence permits to non-EU citizens, who are members of a family of EU citizens, when those EU citizens are not dependent for subsistence on their family members who are third country nationals.

THE FACTS WERE:

Five applicants were refused residence permits in Austria. They were:

- *Mr Dereci, a Turkish national who entered Austria illegally, married an Austrian national, lived with her there, and had with her three children who were minors and Austrian nationals;*
- *Mr Maduiké, a Nigerian national who entered Austria illegally, married an Austrian national, and resided with her in Austria;*
- *Mrs Heiml, a national of Sri Lanka who entered Austria legally, married an Austrian national, and continued to live there, despite her residence permit having expired;*

¹⁸¹³. Ibid, para. 49.

¹⁸¹⁴. Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* (judgment of 15/11/11 (NYR)).

- Mr Kokollari, who entered Austria legally at the age of two with his parents who were then Yugoslav nationals. At the time of proceedings he was 29; resided in Austria; and, claimed to be maintained by his mother who had acquired Austrian nationality; and,
- Mrs Stevic, a Serbian national who resided with her husband and three adult children in Serbia. She sought residence in Austria in order to be reunited with her father, an Austrian national, who regularly provided financial support for her and her family.

Expulsion orders had been made against Mrs Heiml, Mr Dereci, Mr Kokollari and Mr Maduiké.

Held:

The ECJ held that the principles in *Zambrano* apply only in very exceptional situations. It stated that the criterion relating to the denial of genuine enjoyment of the substance of the rights deriving from EU citizenship “refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.”¹⁸¹⁵ The Court emphasised that only when the effectiveness of an EU citizen’s rights derived from EU citizenship would be undermined would a refusal of a residence permit to a third country national, who is a family member of that EU citizen, be in breach of EU law. The Court added that “the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.”¹⁸¹⁶

Comment:

The ECJ identified two criteria for application of the “substance of rights” doctrine introduced in *Zambrano*. The first refers to the determination of whether an EU citizen will be forced to leave the territory of the EU in order to reside with a non-EU family member. Accordingly, a Member State will be in breach of EU law if an EU national would have to leave the territory of the EU in order to reside with a non-EU family member. If an EU citizen has an option to reside with a non-EU family member in another Member State, there will be no breach of EU law. This option was not available in *Zambrano*. With regard to adult EU citizens, the judgment in *Metock* (see [Chapter 22.4.1.1](#)) entails that a host Member State is required to admit to its territory an EU citizen and his/her non-EU spouse unless a refusal can be justified on the grounds of public policy, public security and public health. For Mr Kokollari the option to move to another Member State with his mother did not exist because he was an adult and a non-EU national. However, to him the second criterion based on the enjoyment of his human rights may apply. He was brought up in Austria and had lived there almost all his life. In *Dereci*, the ECJ left it to the referring court to decide whether the situation of the applicants was within the scope of Article 7 of the Charter of Fundamental Rights. If not, the ECHR will apply, bearing in mind that Austria is a Contracting Party to it. With regard to Mr Dereci, he was lucky in that the Association Agreement between the EU and Turkey applied to him.

¹⁸¹⁵. Ibid, para. 66.

¹⁸¹⁶. Ibid, para. 68.

On its basis he is entitled to establish himself in Austria by reason of his marriage to an Austrian national. It seems that Mrs Stevic will not be successful either under EU law or under the ECHR.

It is submitted that in Dereci the ECJ has not only identified some criteria relevant to the application of the “substance of rights” doctrine, but also by applying them has limited the ambit of the principles set out in Zambrano. More clarifications of the “substance of rights” doctrine are expected in Joined Cases C-356 and 357/11 O and S¹⁸¹⁷ pending before the ECJ.

It is to be noted that the doctrine of “substance of rights” applies not only to immigration cases but also to other matters. In Case C-148/02 *García Avello*¹⁸¹⁸ the effect of a national measure was that children had different surnames under Belgian law and under Spanish law. Children, holders of dual Belgian-Spanish nationality, whose father was a Spanish national and whose mother was a Belgian national, lived in Belgium with their parents. According to Belgian law a child could use only the surname of the father and was not able to have the patronymic surname changed to reflect well-established usage in Spanish law, according to which the surname of a child of a married couple consists of the first surname of the father followed by that of the mother. That situation was liable to cause serious inconvenience for children at both professional and private levels resulting from, *inter alia*, difficulties in benefiting, in one Member State of which they were nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in the other Member State of which they were nationals. Accordingly, Belgian law was in breach of EU law on the ground of the “substance of rights” doctrine.

22.3.2 Application of Articles 20 and 21(1) TFEU to non-economically active EU citizens

Persons, who are not economically active, when they exercise their right to free movement, are subject to conditions and restrictions imposed by the Treaties and by secondary legislation. They must have sufficient financial resources to ensure that they will not become an unreasonable burden on the social security system of a host Member State (see [Chapter 22.4.2.2](#)). Further, they must have appropriate medical insurance cover. This raises the issue of whether such persons are entitled to social benefits in a host Member State. On the one hand, it can be said that as they have never made any contribution to the economic life of the host Member State, they should not be entitled to claim social benefits. On the other, Article 18 TFEU prohibits discrimination based on nationality. Before the adoption of Directive 2004/38 (see [Chapter 22.3.4.2.2](#)), the ECJ’s answer to this conundrum was that a host Member State was required to show a “certain degree” of financial solidarity¹⁸¹⁹ with regard to EU citizens who were not its own nationals, although when an EU citizen had become an unreasonable financial burden on its social assistance system, a Member State had the right to deport such a person. Under this approach a host Member State was required to extend social benefits to EU citizens, i.e. to show a certain degree of solidarity, in a situation where EU citizens had demonstrated a certain degree of integration into the society of a host Member State, i.e. had established “a real link” with the host Member State.

¹⁸¹⁷ See the official website of the ECJ (accessed 25/6/12).

¹⁸¹⁸ Case C-148/02 *Carlos García Avello v Belgium* [2003] ECR I-11613.

¹⁸¹⁹ See Case C-184/99 *Rudy Grzelczyk v Centre Public d’Aide Sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para. 44 and Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119, para. 56.

The decisive factor in establishing “a real link” was the length of residence in a host Member State, although depending upon circumstances other factors were also taken into consideration by the relevant national authorities.¹⁸²⁰ As Barnard stated: “The Court seems to be adopting a ‘quantitative’ approach to equality; the longer the migrants reside in the Member State, the more integrated they are in that state, and the greater the number of benefits they receive on equal terms with nationals.”¹⁸²¹ For example, in Case C-85/96 *Martínez Sala*,¹⁸²² a Spanish national, who had resided in Germany for 25 years and who had two children there, without being a worker there within the meaning of Article 45 TFEU, obtained a child-raising allowance in Germany.

The concept of “a real link” has its disadvantages in that it introduces unpredictability, uncertainty and may be considered as unacceptable judicial activism.¹⁸²³ Directive 2004/38/EC (see below) responds to this concern by adopting a quantitative or incremental approach to the extension of social solidarity to migrant EU citizens.

Under the Directive all EU citizens, regardless of their length of stay in a host Member State are entitled to equal treatment but when they stay there less than three months, they are neither entitled to social benefits, nor to study finance unless a host Member State decides otherwise.

When the length of an EU citizen’s residence in a host Member State is between three months and five years, the situation is more complex. Article 24(2) of Directive 2004/38 clearly states that a host Member State is not required to provide any maintenance aid to students in the form of grants and loans before the completion of a five-year residence period in a host Member State unless they can rely on their status as workers, self-employed persons or members of their families. The ECJ has interpreted this provision strictly. In Case C-158/07 *Förster*,¹⁸²⁴ the Court refused to consider the possibility of existence of a sufficient degree of integration into a host Member State’s society based on any factors other than the completion of a five-year residence period in that State (see [Chapter 22.3.4.2](#)). However, the ECJ has maintained “a real link” approach in respect of jobseekers. In Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*,¹⁸²⁵ the ECJ agreed with A-G Colomer’s interpretation of Directive 2004/38 that jobseekers, as opposed to students, are entitled to social benefits without satisfying the condition of completion of five years residence in a host Member State (see [Chapter 23.7.3](#)).

EU citizens who have resided in a host Member State for more than five years are considered fully integrated and thus entitled to all social benefits and all study finance facilities in that State.

¹⁸²⁰. See Case C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13189, paras 90–91, and the Opinion of A-G Ruiz-Jarabo Colomer in Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2003] ECR I-2703, paras 65–67.

¹⁸²¹. C. Barnard, *The Substantive Law of the EU*, 3rd edn, 2010, Oxford: OUP, 454. See also: C. Barnard, “EU Citizenship and the Principle of Solidarity”, in M. Dougan and E. Spaventa (eds.), *Social Welfare and EU Law*, 2005, Oxford: Hart Publishing.

¹⁸²². Case C-85/96 *Maria Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

¹⁸²³. See: M. Dougan and E. Spaventa, “‘Wish You Weren’t Here . . .’ New Models of Social Solidarity in the European Union” in M. Dougan and E. Spaventa (eds.), *Social Welfare and EU Law*, 2005, Oxford: Hart Publishing, 181, at 214; K. Haibronner, “Union Citizenship and Access to Social Benefits”, (2005) 42 CMLRev., (2005), 1245, at 1251; M. Dougan, “The Spatial Restructuring of National Welfare States within the European Union: The Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon”, in U. Neergaard et al. (eds.), *Integrating Welfare Functions into EU Law. From Rome to Lisbon*, 2009, Copenhagen: DJØF Publishing, 171.

¹⁸²⁴. Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507.

¹⁸²⁵. Joined Cases C-22/08 and C-23/08 *Athanasios Vatsouras (C-22/08) and Josif Koupatantze (C-23/08) v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECR I-4585.

22.3.3 The removal of discrimination, and beyond

Subject to [Chapter 22.3.2](#) above, the ECJ, when applying the right of EU citizens to equal treatment, has condemned not only directly¹⁸²⁶ and indirectly discriminatory¹⁸²⁷ national measures, but also those which put EU citizens “at a disadvantage” because they have exercised the right to free movement.

With regard to national measures which are directly discriminatory, i.e. they discriminate on the ground of nationality, they can only be justified by express derogations provided for in the Treaties or secondary legislation, e.g. based on public policy, public security and public health, and must be proportionate to the objective that a Member State seeks to achieve.

Indirectly discriminatory measures and measures which are non-discriminatory, but prevent/hinder or create an obstacle to the exercise of the right provided for in Article 21 TFEU, may be justified either by express derogations as above, or by objective considerations of public interest, and must be proportionate to the objective that a Member State seeks to achieve. This is exemplified in Case C-224/02 *Pusa*.¹⁸²⁸

THE FACTS WERE:

Mr Pusa, a Finnish national in receipt of a Finnish invalidity pension, lived in Spain where he paid his income tax. He owed a debt in Finland. To collect the debt an attachment order was made on his pension. Under Finnish legislation, the amount attached was calculated in such a manner as to leave him a minimum income. This calculation did not take account of his Spanish income tax. As a result, Mr Pusa was left with a monthly disposable sum which was less than would have been available to him had he continued residing in Finland.

Held:

The ECJ held:

“National legislation which places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and reside in another Member State would give rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen’s freedom to move.”¹⁸²⁹ Accordingly, the Finnish legislation was in breach of Article 21(1) TFEU and could not be justified.

Comment:

In the above case, the ECJ followed the view of A-G Jacobs who stated that Article 21(1) TFEU should apply to remove any restriction, whether discriminatory or not, which imposes an unjustified burden on a person who seeks to exercise his rights to free movement.

*This case shows that Article 21(1) TFEU may be relied upon by EU citizens against their home Member States.*¹⁸³⁰

¹⁸²⁶ Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

¹⁸²⁷ Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119.

¹⁸²⁸ Case C-224/02 *Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] ECR I-5763.

¹⁸²⁹ *Ibid*, para. 20.

¹⁸³⁰ See, for example, Case C-148/02 *García Avello v Belgium* [2003] ECR I-11613; Case C-224/98 *Marie-Nathalie D’Hoop v Office National de l’Emploi* [2002] ECR I-6191.

The approach of the ECJ to non-discriminatory restrictions has been confirmed in subsequent cases. In Case C-192/05 *Tas-Hagen and Tas*,¹⁸³¹ Dutch nationals, who lawfully resided in Spain, obtained a war pension, although Dutch legislation required applicants for the war pension to be actually resident in the Netherlands at the time when their application was submitted. In this case the ECJ provided clarifications as to the circumstances in which national measures which may restrict the free movement of EU citizens can be justified. Such measures must be based on objective considerations of public interest independent of the nationality of the person concerned, and must be proportionate to the objective that a Member State sought to achieve.

22.3.4 The rights of students

With regard to EU students, under the Treaties, as interpreted by the ECJ, EU students have access to educational institutions in a host Member State on the same terms as local students. However, their entitlement to study finance and social assistance during the first five years of their residence in a host Member State is subject to conditions set out in Directive 2004/38.

22.3.4.1 Access to education

In Case 293/83 *Gravier*,¹⁸³² the ECJ created a right to non-discriminatory access to higher education institutions by including higher education within the term of “vocational training” and thus bringing it within the scope of the EC Treaty. It is to be noted that the conditions of access to vocational training were within the scope of the EEC Treaty but the EEC had no competence with regard to education as the EEC Treaty did not contain any provisions on education.

THE FACTS WERE:

Miss Gravier, a French national, was accepted by the Liège Académie des Beaux-Arts in Belgium for a four-year course in the art of strip cartoons. She was considered as a foreign student and charged a special fee, known as a “minerval,” which neither Belgian nationals, irrespective of their place of residence, nor EU citizens and their families working in Belgium, were required to pay. She challenged the fee as discriminatory. She argued that the minerval constituted an obstacle to her freedom to receive services and that, as the ECJ recognised in Case 152/82 Forcheri,¹⁸³³ vocational education was within the scope of the EC Treaty.

Held:

The ECJ decided in favour of Miss Gravier. The minerval was discriminatory and was therefore in breach of Article 18 TFEU.

Comment:

This decision raised many controversies in Member States. One of them was the definition of vocational training, which the ECJ defined very broadly in Gravier as including all forms of

¹⁸³¹. Case C-192/05 *K. Tas-Hagen and R.A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451.

¹⁸³². Case 293/83 *Gravier v City of Liège* [1985] ECR 593.

¹⁸³³. Case 152/82 *Forcheri v Belgium* [1983] ECR 2323.

teaching that prepare for, and lead directly to, a particular profession, trade or employment. Furthermore, contrary to the Opinion of A-G Sir Gordon Slynn in this case, the ECJ refused to discuss the organisation and financing of such courses. Member States which financed university courses from public funds (in Belgium the minerval covered only 50 per cent of the cost of the course, the remaining 50 per cent coming from public funds) were deeply concerned about the implications of the judgment on their public finances.

In Case 24/86 *Blaizot*,¹⁸³⁴ the ECJ clarified the definition of vocational training. In this case *Blaizot*, following the decision of the ECJ in *Gravier*, sought reimbursement of the minerval charged for his university course in veterinary science. The ECJ held that university education constituted vocational training “not only where the final exam directly provides the required qualification but also insofar as the studies provide specific training (i.e. where the student needs the knowledge so acquired for the pursuit of his trade or profession), even if no legislative or administrative provisions make the acquisition of such knowledge a prerequisite”.¹⁸³⁵

Therefore all courses other than those which are intended to improve the general knowledge of students rather than prepare them for an occupation are considered as vocational courses. On the basis of the above case law of the ECJ, a host Member State may not charge non-local EU students tuition fees in excess of those imposed on local students, or refuse to grant them a tuition free loan/grant if these are available to local students.¹⁸³⁶

The ECJ has not only dealt with tuition fees but also with other impediments to access to publicly financed educational institutions in a host Member State. In Case C-147/03 *Commission v Austria*,¹⁸³⁷ the ECJ condemned Austrian legislation which imposed on EU citizens, who wished to pursue study at an Austrian university, and who were not holders of an Austrian diploma certifying the completion of secondary education, a requirement that they show that they would have satisfied the entry requirements of the university in the Member State which had issued the secondary education diploma.

In Case C-40/05 *Lyyski*¹⁸³⁸ the ECJ condemned Swedish legislation which made access to a special teaching training programme, necessary to complete in order to become a teacher in Sweden, subject to the condition that applicants must be employed in a Swedish school during the training. In this case, the applicant, who had completed a course of higher education in Sweden, and found work in a Swedish language school in Finland, was refused admission to the special training programme.

The matter of whether a host Member State can restrict, by number, access to its university courses for non-resident EU students was examined in Case C-73/08 *Bressol*.¹⁸³⁹

¹⁸³⁴ Case 24/86 *Vincent Blaizot v University of Liège and Others* [1988] ECR 379.

¹⁸³⁵ *Ibid.*, para. 19.

¹⁸³⁶ Case 197/86 *Steven Malcolm Brown v The Secretary of State for Scotland* [1988] ECR 3205.

¹⁸³⁷ [2005] ECR I-5969.

¹⁸³⁸ Case C-40/05 *Kaj Lyyski v Umeå Universitet* [2007] ECR I-99.

¹⁸³⁹ C-73/08 *Nicolas Bressol and Others, Céline Chaverot and Others v Gouvernement de la Communauté Française* [2010] ECR I-2735.

THE FACTS WERE:

The French-speaking Community¹⁸⁴⁰ in Belgium adopted a decree which restricted the number of non-resident students permitted to enroll in medical and paramedical courses at its higher education institutions. The decree was adopted in order to deal with a significant increase in the number of students from Member States other than Belgium enrolling in higher education institutions of the French-speaking Community, in particular from France. The same language of instruction, and restrictions imposed on access to the courses concerned in France, were the factors which explained the influx of French students. Under the Decree a threshold was fixed on the admissibility of non-resident students. When the threshold was exceeded, the institution concerned organised the drawing of lots between the students concerned. A number of students challenged the compatibility of the decree with EU law, in particular with Article 18 TFEU which prohibits discrimination based on nationality, and Article 21 TFEU which ensures the freedom of movement of EU citizens in conjunction with Articles 165 and 166 TFEU which concern the mobility of students and trainees. The Belgian government provided three justifications:

- *first, that an increased number of students attending the relevant courses had imposed excessive burden on the financing of the relevant courses as they had been financed from public funds;*
- *second, that non-resident students after completing their course of study, were returning to their home Member State with the result that the number of students residing in the Community who had remained after obtaining their diploma was not sufficient to ensure the quality of the public health system in the Community; and,*
- *third, based on the protection of the homogeneity of the higher education system.*

Held:

The ECJ held that the decree was indirectly discriminatory with regard to non-resident students but nevertheless, could be objectively justified on the grounds of genuine risks to the protection of public health. It was for the referring court to decide whether and to what extent the decree could be so justified and whether it complied with the principle of proportionality.

Comment:

The following points are of interest.

First, the ECJ held that the decree in question created a difference in treatment between resident and non-resident students which difference constituted indirect discrimination. This was not the view of A-G Sharpston who considered that under EU law the distinction between direct discrimination and indirect discrimination was not clear and proposed the following definition of direct discrimination: "I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the

¹⁸⁴⁰. Belgium is a federal State comprising three Communities: the Flemish Community (Dutch-speaking), the French-speaking Community and the German-speaking Community.

respective categories of persons distinguished only by applying a prohibited classification.”¹⁸⁴¹

The view of the A-G was that the Belgian decree was directly discriminatory so far as the requirement related to permanent residence was concerned because: “The difference in treatment [of resident and non-resident students] is clearly based on a criterion (the right to remain permanently in Belgium) which is necessarily linked to a characteristic indissociable from nationality.”¹⁸⁴²

Obviously, the classification of the decree as directly or indirectly discriminatory is vital in that direct discrimination based on nationality can only be justified on the explicit derogations set out in the Treaties whilst indirect discrimination can be justified on the grounds of objective criteria established by the ECJ. With regard to direct discrimination the Treaties do not provide for the possibility of any derogation from the prohibition on discrimination based on nationality enshrined in Article 18 TFEU with regard to access to education.

The ECJ did not comment on the A-G’s definition of direct discrimination.

Second, in accordance with the ECJ’s case law, as expected, the ECJ rejected the justification based on financial considerations, i.e. that the difference in treatment of resident and non-resident students was necessary to avoid excessive burdens on the financing of higher education in Belgium.

Third, with regard to the justification relating to the protection of the homogeneity of the higher education system and the justification relating to public health requirements, the ECJ decided that the national court should determine whether the decree was appropriate for the attainment of the objectives sought, and whether the decree satisfied the requirements of the principle of proportionality. In order to facilitate the task of the national court, the ECJ provided the national court with detailed guidance. In particular, the referring court was to verify whether the selection process for non-resident students was limited to the drawing of lots and, if this was the case, whether that method of selection based on chance, not on the aptitude of the candidates concerned, was necessary to attain the objective pursued by the decree.

22.3.4.2 Entitlement to financial assistance from a host Member State

Two situations should be distinguished, first, the entitlement of students to study finance and second, the entitlement of students to social assistance.

22.3.4.2.1 Entitlement to study finance

Article 24(2) of Directive 2004/38 limits the obligations of a host Member State to provide study finance consisting of student grants or student loans to persons other than workers and self-employed persons and their families during their residence up to five years. In Case C-158/07 *Förster*,¹⁸⁴³ the ECJ held that that the requirement of five years’ uninterrupted residence set out in Article 24(2) of Directive

¹⁸⁴¹ C-73/08 *Nicolas Bressol and Others, Céline Chaverot and Others v Gouvernement de la Communauté Française* [2010] ECR I-2735, para. 56.

¹⁸⁴² *Ibid*, para. 67.

¹⁸⁴³ Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2008] ECR I-8507.

2004/38 constitutes an appropriate yardstick for finding that an applicant has indeed achieved the necessary level of integration into the society of a host Member State to be entitled to a maintenance grant. The position of the ECJ in *Förster* has been subject to differing interpretations,¹⁸⁴⁴ as it seems to suggest the judgment of the ECJ in Case C-209/03 *Bidar*¹⁸⁴⁵ is no longer good law.

THE FACTS WERE:

In 1998 young Mr Bidar, a French national, and his mother moved to the UK where she was to undergo medical treatment. Subsequently she died. Mr Bidar then lived in the UK with his grandmother as her dependant, and completed his last three years of secondary education without ever having recourse to social assistance. In September 2001 he enrolled at University College London and applied to the relevant English authority for financial assistance. He was granted assistance with tuition fees but was refused a maintenance loan on the ground that he was not “settled” in the UK.

Under the relevant legislation a person is considered as being “settled” in England or Wales if he/she will have been resident there for the three years prior to commencing their course, but it is impossible to become “settled” if one resides there, during any part of that three-year period, for the purpose of receiving full-time education.

Mr Bidar challenged the decision before the High Court of England and Wales on the basis that the requirement to be “settled” constituted discrimination based on nationality, in breach of the EU law. The High court referred the matter to the ECJ.

Held:

The ECJ held that Mr Bidar, having been a lawful resident in the UK during his secondary studies, had established a genuine link with the society of his host Member State and was, consequently, entitled to obtain study finance in the UK.

Comment:

*The ECJ’s starting point was that a citizen of the EU lawfully resident in another Member State could rely on the prohibition of discrimination on grounds of nationality in all situations within the scope of the EC Treaty. The ECJ held that the situation of Mr Bidar was within the scope of the Treaty as a result of developments in EU law. In this respect the ECJ held that since the judgments in Case 39/86 *Lair*¹⁸⁴⁶ and Case 197/86 *Brown*¹⁸⁴⁷ the EU had introduced the concept of EU citizenship and had made amendments to the EC Treaty consisting of including education and vocational training within its scope (see [Chapter 23.8](#)).*

However, the ECJ then had to consider Article 3 of Directive 93/96 [now Article 7(1)(b)(c)] of Directive 2004/38] which states that students have the right of residence in a host Member State provided they have sufficient resources to avoid becoming a burden on that State’s social assistance system and have appropriate sickness insurance cover. This Article excludes any right to receipt of maintenance grants by students, and therefore excludes students like

¹⁸⁴⁴. See S. O’Leary, “Free Movement of Persons and Services”, in P. Craig and G. de Búrca (eds), *The Evolution of EU Law*, 2nd edn, 2011, Oxford: OUP, 516–17.

¹⁸⁴⁵. [2005] ECR I-2119.

¹⁸⁴⁶. Case 39/86 *Lair v Universität Hannover* [1988] ECR 3161.

¹⁸⁴⁷. Case 197/86 *Brown v Secretary of State for Scotland* [1988] ECR 3205.

Mr Bidar from receiving a maintenance loan. The ECJ solved this problem by stating the Directive did not preclude students like Mr Bidar, who are lawfully resident in a Member State in order to pursue their studies, from relying on the principle of non-discrimination enshrined in Article 18 TFEU. However, the application of this principle is limited given that the Member States remain competent to determine the conditions of granting assistance to cover students' maintenance costs. These conditions, however, must be based on objective criteria independent of nationality and proportionate to the objectives pursued by national legislation. In respect of the challenged legislation the ECJ found that it was indirectly discriminatory because it was placing nationals of other Member States at a disadvantage as compared to UK nationals. Indeed, the challenged legislation precluded any possibility of a national of another Member State obtaining settled status as a student in these circumstances. However, the justifications provided by the UK government were accepted by the ECJ. A Member State is allowed to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that Member State. Thus, it is legitimate for a Member State to grant assistance to cover maintenance costs only to students who have demonstrated a certain degree of integration into the society of that Member State. Previously in Case C-138/02 Collins¹⁸⁴⁸ the ECJ accepted that a certain length of residence in the host Member State can be recognised as an appropriate factor in establishing the degree of integration between the student and the host Member State. In the case of Mr Bidar his lawful residence in the UK for a substantial part of his secondary studies showed that he had established a genuine link with the society of the host Member State. Consequently, the challenged legislation precluding him from obtaining the status of a settled person as a student was incompatible with EU law.

The ECJ in Case C-158/07 *Förster*, distinguished the situation of Miss Förster from that of Mr Bidar. It held that in the case of Mr Bidar the challenged legislation imposed not only the requirement of residence but also the requirement to be "settled" in the UK, with the consequences that it was impossible for students, regardless of their degree of integration, to ever qualify for a maintenance grant or loan in the UK. This was not the case in *Förster*.

It is submitted that it is possible to interpret the judgment of the ECJ in *Förster* in line with the previous case law of the ECJ on students' entitlement to study finance from a host Member State. In Case C-158/07 *Förster*, the ECJ clarified its previous case law in that it confirmed that it is acceptable for a Member State to have a five-year residence requirement when a person has entered a host Member State as a student. However, when a person enters a Member State in another capacity, as was the case of Mr Bidar, who entered the UK as a dependent child, the entitlement to study finance will depend on whether the person concerned has established a genuine link with the society of the host Member State. Accordingly, the requirement of five years' residence in a host Member State set out in Article 24(2) of Directive 2004/38 will not be the only factor in determining that person's entitlement to study finance.

¹⁸⁴⁸. Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703.

22.3.4.2.2 Entitlement to social assistance

In Case C-184/99 *Grzelczyk*,¹⁸⁴⁹ the ECJ examined the matter of entitlement of EU students to social assistance from a host Member State.

THE FACTS WERE:

Mr Grzelczyk, a French national studying in Belgium supported himself for the first three years by working, but in his final year of study applied to the Belgian authorities for payment of the minimex, i.e. a non-contributory minimum subsistence allowance in Belgium. Initially, he was granted the minimex on the ground that he had worked hard to finance his studies and that during his final academic year, being more demanding than previous years, he would not be able to both work and study. Subsequently, his minimex allowance was stopped, on the ground that he was not a Belgian national, and he was asked to reimburse the sums received.

Held:

The ECJ held that Belgian legislation was directly discriminatory because Belgian nationals who found themselves in exactly the same circumstances as Mr Grzelczyk would satisfy the conditions for obtaining the minimex. Accordingly, he was allowed to rely on Article 18 TFEU to claim the minimex as long as he did not become an unreasonable burden on the Belgian social assistance system. Mr Grzelczyk appeared not to be an “unreasonable burden.”

Comment:

The ECJ held that Mr Grzelczyk as an EU citizen was within the personal scope of the Treaties. His situation was also within the material scope of application of the Treaties because he had exercised his rights to free movement and residence in a host Member State. Accordingly, he could rely on Article 18 TFEU. However, the requirement relating to sufficient resources set out in Directive 93/96 was an obstacle to his claim for the minimex. In this respect, the ECJ held that on the one hand, Article 1 of Directive 93/96 required students to have sufficient resources to avoid becoming a burden on the social security system of a host Member State, but on the other, the Directive did not contain any provisions precluding students from receiving social benefits. In this respect Directive 2004/38, which repealed Directive 93/9, takes the same position. The ECJ stated that Articles 20 and 21 TFEU read in conjunction with Article 18 TFEU allowed Mr Grzelczyk to claim social assistance benefits as long as he did not become an unreasonable burden on the social assistance system of the host Member State. Even though a host Member State has the right to withdraw a residence permit, or not to renew it, in respect of students who have insufficient financial resources, and thus have to resort to the host Member State’s social assistance system such measures should not be taken automatically. If financial difficulties are temporary, as was the case of Mr Grzelczyk, the host Member State must show a certain degree of financial solidarity towards such a student. Consequently, as long as an EU student is not considered as an “unreasonable” burden on the host Member State’s social assistance system, he may be given social assistance from a host Member State.

¹⁸⁴⁹. Case C-184/99 *Rudy Grzelczyk v Centre Public d’Aide Sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

22.3.4.3 Entitlement to financial assistance from a home Member State

A student who wishes to pursue his/her education in a host Member State may be deterred from so doing by rules relating to financial assistance imposed by the home Member State. This is exemplified by Joined Cases C-11/06 *Morgan* and Case C-12/06 *Bucher*.¹⁸⁵⁰

THE FACTS WERE:

In Case C-11/06 Ms Morgan, a German national, moved to the UK where she initially worked for one year as an au pair and subsequently commenced studies in applied genetics at the University of Bristol. When she applied to the relevant German authorities for a study grant, her application was refused on the ground that she had failed to satisfy the German law conditions relating to awards of education and training grants for studies outside Germany, requiring that the course of study outside Germany should constitute a continuation of education or training pursued for at least one year in a German establishment.

In Case C-12/06 Ms Bucher, a German national, moved from Bonn to Düren, a German town on the Netherlands border, in order to take a course of study in ergotherapy in the Netherlands town of Heerlen (located very close to the German border). When she applied to the German authorities for a study grant, her application was refused on the ground that she was not “permanently” resident near a border, as required by the German law, and thus did not satisfy the conditions of the German law relating to study grants outside Germany.

Both claimants submitted that the courses being taken in host Member States were not offered in Germany. Both challenged the decisions of the relevant German authorities. The referring courts asked the ECJ to rule on the compatibility of the German legislation with Articles 20 and 21 TFEU.

Held:

The ECJ held that the German legislation was in breach of Articles 20 and 21 TFEU as it constituted an unjustified restriction on the free movement of EU citizens.

Comment:

The Court stated that the challenged legislation was disproportionate. First, it forced the claimants to choose between abandoning the education they had planned to receive in a host Member State, and pursuing it, but losing their entitlement to an education grant. Second, the requirement that a student must first study for at least one year in a home Member State was too general and exclusive because: “It unduly favours an element which is not necessarily representative of the degree of integration into the society of that Member State at the time the application for assistance is made.”¹⁸⁵¹

¹⁸⁵⁰. Joined Cases C-11/06 *Rhiannon Morgan v Bezirksregierung Köln* and Case C-12/06 *Iris Bucher v Landrat des Kreises Düren* [2007] ECR I-9161. On this topic see: see M. Dougan, “Cross-border Educational Mobility and the Exportation of Student Financial Assistance”, (2008) 33 ELR, 723.

¹⁸⁵¹. *Ibid*, para. 46.

22.3.4.4 Other rights conferred on non-resident EU students

The principle of equal treatment requires that non-resident students are entitled to reduced-cost public transport if such reductions are available to resident students, access to student accommodation on the same terms as local students, and entitlement to tax benefits. In Case C-76/05 *Schwarz*,¹⁸⁵² the ECJ ruled that German tax law which precluded the granting of tax relief in respect of fees paid by German taxpayers to private schools in other Member States but granted relief where schools were situated in Germany, was in breach of Article 56 TFEU.

22.4 Directive 2004/38 on the right of EU citizens and their families to move freely and reside within the territory of the Member States

An important piece of legislation (which merged into one instrument all the legislation – consisting of two regulations and nine directives – on the right of entry and residence for EU citizens) is Directive 2004/38/EC of 29 April 2004 on the right of citizens and their family members to move and reside freely within the territory of the Member States.¹⁸⁵³ As the title indicates it applies to all EU citizens and their families, irrespective of whether they are economically active, e.g. workers, self-employed persons, providers of services, or not, e.g. students, retired persons, etc, when they exercise their right to free movement. The Directive brings together the piecemeal measures found in the complex body of legislation that had previously governed this matter, and reiterates the relevant case law. It simplifies and improves the rules in this area, in particular by:

- reducing administrative formalities to the bare essentials;
- providing a clear definition of the status of family members;
- limiting the scope for refusing entry and terminating the right of residence (see [Chapter 25.5](#)); and,
- introducing the right of permanent residence.

The main features of Directive 2004/38 are examined below and in [Chapter 25.3](#), [25.4](#) and [25.5](#).

22.4.1 Persons covered by the Directive

The Directive applies to all EU citizens and their family members. Article 2(2) provides a definition of family members. They are the EU citizen's:

- spouse;
- partner with whom the citizen has contracted a registered partnership, on the basis of the legislation of a Member State if the legislation of a host Member State treats a registered partnership as equivalent to marriage;
- direct descendants who are under the age of 21 or are dependent and those of the spouse or partner; and,

¹⁸⁵². Case C-76/05 *Herbert Schwarz, Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I-6849. See also Case C-56/09 *Emiliano Zanotti v Agenzia delle Entrate-Ufficio Roma 2* [2010] ECR I-4517.

¹⁸⁵³. [2004] OJ L 229/1.

- direct dependent ascendants and those of the spouse or partner, i.e. parents and grand-parents of an EU citizen or his/her spouse/partner.

Article 3 concerns the right of entry and residence of members of the family who are not mentioned in Article 2(2). With regard to them a host Member State is required to examine the personal circumstances of such persons and must justify any denial of entry or residence. Three categories of persons are mentioned:

- those who were dependents, or members of a household, of an EU citizen in the country from which they have come;
- those who require personal care by an EU citizen on serious health grounds; and,
- a partner with whom an EU citizen has a durable relationship, duly attested.

It is well established in EU law that the status of dependency is not linked to the entitlement to maintenance because such a requirement would result in defining the status of dependency or otherwise on the basis of national law, which varies from one Member State to another. Further, the broad interpretation of provisions on the free movement of workers entails that neither the reason for recourse to financial support nor the assessment of whether the person concerned is able to support himself/herself by taking up employment are relevant in determining the status of dependency.¹⁸⁵⁴ However, the issue of how to prove the relationship of dependency is more controversial. In Case C-1/05 *Jia*,¹⁸⁵⁵ the ECJ provided some useful clarification. It held that:

- The same criteria apply when assessing the relationship of dependency, whether the EU national is a worker or a self-employed person;
- A host Member State is required to assess whether the person concerned is in a position to support himself/herself in the light of his/her financial and social conditions in the Member State of origin or the Member State from whence he/she came (or perhaps this should be expressed as the Member State where he/she was residing) at the time when the application to join the EU national was made. This clearly excludes the assessment of his/her financial and social conditions in the host Member State; and,
- Evidence of dependency may be adduced by any appropriate means. On the one hand, it is not necessary to require a document of the competent authority of the Member State of origin, or the Member State from which the applicant came, attesting the existence of a situation of dependency, although this kind of proof is particularly appropriate for that purpose. On the other hand, an undertaking from an EU national or his/her spouse to support a family member may not be sufficient.

22.4.1.1 Spouses

Article 2(2) of Directive 2004/38 expressly mentions a spouse of an EU national. In Case 267/83 *Diatta*,¹⁸⁵⁶ the ECJ held that it is not necessary for spouses to live under the same roof. This decision was delivered in the context of spouses living separately and intending to obtain a divorce (the wife was of Senegalese nationality, her husband was a French national working in Germany). However, in the

¹⁸⁵⁴. Case 316/85 *Centre Public d'Aide Sociale (Public Social Welfare Centre), Courcelles v Marie-Christine Lebon* [1987] ECR 2811.

¹⁸⁵⁵. Case C-1/05 *Yunying Jia v Migrationsverket* [2007] ECR I-1.

¹⁸⁵⁶. Case 267/83 *Aissatou Diatta v Land Berlin* [1985] ECR 567.

light of Article 7(1)(d) of the Directive which states that a spouse must be accompanying or joining an EU citizen, and Article 16(2) of the Directive which states that a family member must reside with the EU citizen in order to acquire permanent residence in a host Member State, it seems that a separated spouse would not satisfy the requirements of Article 2(2) of the Directive.

The ECJ has interpreted the words “joining” broadly, to include not only a couple who met prior to their departure to a host Member State but also those who both met and subsequently got married in a host Member State. This is exemplified in Case C-127/08 *Metock*,¹⁸⁵⁷ in which the ECJ was asked to interpret Directive 2004/38 to assist the Irish High Court to decide whether Irish legislation implementing Directive 2004/38 was compatible with EU law. The Irish legislation provided that a national of a third country who is a family member of an EU citizen may reside with or join that citizen in Ireland only if that family member lawfully resided in another Member State immediately before residing with/joining the EU citizen in Ireland.

THE FACTS WERE:

The Irish High Court referred to the ECJ four cases. In each of the four cases, a non-EU national had entered Ireland and lodged an asylum application, which was refused. Subsequent to arrival in Ireland, each non-EU national married a national of another Member State who was living and working in Ireland. All marriages were genuine marriages, not marriages of convenience. After the marriage, the non-EU nationals applied for a residence card, which the Irish Minister for Justice refused. This refusal in three of the four cases was solely based on the fact that each applicant was not in a position to provide evidence that he had been lawfully resident in another Member State prior to arrival in Ireland. In the fourth case concerning Mr Igboanusi, a Nigerian national, who had married Ms Batkowska, a Polish national, subsequent to the final decision refusing his application for political asylum, a deportation order was made prior to his marriage. Therefore, when Mr Igboanusi married Ms Batkowska he was unlawfully residing in Ireland. In execution of the deportation order Mr Igboanusi was arrested on 16 November 2007, and deported to Nigeria in December 2007.

Held:

The ECJ:

1. *Held that under Directive 2004/38 a host Member State is not allowed to impose a condition requiring a national of a non-member country, who is the spouse of an EU citizen residing in that Member State but not possessing its nationality, to have previously been lawfully resident in another Member State before arriving in the host Member State. The ECJ held that no such condition is provided for in Directive 2004/38 and that Article 2 of Directive 2004/38 makes no distinction between those family members who have already resided lawfully in another Member State prior to their arrival in a host Member State and those who joined an EU citizen in a host Member State without previously residing in any Member State, or whose residence in another Member State was unlawful prior to their arrival in a host Member State;*
2. *Confirmed that the EU has exclusive powers to regulate, as it did by Directive 2004/38, the entry (and subsequent residence there) of nationals of non-member*

¹⁸⁵⁷ C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.

countries who are family members of an EU citizen into a Member State in which that citizen has exercised his right of freedom of movement, including a situation where the family members were not already lawfully resident in another Member State; and,

3. *Held that non-EU nationals who are family members of an EU citizen benefit from the right to free movement irrespective of whether they have entered the host Member State before or after becoming family members of that EU citizen, and irrespective of when and where their marriage may have taken place, and of how they entered the host Member State. Obviously, in any event, under Article 27 of Directive 2004/38 a Member State is allowed to penalise a national of a non-Member State for, prior to becoming a family member of an EU citizen, entering into and/or residing in its territory in breach of the national rules on immigration. However, any punishment must be in conformity with EU law in that it must be proportionate.*

Comment:

With regard to point 2, the ECJ made an important clarification bearing in mind that the Irish government and many other governments of the Member States, submitted that they retained exclusive competence, subject to Title IV of Part Three of the Treaty, to regulate the first access to EU territory of family members of an EU citizen who are nationals of non-member countries. Recognition of the exclusive competence of Member States in respect of the free movement of persons would have had very serious consequences on the effectiveness of the right to free movement of EU nationals and the uniformity of the application of EU law in this area. An argument in favour of the exclusive competences of Member States based on the necessity to control immigration at the external borders of the EU, which presupposes an individual examination of all the circumstances surrounding a first entry into EU territory, was rejected by the ECJ. The Court rightly stated first, that only non-EU nationals who are family members of EU nationals benefit from the right of entry into and residence in a Member State and second, that a Member State retains its power to refuse entry and residence to both EU citizens and non-EU family members of EU citizens on grounds of public policy, public security or public health.

In the light of the above judgment and the judgment of the ECJ in Case 291/05 *Eind*, the controversial judgment of the ECJ in Case C-109/01 *Akrich*¹⁸⁵⁸ has lost its importance. However, in *Akrich* the ECJ made two important clarifications:

¹⁸⁵⁸. Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607. In *Akrich* the issue was whether a national of a Member State, who is married to a third-country national who does not qualify under national legislation to enter and reside in that Member State, when he or she moves to another Member State with the non-national spouse with the intention of working there for only a limited period of time as an employee, can take advantage of EU law by securing the right of residence for the non-national spouse when returning to the Member State of nationality. The ECJ held that Mr Akrich could not rely on EU law to enter and remain in the home Member State of his spouse because he resided unlawfully there before he and his wife had moved to another Member State. The only remedy which might have been available to him is based on Article 8 of the ECHR. In this case the ECJ strongly emphasised the importance of the right to family life, referring to its own case law and the judgments of the ECtHR, but did not rule on the point. It is to be noted that in the light of the judgments of the ECJ in *Metock* and in *Eind*, Mr Akrich would have had no problem to return to his spouse's home Member State.

- that the marriage must be a genuine marriage and not a marriage of convenience. This is confirmed in Article 35 of Directive 2004/38; and,
- that the intention of EU migrant workers (including the intention to use rights conferred under EU law to evade the application of national rules which are unfavourable to them) when exercising their right to free movement has no impact on their entitlement under EU law.

22.4.1.2 *Registered partners*

Registered partners, irrespective of their sexual orientation and nationality, have the right to enter and reside in a host Member State when the partnership is recognised by both the home and host Member States. This means that, for example, a British national will be able to take his male Mexican partner, with whom he entered into civil partnership under the UK 2004 British Civil Partnership Act, to Sweden, where registered homosexual partnerships are recognised, but not to Greece, where no such recognition exists in law. However, Article 3(2)(b) of Directive 2004/38 imposes on a host Member State in which no registered partnerships, or partnerships, are recognised, an obligation to facilitate entry and residence of partners of EU nationals, irrespective of a partner's sexual orientation or nationality, in a situation where the partnership is durable and duly attested. Unfortunately, the Directive neither specifies the concept of "durable relationship" nor the manner in which an EU national may demonstrate its durability. Notwithstanding this, Case 59/85 *Reed*¹⁸⁵⁹ may be of assistance to EU nationals who are in durable relationships with partners. In this case, the ECJ held that by virtue of the principle of non-discrimination, a Member State cannot refuse a cohabitee of a worker who is an EU national the right to reside with the worker in so far as national law provides this possibility for its own nationals. As a result, Miss Reed, a British national, was allowed to remain in the Netherlands with her English cohabitee of five years.

Directive 2004/38 regulated, for the first time, the issue of the right of residence of a spouse/registered partner who is not an EU national in the event of divorce, annulment of marriage or termination of registered partnership. Provided that such a person is a worker or a self-employed person (Article 7(a)); or has sufficient resources to avoid becoming a burden on the social security system of the host Member State and has appropriate sickness insurance cover (Article 7(b)); or is a student enrolled at an establishment accredited by the host Member State (Article 7(c)); or is a family member accompanying or joining an EU citizen who satisfies the conditions set out in Article 7 (a), (b) or (c), he/she retains the right of residence in a host Member State if:

- the relationship specified above has lasted at least three years, including one year in a host Member State; or
- by agreement or court order, he/she has custody of an EU citizen's children; or
- this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered relationship was subsisting; or
- by agreement or by court order he/she has a right of access to a minor child, provided that the court has ruled that such access must be in the host Member State. In this case the right of residence is retained for as long as it is required.

The death of an EU citizen should not affect the right of residence of non-EU members of his/her family if they have resided in the host Member State as family members for at least one year before his/her death and can satisfy the conditions set out in Article 7(1)(a), (b), (c) or (d).

¹⁸⁵⁹. Case 59/85 *The Netherlands v Ann Florence Reed* [1986] ECR 1283.

In the case of the death or departure of an EU citizen from a host Member State, Article 12(3) of Directive 2004/38 states that this should not entail loss of the right of residence by his/her children or by a parent who has actual custody of the children, regardless of their nationality, if the children reside in the host Member State and are enrolled at an educational establishment there. They, as well as the parent, retain the right to reside in the host Member State until the completion of their studies.

22.4.2 The right of residence

The right of nationals of a Member State to leave the territory of a home Member State, enter the territory of another Member State and reside there is conferred directly by the Treaties. This was decided by the ECJ in Case 48/75 *Royer*.¹⁸⁶⁰ Secondary legislation determines the scope of, and provides detailed rules for, the exercise of the right to move and reside in a host Member State which is conferred directly by the Treaties.

Directive 2004/38 reiterates the principle that failure to comply with formalities regarding entry and residence cannot justify a decision ordering expulsion from the territory of a host Member State¹⁸⁶¹ or temporary imprisonment. In respect of sanctions that a Member State may impose on nationals from other Member States for failure to comply with administrative requirements regarding entry and residence, such sanctions are subject to the principle of proportionality. In Case 265/88 *Messner*,¹⁸⁶² a requirement under Italian law imposing on all immigrants the obligation to register with the police within three days of their arrival, sanctioned by criminal penalties, was considered as disproportionate. Any national measures which are disproportionate to the objectives of the Treaties in the area of free movement of persons will be struck down by the ECJ as contrary to EU law.¹⁸⁶³

Directive 2004/38 makes a distinction between residence of an EU national in a host Member State for up to three months and for more than three months.

22.4.2.1 Right of residence for up to three months

All EU citizens are entitled to enter another Member State on the basis of a valid identity document or passport. If they do not have these travel documents, the host Member State must afford them every facility in obtaining the requisite documents or having them sent. In Case C-215/03 *Salah Oulane*,¹⁸⁶⁴ the ECJ stated that a Member State may not refuse to recognise the right of residence on the sole ground that a person did not present one of these documents. Any document or evidence proving unequivocally that a person is an EU citizen should be accepted by a host Member State.

A Member State is prohibited from requiring either an entry or an exit visa. A family member who is a non-EU national accompanying an EU citizen may be required to have a short-stay visa as specified by Regulation 539/2001.

Under Article 8 of Directive 2004/38 EU citizens and members of their families may be required to register their presence in the territory of a host Member State within a reasonable and non-discriminatory period of time after their arrival, but any penalty for breach of the requirement must be proportionate and comparable to those which apply to similar national infringements.¹⁸⁶⁵

^{1860.} Case 48/75 *The State v Jean Noël Royer* [1976] ECR 497.

^{1861.} See Case 118/75 *Lynne Watson and Alessandro Belmann* [1976] ECR 1185; Case 157/79 *R v Pieck* [1980] ECR 2171.

^{1862.} Case 265/88 *Criminal Proceedings against Lothar Messner* [1989] ECR 4209.

^{1863.} Case 30/77 *R v Pierre Bouchereau* [1977] ECR 1999.

^{1864.} Case C-215/03 *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie* [2005] ECR I-1215.

^{1865.} Case C-378/97 *Criminal Proceedings against Florus Ariël Wijzenbeek* [1999] ECR I-6207; Article 8(2) of Directive 2004/38.

The question whether a host Member State may restrict the residence of an EU citizen to part of the national territory was examined by the ECJ in Case 36/75 *Rutili*.¹⁸⁶⁶

THE FACTS WERE:

Rutili was an Italian national who resided in France, and between 1967 and 1968 he actively participated in political and trade union activities. The French authorities grew increasingly concerned with his activities, and issued a deportation order. This was subsequently altered to a restriction order requiring him to remain in certain provinces of France. In particular, the order prohibited him from residing in the province in which he was habitually resident and in which his family resided.

Rutili challenged the legality of these measures on the ground that they interfered with his right of freedom of movement. The matter was referred to the ECJ for a preliminary ruling.

Held:

The ECJ interpreted the right of a Member State to limit the free movement of workers on the ground of public policy and concluded that this right must be construed strictly. In particular, a Member State cannot, in the case of a national of another Member State, impose prohibitions on residence which are territorially limited except in circumstances where such prohibitions may be imposed on its own nationals. Consequently, if a Member State has no power to restrict the residence of its own nationals to a specific area, then it has only two options in relation to an EU migrant worker: either to refuse entry or to permit residence anywhere in the national territory.¹⁸⁶⁷ This solution has been incorporated into Article 22 of Directive 2004/38.

22.4.2.2 Right of residence for more than three months

The right of residence for a period exceeding three months is granted to three categories of persons:

- Workers or self-employed persons (Article 7(1)(a)), including those who are temporarily unable to work due to illness or accident, or are involuntarily unemployed and registered as job-seekers with the relevant employment office, or are embarking on vocational training;
- Economically inactive persons and their families (Article 7(1)(b)) where they have sufficient resources to avoid being a burden on the social assistance system of the host Member State. Further, they must have comprehensive sickness insurance cover in the host Member State; and,
- Students (Article 7(1)(c)). They must be enrolled at a private or public establishment accredited or financed by the host Member State and must have sufficient resources to avoid becoming a burden on the social security system of the host Member State. As a result they must have health insurance and adequate means of support. In addition only a spouse or a registered partner and dependent children are regarded as family members for the purposes of the Directive.

¹⁸⁶⁶. Case 36/75 *Roland Rutili v Ministre de l'intérieur* [1975] ECR 1219.

¹⁸⁶⁷. See Case C-100/01 *Ministre de l'Intérieur v Aitor Oteiza Olazabal* [2002] ECR I-10981.

The issue of what constitutes “sufficient resources” is of utmost importance for EU citizens exercising their right to free movement. In this respect Article 8(4) of the Directive specifies that in each case the personal situation of the person concerned should be assessed by a host Member State. It also states that a Member State is not allowed to set a fixed amount, and in any case the amount must not be higher than the threshold below which nationals of the host Member State become eligible for social assistance or, alternatively, the minimum social security pension paid by the host Member State.

In Case C-408/03 *Commission v Belgium*,¹⁸⁶⁸ the ECJ reiterated its case law on this topic. It held that the origin of resources, whether personal or belonging to third persons, including those with whom the EU citizen has no legal link (for example, an unregistered partner), are irrelevant. The ECJ found Belgium in breach of Article 21 TFEU and Directive 90/364 for refusing to take account of the income of a long-standing Belgian partner of a Portuguese woman, who went to Belgium with her three daughters to live with him, but without any agreement concluded before a notary and containing an assistance clause. According to the ECJ, an undertaking given by the Belgian partner in a not legally binding form was sufficient.

Directive 2004/38 abolished the requirement of residence permits for EU nationals but Member States are allowed to require them to register with the competent authorities within a period of no less than three months of their arrival. A registration certificate must be issued immediately on the presentation of:

- a valid identity card or valid passport;
- proof that the EU citizen meets the requirements set out by the Directive, e.g. a confirmation of engagement from the employer, a certificate of employment or any other relevant evidence.

Family members who are non-EU nationals, however, are required to obtain a residence permit, which must be delivered within six months of the application and be valid for five years from the date of issue.¹⁸⁶⁹

The right of residence expires if the persons concerned break any of the conditions of their residence as prescribed by the Directives. Such persons may be deported on the grounds of public policy, public security and public health (see [Chapter 25.3](#)).

22.4.2.3 Permanent residence

Directive 2004/38 introduced the right of permanent residence. This is granted to EU nationals and members of their families, irrespective of their nationality, after a five-year period of uninterrupted and legal residence in a host Member State, provided that no expulsion decision has been enforced against them. In Case 162/09 *Lassal*¹⁸⁷⁰ the ECJ held that continuous periods of five years completed before the date fixed by the Directive for its implementation (30 April 2006) must be taken into account for the purposes of the acquisition of the right of permanent residence.

In Joined Cases C-424/10 and 425/10 *Ziolkowski and Szeja*¹⁸⁷¹ the ECJ held that the concept of “legal residence” has an autonomous EU meaning. It refers to a period of residence which complies with the conditions set out in Directive 2004/38/EC, i.e. the person concerned must reside in a host Member State as a worker, or self-employed person, or have sufficient resources for himself/herself and

¹⁸⁶⁸. [2006] ECR I-2647.

¹⁸⁶⁹. Case C-157/03 *Commission v Spain* [2005] ECR I-2911.

¹⁸⁷⁰. Case 162/09 *Secretary of State for Work and Pensions v Taous Lassal* [2010] ECR I-9217.

¹⁸⁷¹. Judgment of 21/12/11 (NYR).

his/her family not to become a burden on the social assistance system of a host Member State and have comprehensive sickness insurance cover in a host Member State. Accordingly, lawful residence in a host Member State according to national law of that State may not coincide with “legal residence” for the purpose of acquiring permanent residence in a host Member State if the conditions set out in the Directive are not satisfied. In the above cases, the applicants, Polish nationals, were unable to support themselves economically during their long stay in Germany. Their residence in Germany was lawful under German law, as they had been granted the right to reside there on humanitarian grounds in the 1980s. This right was terminated in 2006. The applicants had never satisfied the conditions set out in Directive 2004/38/EC and therefore Germany was entitled to deport them to Poland.

Article 16(3) specifies that continuity of residence is not affected by temporary absences not exceeding a total of six months a year, or by absence of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for serious reasons such as illness, pregnancy, and study. In Case C-162/09 *Lassal*,¹⁸⁷² Ms Lassal, who entered the UK in January 1999, left the UK in February 2005 and returned to the UK in December 2005. The UK Secretary of State argued that the absence of Ms Lassal from the UK from February 2005 to December 2005 resulted in her commencing to accrue a five-year period of residence either from 30 April 2006 (the date fixed by the directive for its implementation) or from December 2005 (the date she returned to the UK). The ECJ held that absences from the host Member State of less than two consecutive years, which took place before 30 April 2006 but following a continuous period of five years legal residence completed before that date do not affect the acquisition of the right of permanent residence.

In the circumstances described in Article 17 of the Directive some EU citizens and members of their families are entitled to become permanent residents of the host Member State before completion of a continuous period of five years of residence (for example, those who reach the age of retirement, or take early retirement or, become unable to work due to an accident at work or an occupational disease). The right of permanent residence once acquired, can be lost only in the event of an absence from the host Member State for more than two successive years.

22.4.3 Equal treatment

Article 24 of Directive 2004/38 provides that EU citizens and their family shall enjoy equal treatment with nationals of the host Member State. This is extended to family members who are non-EU nationals and who have the right of residence or permanent residence in the host Member State (see [Chapter 22.4.2](#)).

22.5 The right to participate in municipal elections and in elections to the EP

Article 22 TFEU confers both active rights (the right to stand as a candidate) and passive rights (the right to vote) in respect of municipal¹⁸⁷³ and EP¹⁸⁷⁴ elections on an EU citizen residing in a Member State of which he/she is not a national, under the same conditions as nationals of that Member State. Further measures (mentioned below) were necessary to implement those rights.

¹⁸⁷². Case C-162/09 *Lassal* [2010] ECR I-9217.

¹⁸⁷³. Article 22(1) TFEU.

¹⁸⁷⁴. Article 22(2) TFEU.

22.5.1 The right to participation in municipal elections

Participation in municipal elections for EU nationals residing in a Member State of which they are not nationals is important as it contributes to their integration into the society of a host Member State. It is also in line with the Council of Europe Convention of 5 February 1992 on the Participation of Foreigners in Public Life at Local Level provided they fulfil the requirement of residence.

The adoption of an EU measure in this area posed three problems:

- first, the matter of the determination of the local government unit;
- second, the matter of the determination of the public offices which nationals of other Member States may hold; and,
- third, the matter of the granting of local election rights in a Member State with a very high percentage of residents from other Member States.

All the above problems were addressed in Council Directive 94/80 of 19 December 1994, which conferred on citizens of the Union the right to vote and stand as candidates in local elections in their Member State of residence under the same conditions as nationals of that Member State.¹⁸⁷⁵

The first matter was partially solved by Directive 94/80, which in Article 2(1) provides a definition of the basic local government unit, and partially by the Member States, which in the Annex to that Directive listed the relevant types of administrative entity. Article 2(1) defines the basic local governmental unit as “certain bodies elected by direct universal suffrage and . . . empowered to administer, at the basic level of political and administrative organisation, certain local affairs on their own responsibility”. However, the reference to national law in determination of those bodies has resulted in wide diversity in the levels of local government accessible to EU citizens. For example, in the UK, non-national EU citizens are entitled to both passive and active voting rights in respect of all levels of government below national government, while in France they are limited to voting at the lowest level. The list of administrative entities provided by the UK encompasses “counties in England, counties, county boroughs and communities in Wales, regions and Islands in Scotland, districts in England, Scotland and Northern Ireland, London boroughs, parishes in England, the City of London in relation to ward elections for common councilmen”.¹⁸⁷⁶

The second matter relating to access to certain offices elected by direct universal suffrage, such as the post of mayor or alderman (a member of the local executive), is regulated in Article 5(3) of Directive 94/80 which states that “the office of elected head, deputy or member of the governing college of the executive of a basic local government unit if elected to hold office for the duration of his mandate” may be reserved to nationals of a Member State. This provision is contrary to European integration but in line with Articles 45(4) and Article 51 TFEU, which exclude nationals of Member States resident in other Member States from holding public office and from activities which involve the exercise of official authority. As a result, Directive 94/80 strengthens the limitations already existing under the Treaties instead of abolishing any difference in treatment between nationals and non-nationals being EU citizens residing in a host Member State.

The third matter was solved by allowing derogations from the Directive to accommodate Member States with a very high percentage of resident non-national EU citizens. If more than 20 per cent of foreign residents are nationals of the EU without being nationals of that Member State, the exercise of their electoral rights may be subject to the requirement of a certain period of residence in that Member

¹⁸⁷⁵. [1994] OJ L368/38.

¹⁸⁷⁶. Annex to Directive 94/80.

State. This derogation concerns mostly Luxembourg where approximately 30 per cent of the population are foreign residents and more than 90 per cent of them are EU nationals.

Other features of the Directive are:

- It allows multiple voting. For example, a French national residing in England and in Belgium is entitled to exercise his/her voting rights in both countries;
- It gives no definition of residence. It only provides that the owners of holiday homes are not considered as residents in a Member State where they have a holiday home unless they are allowed to participate in municipal elections on the basis of reciprocity.¹⁸⁷⁷ To illustrate reciprocity, an Englishman living in Southampton who owns a holiday home in Barcelona in Spain, will be allowed to vote and stand at municipal elections in Spain only if a Spanish national who owns a holiday home in Southampton in England has the same rights in England.

Directive 94/80 is very modest. It confers passive and active voting rights in municipal elections which are of little importance in the political life of any Member State.¹⁸⁷⁸ The grant of voting rights in national parliamentary elections, in direct presidential elections or in referenda would give real meaning to citizenship of the EU.

22.5.2 The right to participate in elections to the European Parliament

Article 22(2) TFEU confers on citizens of the EU the right to vote and to stand in elections to the European Parliament in the Member State of their residence under the same conditions as nationals of that Member State. The content of this right is examined in [Chapter 3.6.1](#).

22.6 The right to diplomatic and consular protection

Article 23 TFEU states that an EU national is entitled to the diplomatic and consular protection of any Member State, under the same conditions as nationals of that Member State, in the territory of a third country in which the Member State of which he/she is a national is not represented.¹⁸⁷⁹ This right is confirmed in Article 46 of the Charter of Fundamental Rights of the EU.

Before the entry into force of the ToL, the procedure provided for enactment of further measures in the area of diplomatic and consular protection was based on inter-governmental co-operation. Pre-ToL measures included “Guidelines for the Protection of Unrepresented EC Nationals by EC Missions in Third Countries” on the basis of which the Council adopted the following binding measures, which remain in force:

- Decision 95/553/EC¹⁸⁸⁰ on the protection of EU citizens in territories where their own Member State or the State which permanently represents their Member State maintains no accessible permanent mission or relevant consulate. Under the decision EU citizens can obtain assistance, relief and, if needed, repatriation, in most distressing circumstances, e.g. when they are victims of violent crimes; when they have serious accidents; when they are arrested; or, in detention.

¹⁸⁷⁷ Article 4(2) of Directive 94/80.

¹⁸⁷⁸ In the UK the Representation of the People Act (2000) enacted on 9 March 2000 governs the right to vote or to stand in both municipal and European Parliamentary elections.

¹⁸⁷⁹ See A. I. Saliceti, “The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services”, (2011) EPL, 91.

¹⁸⁸⁰ [1995] OJ L314/73.

- Decision 96/409/CFSP¹⁸⁸¹ on the Emergency Travel Document, which provides for the issue by Member States of a common format emergency travel document to citizens of the EU in places where their Member State has no permanent diplomatic or consular representation or in other specific circumstances.

Under the ToL, measures relating to the protection of EU citizens outside the EU in the circumstances described in Article 23 TFEU are within the scope of the Treaties. Such measures may be adopted by the Council in accordance with a special legislative procedure and after consulting the EP. Measures adopted under Article 23 TFEU are under review by the Commission which considers that consular and diplomatic protection needs to be strengthened.¹⁸⁸² In December 2011, the Commission following publication of a Green Paper, adopted a proposal for a directive on diplomatic and consular protection of Union citizens in third countries.¹⁸⁸³ The proposed directive refers to EU citizens who live in or travel in a third country where their Member State of nationality does not have an embassy or consulate as “unrepresented EU citizens”. The proposed directive strengthens the protection by:

- Extending the protection list to Union citizen’s family members who are nationals of a third country;
- Clarifying the concept of “accessibility of embassy or a consulate” in that it provides that they are accessible if they can effectively provide protection and can be reached safely within convenient travel distance and reasonable time (i.e. it should be possible for an EU citizen to return to the place of departure the same day, *via* means of transportation commonly used in the third country) (Article 3);
- Identifying the types of assistance to be provided to unrepresented EU citizens (Article 6);
- Requiring close co-operation and co-ordination between diplomatic and consular authorities of the Member States, including the establishment of a “lead State” in a given third country which will be in charge of co-ordinating and leading assistance in cases of crisis (Article 16);
- Specifying financial procedures in the form of financial assistance advance or repatriation to unrepresented EU citizens (Article 3); and
- Providing for monitoring and evaluation of the implementation of the directive by the Commission (Article 20).

Additionally, the Commission has prepared a dedicated website on consular protection.¹⁸⁸⁴

22.7 The right of EU citizens’ initiative

The right of EU citizens’ initiative has been implemented by Regulation 211/2011¹⁸⁸⁵ (see [Chapter 5.2.2](#)).

¹⁸⁸¹. [1996] OJ L168/4.

¹⁸⁸². On 28 November 2006 the Commission published its Green Paper on Diplomatic and Consular Protection of Union Citizens in Third Countries, COM(2006)712 final.

¹⁸⁸³. COM(2011) 881 final.

¹⁸⁸⁴. See <http://ec.europa.eu/consularprotection/index.action> (accessed 3/3/12).

¹⁸⁸⁵. [2011] OJ L65/1.

22.8 The right to petition the EP

Article 24(2) TFEU states that a citizen of the Union individually or in association with others may petition the EP in accordance with Article 227 TFEU. The right, however, is not limited to EU citizens. It has been granted to any natural or legal person residing or having its registered office in a Member State. There are certain limitations under Article 227 TFEU in that the submitted matter:

- must be within the fields of activity of the EU; and,
- must affect the petitioner directly.

The Committee on Petitions, set up to deal with petitions, decides on their admissibility. If a petition is admissible the Committee may ask the Commission or other body to provide information. Once there is enough information the petition is put on the agenda of the Committee. At its meeting a Commission representative is invited to make comments in respect of the matter raised in the petition. Depending on the case further action may be taken by the Committee:

- If the petition concerns the interests of an individual, the Commission will get in touch with relevant authorities or submit the case to the permanent representative of the Member State concerned. In some cases the Committee may ask the President of the EP to make representations to the national authorities in person;
- If the petition is of general interest, that is, a Member State is in breach of EU law, the Commission may start proceedings against the offending Member State; and,
- If the petition concerns a political matter, the EP or the Commission may use it as the basis for a political initiative, which may result in initiating or prompting an action at EU level.

In each case an applicant is informed of the action taken on the petition and of the result.

22.9 The right to submit complaints to the EU Ombudsman

Article 24(3) TFEU states that every EU citizen has the right to make a complaint to the EU Ombudsman who is also empowered to receive complaints from any natural or legal person residing or having its registered office in a Member State.¹⁸⁸⁶

The Ombudsman is elected by the EP after its own elections, holds office for the duration of the term of the EP, and may be reappointed. The Ombudsman must be a citizen of the EU, chosen from persons whose independence is beyond doubt and who must possess the qualifications required for appointment to the highest judicial offices in their own Member State, or have the experience and the competences recognised as necessary for the exercise of the functions of Ombudsman.

The Ombudsman may be removed from office by the ECJ at the request of the EP if he/she no longer satisfies the conditions required for the performance of his/her duties or no longer meets the obligations resulting from his/her office, or is guilty of serious misconduct. The Ombudsman may not hold any office of an administrative or political nature, nor engage in any additional occupation or profession, paid or unpaid, during his/her term of office. The Ombudsman's role is to act independently, and thus the Ombudsman neither seeks nor takes instructions from anybody.

¹⁸⁸⁶. See the EU Ombudsman website <http://www.ombudsman.europa.eu/home/en/default.htm> (accessed 18/4/12).

His general duties are set out in Article 228 TFEU and further specified in Council Decision 94/262 of 9 March 1994.¹⁸⁸⁷ The Ombudsman's competences *ratione materiae* are limited to maladministration in the activities of EU institutions, bodies, offices or agencies. The Ombudsman cannot investigate complaints of maladministration in the activities of the EU courts acting in their judicial role. The limitation of the Ombudsman's competences to investigation of maladministration of only EU institutions, bodies, offices or agencies is very disappointing since complaints regarding maladministration by national bodies pursuant to or in violation of EU law are extremely important and often vital for ordinary people. This limitation has been recognised by the EU Ombudsman. According to the Ombudsman in 2010, 50 per cent of complaints were outside the Ombudsman's mandate because they concerned the activities of national authorities.¹⁸⁸⁸ In order to assist EU citizens the EU Ombudsman works in close co-operation with national ombudsmen.

The Ombudsman may make investigations on his/her own initiative as well as in response to complaints from individuals, or submitted to him/her through members of the European Parliament, except if the alleged facts are, or have been, the subject of legal proceedings.

If the Ombudsman decides that a complaint is well founded, it is referred to the institution concerned, which has three months to express its views. After the expiry of that period, if the institution in question has not taken appropriate measures to resolve the matter, the Ombudsman must draft a report (which may include recommendations) and forward it to the EP and the institution concerned. However, the Ombudsman may then only inform the complainant of this process; the Ombudsman provides no legal remedy.

Even if the existence of the Ombudsman may seem superfluous taking into account that the competences of the EP Committee on Petitions and the Ombudsman overlap and that remedies for maladministration by EU institutions, bodies, offices or agencies are already provided by the Treaties, and are more adequate and more efficient than any resulting from the successful intervention of the Ombudsman, it is an important institution protecting rights of EU citizens and natural and legal persons residing in the EU. First, it helps them to find redress for maladministration by EU institutions. For example, in 2010, it was able to help complainants in almost 70 per cent of cases processed.¹⁸⁸⁹ Second, it has greatly contributed to the defining and development of ethical standards of good administration in EU institutions.¹⁸⁹⁰ Third, its existence certainly enhances the democratic nature of the EU.

22.10 The right to use one's own language in correspondence with EU institutions, bodies, offices and agencies

Article 24(4) TFEU provides that every citizen of the EU has the right to write to any EU institution, body, office or agency in one of the official languages of the EU (see [Chapter 3.1.2](#)) and to receive an answer in the same language. This provision seems to entail more than a simple right to use one's own language in correspondence with the EU institutions which, under Article 13 TEU, are required, *inter alia*, to serve the interests of EU citizens and therefore to communicate with them in a language that they

¹⁸⁸⁷ [1994] OJ L113/15. This decision was amended by Decision 2008/587/EC ([2008] OJ L189/587) which increased the powers to the EU Ombudsman.

¹⁸⁸⁸ See Annual Report on the Activities of the EU Ombudsman for the year 2010, <http://www.ombudsman.europa.eu> (accessed 3/3/12).

¹⁸⁸⁹ See the 2010 European Ombudsman Report available at <http://www.ombudsman.europa.eu/activities/annualreports.faces> (accessed 3/3/12).

¹⁸⁹⁰ See M. E. De Leeuw, "The European Ombudsman's Role as a Developer of Norms of Good Administration," (2011) 17 EPL, 349.

can understand. Indeed, Article 24(4) TFEU enhances the principle of transparency including the right of EU citizens to have access to information (see [Chapter 5.2.3](#)).

22.11 The evolving nature of EU citizenship

The most important aspect of Union citizenship is its dynamic character. So far, the rights of EU citizenship have mainly been developed by the ECJ, as evidenced by its broad interpretation of Articles 20 and 21(1) TFEU; by the Commission, which has taken many initiatives to strengthen and enhance the European identity and enable European citizens to participate in the EU integration process in an increasingly intense way,¹⁸⁹¹ and, by the EP, which, being the democratic servant of EU citizens, has always promoted their interests.

It is submitted that the development of the rights of EU citizens has been stifled by the requirements set out in Article 25 TFEU, relating to the adoption of measures aimed at adding to or strengthening the rights of EU citizens. Article 25 TFEU states:

“the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.”

As a result, any progress was, and remains, very slow. Under Article 25 TFEU the Council may only increase the list of rights granted to EU citizens and not reduce them.

It should be noted that under Article 21(3) TFEU specific legislative powers were granted to the Council with regard to the development of the social dimension of EU citizenship. This Article states that for the purposes of the removal of obstacles to the free movement of EU citizens:

“if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.”

The importance of Article 21(3) TFEU is that the ToL brought social security and social protection matters within the scope of EU citizenship. So far, EU social law has been mainly concerned with co-ordinating social security schemes and social protection measures to ensure that migrant workers, self-employed persons and EU citizens in general are not discriminated against in a host Member State. Under Article 21(3) TFEU, Member States may, if they so decide, create a social dimension of EU citizenship beyond that which has been developed by the ECJ in its case law under Article 21(1) TFEU (see [Chapter 22.3](#)). However, Article 21(3) TFEU is not as revolutionary as it may appear. This is because any measure adopted under Article 21(3) TFEU requires a unanimous vote in the Council and therefore Member States have ensured that no social welfare rights will be granted to nationals of other Member States solely on the basis that they are EU citizens (as opposed to being EU workers, or self-employed persons) when any Member State expresses its opposition. This is an important safeguard for the Member States which, only when acting all together, are competent to decide whether they can afford to extend certain social benefits to EU nationals who are not their own citizens.

In the removal of barriers to the free movement of EU citizens the Commission's reports on the application of the provisions concerning citizenship of the EU are vital. Under Article 25(2) TFEU

¹⁸⁹¹. See the Commission's "Europe for Citizens Programme 2007–2013" available at http://ec.europa.eu/citizenship/index_en.html (accessed 3/3/12).

the Commission is obliged to prepare such a report every three years and to forward it to the EP; the Council; and, the Economic and Social Committee. The Commission 2010 Report¹⁸⁹² recommending 25 actions has resulted in most of them being implemented.¹⁸⁹³ In order to make EU citizenship more relevant to citizens, the Commission launched a broad public consultation in 2012 on problems faced by EU citizens when exercising their rights. The consultation will serve as a basis for preparing an actions programme for the 2013 Report. The Commission also proposes to designate 2013 as “The European Year of Citizens” and to organise awareness events and promote citizen-related policies throughout the Year.

RECOMMENDED READING

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¹⁸⁹². The report is available at: http://ec.europa.eu/commission_2010-2014/redirecting/factsheets/index_en.htm (accessed 3/3/12).

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PROBLEM QUESTION

John, and his son Jeremy, both Austrian nationals, moved from Austria to Germany 10 years ago. Recently, they have encountered the following problems:

- A. In January 2009 John acquired German nationality by naturalisation, the acquisition of which resulted in the automatic loss of his Austrian nationality. The German authorities have since discovered that when John applied for German citizenship he did not mention that he left Austria because criminal proceedings had been commenced against him on account of alleged serious fraud. As a result of their discovery, the German authorities intend to withdraw the naturalisation on the ground that it was acquired by deception. If this occurs, John will become a stateless person (i.e. he will be without any nationality).
- B. In November 2009, Jeremy, aged 22, met Nadia, a citizen of Barbaria (a fictitious country), who had arrived in Germany in June 2008 and immediately applied for political asylum. In February 2010, Nadia's application for political asylum was definitively refused and a deportation order was issued against her requiring her to leave Germany within seven days. In March 2010, Jeremy married Nadia. When in June 2010 Nadia applied for a residence permit in Germany as the spouse of an EU citizen working and residing in Germany, her application was refused, on the ground that, by reason of the deportation order, Nadia was staying in Germany illegally at the time of her marriage. In June 2012 a deportation order was made against Nadia. In July 2012 Nadia was deported to Barbaria.
- C. John wants his daughter Anna, aged 24, and her son James aged four, both Jamaican nationals residing in Jamaica, to join him in Germany. He has been supporting them financially for many years.

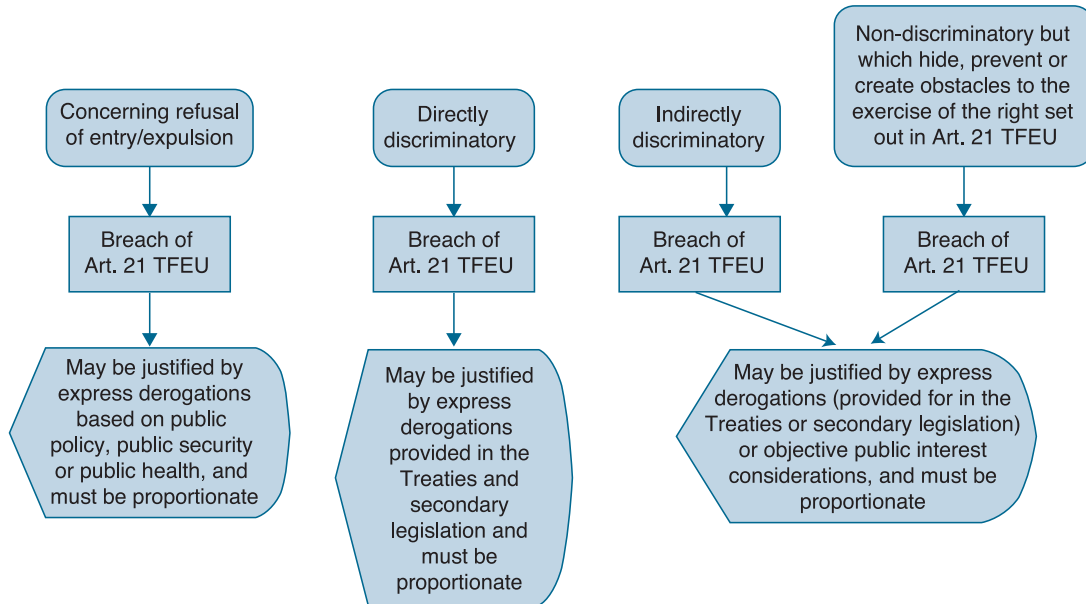
Advise John and Jeremy as to the application of EU law on EU citizenship on each aspect of the situations described above.

ESSAY QUESTION

Critically assess the contribution of the ECJ to the development of the concept of EU citizenship.

AIDE-MÉMOIRE

National rules prohibited under Article 21 TFEU



The right of family members of EU citizens to be admitted to the territory of a host Member State provided they do not fall under derogations based on public policy, public security, or public health.

MANDATORY ADMISSION (ARTS. 3(1) AND 2(2) OF DIRECTIVE 2004/38)	DISCRETIONARY ADMISSION (ART. 3(2) OF DIRECTIVE 2004/38)
<ol style="list-style-type: none"> Spouse, but marriage must not be of convenience. Registered partner, irrespective of sexual orientation, when partnership was registered in a home Member State and when the host Member State treats registered partnerships as equivalent to marriages. Direct descendants of an EU citizen, or an EU citizen's spouse (or a registered partner subject to point 2 above). They must be under 21 years of age or dependents. Direct ascendants who are dependent on an EU citizen or his/her spouse, or his/her registered partner (subject to point 2 above). 	<ol style="list-style-type: none"> Family members, other than those whose admission is mandatory, if: <ul style="list-style-type: none"> They are dependent on either an EU citizen, or an EU citizen's spouse, or registered partner (this is subject to recognition by a host Member State of registered partnerships) in a country from which they wish to come; They are members of the household of an EU citizen in a home Member State; They have a serious health condition requiring personal care by an EU citizen. Partners, irrespective of their sexual orientation, who are in a durable relationship with an EU citizen. This must be duly attested.