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FOREWORD

Two Challenges for EU Workers: the Public Sector and Family Members

Jean Monnet Professor ad personam Elspeth Guild, Radboud University, Nijmegen, Netherlands

It is a pleasure to present this second issue of the Online Journal on free movement of workers within the European Union. Although free movement of workers is one of the founding freedoms of the EU, its realisation in practice still raises contentious issues in both public and private law.

In this second edition, we turn to two issues of central concern to EU workers who are using their free movement rights: the right to employment in a host Member State's public sector for EU workers and the right to family life with family members in the host state.

Access to employment is at the heart of workers' rights across the EU. In his article, Professor Ziller outlines the special duty of good faith on Member States' authorities to ensure full compliance with the rights of EU workers from other Member States in the public sector particularly in times when job creation in this area may be an important strategy to reduce unemployment.

Regarding the second issue, it is clear from the cases which national courts refer to the CJEU that the treatment in host Member States of third country national family members of EU national workers is contentious in some states. Although EU legislation insists on the centrality of the right of workers to be joined by their family members in any host Member State, practices vary across the Member States. Where the family members are third country nationals, Member State concerns about abuse of rights often arise resulting in differential treatment of these family members in comparison with those who hold the citizenship of a Member State. To clarify some of the issues, Dr Cholewinski examines the EU definition of family members entitled to accompany or join workers moving within the EU and the challenges they face. Dr Wray focuses specifically on the situation of the children of migrant workers and their rights, including as these affect their parents. Both these articles provide invaluable new perspectives on one of the key issues of concern to EU workers.

We also would like to draw attention to the fact that the European Commission is currently assessing the application of EU rules on freedom of movement for workers and the possibilities of adopting new initiatives in this area. In this framework, the European Commission is launching a public consultation to which citizens, public authorities and any organisation with an interest in free movement of workers are invited to participate. The public consultation will be online on the website of DG Employment, Social Affairs and Inclusion from 17 June to 12 August 2011 at:

http://ec.europa.eu/social/main.jsp?catId=699&langId=en&consultId=8&visib=0&furtherConsult=yes&preview=cHJldmlld0VtcGxQb3J0YWwh

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ABOUT THE AUTHORS

Jacques Ziller

Professor of European Union Law at the University of Pavia, he has been teaching at Paris 1,

Panthéon-Sorbonne University, France, and at the European University Institute, Florence, Italy. He is a specialist of European Union and Comparative law. Specialised in research and training for senior civil servants in the fields of comparative public administration and management and also in the field of European affairs and regional integration when working as a lecturer and later an associate professor at the European Institute of Public Administration (IEAP/EIPA-Maastricht, The Netherlands, 1986-1989) and Director of research and publications at the International Institute of Public Administration (IIAP, Paris, France, 1992-1995). Chief Editor of the Revue française d'Administration publique from January 1992 to September 1995.

Ryszard Cholewinski

Ryszard Cholewinski is Migration Policy Specialist in the International Migration Programme of the International Labour Office. Prior to joining the Office, he was Senior Migration Policy and Research Specialist in the International Organization for Migration in Geneva (2005-2010) and Reader in Law at the University of Leicester. He has written widely on international labour migration, the human rights of migrants, and various aspects of European Union law and policy relating to migration. He is author of *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford, Clarendon Press, 1997) and, more recently, co-editor of a special issue on "Human Rights and Mobility" for the *Refugee Survey Quarterly* (Vol. 28, No. 4, 2009).

Dr Helena Wray

Dr Helena Wray is Senior Lecturer in Law, Middlesex University, London. She has taught public

law, legal system and immigration law for many years and has published widely on immigration law and policy, particularly in relation to family migration, in academic journals and textbooks. She is joint editor of the Journal of Immigration, Asylum and Nationality Law, the only peer reviewed UK immigration law journal, and, in October 2011, will publish *A Stranger in the Home*: *Regulating Marriage Migration into the UK* (Ashgate). Before becoming an academic, Helena worked as a lawyer in the City of London, leaving to become a university teacher and to study for a Ph.D at London University. She also has a longstanding and active interest in the provision of legal advice within local communities.

Free Movement of European Union Citizens and Employment in the Public Sector

Jacques Ziller, Professor of European Union Law at the University of Pavia (jacques.ziller@unipv.it)

The article is based upon the Report written by the Author at the beginning of 2010 for the European Commission which wanted to investigate the current state of play in the national legislation, the reforms undertaken since 2005 and the way the legislation is applied in practice in order to implement the right to free movement of workers in the public sector of EU Member States: http://ec.europa.eu/social/main.jsp?langId=en&catId=457&newsId=956&furtherNews=yes.

1. Introduction

The issues of free movement of workers in the Member States' public sector differ from the more general issues of free movement of workers in EU law.

In EU law, Member States have a specific position due to the fact that they are the parties to the EU treaties. As such, Member States have specific duties and rights – especially under the principle of sincere cooperation of Art. 4 TEU –, which they have negotiated, signed and ratified, whereas private persons are simply the addressees of duties and rights which the Member States agreed to set down in the treaties and EU legislation. For EU law the concept of Member State is not limited to State authorities in the formal sense of constitutional law, but extends to all public authorities, including regional and local authorities as well as autonomous public bodies. Public authorities in the Member States have furthermore a dual function. In both functions they are bound by the duties of Member States, especially by the duty of sincere cooperation.

First, public authorities have the powers to act as regulators of employment in the public service according to the Member States' constitutional rules, through the adoption of legislation and regulations applying to workers in the public sector (as well as in the private sector); as such they have a number of duties deriving especially from Art. 45 TFEU on free movement of workers and from the EU legislation that is implementing it. These duties may be summarised as being the obligation to eliminate sources of direct and indirect discrimination between their own nationals and other EU citizens – with the proviso of Art. 45 (4) (see hereunder) –, the duty to ensure enforcement of EU law by all the public authorities, the duty to protect EU citizen's rights deriving from the treaties and the Charter – which include the duty to give grounds and provide for remedies, and liability for breach of EU law.

Second, public authorities also act as employers. Contrary to private employers, which are not an authority of the Member State, public authorities are considered as an expression of the Member State not only when acting as regulators, but also as employers. Even if a failure to fulfil the obligations imposed upon Member States by EU law is to be attributed to an autonomous public authority, the Member State is liable. This is also true if the public authority acts as an employer, not as regulator. The neutrality of EU law towards the internal organization of Member States, usually known as the principle of "*organizational and procedural autonomy of the Member States*" means,

for instance, that public authorities have the right to choose freely between a career system or post based system for their civil service; to choose between different recruitment systems; to make policy choices in order to ensure attractiveness of public sector employment; and to make policy choices when using the exemption of Art. 45 par 4 TFEU etc. The principle of organisation and procedural autonomy does not imply however that Members States and their authorities are entirely free in their choices on organisation and procedure: they have to take into account the principles of EU law such as non discrimination, the duty to give reasons and to provide for judicial review, and the right to free movement and residence of EU citizens.

The importance of public sector employment in the EU labour market is indicated by statistics on the scope of the public sector in Member States: the public sector covers from 12 % to more than 33 % of the total employment in EU Member States. The relevant statistics are not easy to handle, as there is no common European definition of employment in the public sector, employment in public administration, employment in the civil service, etc. for statistical purposes. This is due mainly to two factors. First, national statistics tend to be assembled in most countries on the basis of formal legal definitions of the civil service, public administration and the public sector. Second, the methods used in different Member States to compile and aggregate statistics on public employment also differ, and are often not updated on a yearly basis. These two reasons make it difficult to compare data from one Member State to another, and it is therefore advisable to refrain from such comparison in assessing compliance to EU law. It is also advisable to be extremely cautious in using 'best practices' on a comparative basis for policy recommendation. With these proviso in mind, it is however useful to look at statistical data in order to get an idea about the impact of limitations to free movement of workers in the public sector on the whole of the EU labour market.

Public employment in EU Member States

	Public	% of total
Belgium	905 500	20.6%
Bulgaria	627 600	26%
Czech Republic	1 003 900	19.90%
Denmark	922 900	32.30%
Germany	5 699 000	14.30%
Estonia	155 500	23.70%
Italy	3 611 000	14.45%
Ireland	373 300	17.70%
Greece	1 022 100	22.30%
Spain	2 958 600	14.60%
France	6 719 000	29%
Cyprus	67 100	17.60%
Latvia	320 100	31.90%
Lithuania	430 800	33.30%
Luxembourg	37500	12%
Hungary	822 300	29.20%
Malta	46 900	30.70%
Netherlands	1 821 600	27%
Austria	476 900	11.80%
Poland	3 619 800	26.30%
Portugal	677 900	13.10%
Romania	1 723 400	18.40%
Slovenia	263 400	31.10%
Slovakia	519 200	22.80%
Finland	666 000	26.30%
Sweden	1 267 400	33.90%
United Kingdom	5 850 000	20.19%

The table is based upon employment statistics of the International Labour Organisation (ILO), which I have used in order to get country by country indications. The column "Public" contains in most cases the total number of workers in the entire public sector, including public enterprises, or in some cases only the government sector: ILO data are not the same from one country to another. The column '% of total' means 'percentage of public employment in total employment'. Most of the data are for the year 2008, but for some countries, only older data are available.

This article is based upon the Report which I have written at the beginning of 2010 for the European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities([1]). The Commission wanted to investigate the current state of play in the national legislation, the reforms undertaken since 2005 and the way the legislation is applied in practice in order to implement the right to free movement of workers in the public sector of EU Member States. The Report is based upon the information given by Member States' authorities in response to questionnaires addressed to them by the European Commission in 2009; upon the reports written by the Network of experts in the field of free movement of workers established by the European Commission, which are published together with the Member States' comments([2]); upon information collected by Member States' authorities in the framework of the Human Resources Working Group, which is a working party of the EUPAN([3]). The Report further relies on information which I gathered in specialised literature (law journals, handbooks and monographs, as well as specialised databases and documents available in research centres and on the Internet)([4]). This article summarises the analysis of issues presented in the Introductory Chapter of the Report (*Section* 2), as well as the main findings (*Section* 3) presented in Part I of the Report which also contains my recommendations, which are not taken up here. Part II of the Report consists in country files in which I tried to summarise the situation with respect to free movements of workers in each of the 27 Member States. *Section* 3 of this paper is based upon these country files.

([1]) Available on the Website of the European Commission, Employment, Social Affairs and Inclusion at http://ec.europa.eu/social/main.jsp?langId=en&catId=457&newsId=956&furtherNews=yes (site address on 1 June 2011).

([2]) http://ec.europa.eu/social/main.jsp?catId=475&langId=en (site address on 1 June 2011).

([3]) EUPAN is an informal network of the Directors General responsible for public administration in the Member States of the European Union and the European Commission: http://www.eupan.eu/3/26/ (site address on 1 June 2011).

([4]) EU law literature is mainly dealing with the criteria developed by the ECJ for the application of the exception of article 45 (4). There is only little comparative literature on civil/public service, dealing with the issue of free movement of workers in the public sector: see AUER A., DEMMKE C., POLET R., La Fonction Publique dans l'Europe des Quinze – Réalités et perspectives, Maastricht, Institut Européen d'Administration Publique, 1996.; BOSSAERT D., DEMMKE C., NOMDEN K., POLET R., La Fonction Publique dans l'Europe des Quinze – Nouvelles tendances et évolutions, Maastricht, Institut Européen d'Administration Publique, 2000; CLAISSE A. & MEININGER M.-C., Fonctions publiques en Europe, Paris, Montchrestien, 1994; MAGIERA S. & SIEDENTOPF H. (eds.), Das Recht des öffentlichen Dienstes in den Mitgliestaaten der Europäischen Gemeinschaft, Berlin, Duncker & Humblot, 1994; ZILLER J., Egalité et Mérite – L'accès à la fonction publique dans l'Europe des Douze, Bruxelles, Bruylant, 1988; ZILLER J., Administrations Comparées – Les systèmes politico-administratifs de l'Europe des Douze, Paris, Montchrestien, 1993.

2. The issues of free movement of workers in the public sector of EU Member States

The link between citizenship and social market economy established in the treaties (especially in art. 3 (3) TEU) has a specific dimension when it comes to employment in the public sector of Member States, due to the special responsibilities of public authorities towards citizens in the good functioning of the EU's internal market and in the area of freedom, security and justice. A number of provisions of the EU Treaties and Charter of Fundamental Rights underline that free movement of workers is a fundamental principle of European Union law, as a corollary to the right to move and reside freely within the territory of the Member States. These provisions are Art. 3 TEU, which states the objectives of the EU, Art. 45 - *Freedom of movement and of residence* of the Charter, as well as Art. 20 and 21 TFEU on EU citizen's rights, and Art. 45 TFEU on the freedom of movement of workers.

As a consequence of the fundamental character of the freedom of movement of workers, any limitation of, or exception to the principle has to be interpreted in a strict manner, according to well established rules of interpretation of legal documents. Any exception or limitation to the free movement of workers has to be compatible with the functioning of the internal market and maintaining the EU's area of freedom, security and justice without internal frontiers. The limitation in Art. 45 (4), according to which its provisions "*shall not apply to employment in the public service*" thus cannot be meant to place the public sector outside of the scope of the freedom of movement of workers and EU citizens right to free movement and residence. There is however no EU legislation specific to the limitations deriving from Art. 45 (4) TFEU, and therefore the only authoritative guidance as how to understand is to be found in the ECJ's case law. This case law includes a big number of rulings which help defining the notion of worker, what has to be considered as discrimination based upon nationality or an obstacle to the free movement of workers, and the exact meaning of the limitations deriving from Art. 45 (4).

With the entry into force of the Lisbon Treaty on 1 December 2009, special attention is being given in the Treaties to the principles of mutual respect and of sincere cooperation between the EU and its Member States. These principles, as well as the

principle of conferral, according to which "*competences not conferred upon the Union in the Treaties remain with the Member States*", were already well established in the framework of the EC treaty and the case law of the ECJ.

Particularly important to the issues linked to free movement of workers in the public sector is the combination of the principle according to which the EU "*shall respect national identities" of Member States "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government*" as well as "*their essential state functions*", and the principle that "*Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*". A good illustration of how the first of these principles interacts with the freedom of movement of workers in the public sector is given by the ECJ in the *Groener* judgment of 1989([5]) (point 19), where the ECJ said that in the circumstances of the case such a requirement was acceptable because: "*The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language*". The ECJ added: "*However, the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member State*". Applying this reasoning to the circumstances of the case, the Court further said (point 20): "*The importance of education for the implementation of such a policy must be recognized. Teachers have an essential role to play, not only through the teaching which they provide but also by their participation in the daily life of the school and the privileged relationship which they have with their pupils. In those circumstances, it is not unreasonable to require them to have some knowledge of the first national language.*"

The ECJ's judgement in the *Groener* case does not mean that a language requirement for access to a post in the public service is necessarily always compatible with Art. 45 TFEU. The purpose of such a requirement may not be to by-pass the principle of free movement of workers, it has to be a genuine and legitimate policy purpose. Furthermore, the proportionality test needs to be applied by the relevant authorities and the courts, taking into account the specific circumstances of each case.

The wording of Art. 45 (4) according to which its provisions "*shall not apply to employment in the public service*", has to be examined in the light of the dual citizenship – EU and Member State – which has been established by the Maastricht treaty. When the text of Art. 45 TFEU was written in the EEC treaty in 1957 (Article 48), all Member States had provisions in their domestic law – sometimes enshrined in their constitution – according to which their citizenship or nationality was a condition of access to their civil service or public administration; this easily explains why they agreed on the limitation to free movement of workers as expressed in Art. 45 (4) TFEU. In most Member States, access to the civil service or public administration is being considered as a political right linked to citizenship, in the same way as electoral rights. With the Maastricht treaty, Member States decided to extend electoral rights to EU citizens by giving them the right to vote at local elections in other Member States than their own one: they did not suppress the limitation expressed in Art. 45 (4) TFEU, for which principles for interpretation had been established in the case-law of the ECJ.

The principles for the interpretation of Art. 45 par 4 TFEU have been developed by the ECJ in 1982; they were not contradicted by the innovations linked to the establishment of EU citizenship. On the contrary, the principles are being confirmed by the concept of dual citizenship introduced by the Maastricht treaty. Indeed the principles set by the ECJ illustrate the idea that EU citizenship does not replace national citizenship, while it guarantees the right to move and reside freely in the Union and especially the free movement of workers.

2.1. The Applicability of Free Movement Rules to the Public Sector

The public sector of Member States is not exempted from the application of rules and principles ensuring free movement of workers: every national of an EU Member State has, as a matter of principle, the right to work in another Member State (with the exception in some very specific cases of transitional arrangements in the years following accession of new Member States).

([5]) Judgment of 28/ 11/ 1989, Groener against Minister for Education and City of Dublin Vocational Education Committee, case 379/87 (ECR 1989, p. 3967).

The concept of "*worker*" is not defined in the Treaty, which uses it in *Chapter* I of its Title III (*Free movement of persons, capitals and services*), Art. 45 to 48. It has been interpreted by the ECJ as covering any person who (i) undertakes genuine and effective work (ii) under the direction of someone else (iii) for which he/she is being paid. Civil servants and employees in the public sector are workers in the sense of Art. 45 TFEU, hence the rules on free movement of workers in principle apply also to them. The provision of Art. 45 (4) TFEU, according to which it "*shall not apply to employment in the public service*" only means that certain posts in the public sector may be reserved to the nationals of the relevant Member State. The ECJ has developed a jurisprudence which includes principles for the application of Art. 45 (4) (see hereunder).

In practice, most of the posts in the public sector cannot be reserved to nationals, because they do not correspond to the aforementioned criteria; there are also many posts that a given Member State opens by own decision to others than its nationals. For both types of posts, the rule is that no discrimination may be made in recruitment, working conditions and human resource management, which would be based upon the nationality of a candidate to a post or of the holder of the post. Furthermore there should be no obstacle to the free movement of workers due to legislation, regulations or practice, unless it is duly justified by imperative grounds of general interest and in conformity with the principle of proportionality.

Some detailed rules for the application of free movement of workers in the public sector are to be found in EU legislation on free movement of workers – especially *Regulation* 1612/68([6]) – and free movement of persons – especially *Directive* 2004/38([7]) – and in the ECJ's case law on the interpretation of EU legislation and of the relevant treaty provisions.

Any discrimination based upon the nationality of EU citizens is prohibited by the Treaty and relevant legislations, with the exception of the possibility for Member States to reserve some posts to their own nationals. This means that any EU citizen has a right to:

- take up and pursue available employment in the public sector of another Member State than his(her) own, with the same priority as nationals of that State (Regulation 1612/18 Art. 1 (2) and Art. 3);

- be treated in the same way as nationals of the Member State in the public sector of which they are working.

As a consequence EU law forbids any legislation, regulation or practice reserving specific aspects of remuneration – including supplements of any kind –, promotion, advantages linked to working conditions, access to vocational training, or social benefits or tax advantages linked to work etc., to the nationals of a specific Member State, or giving priority to nationals of one Member State (*Regulation* 1612/68 Art. 7). The right to equal treatment in accessing and pursuing employment applies not only to EU citizens, but also to their spouse and children under the age of 21 even if they are not EU citizens (*Directive* 2004/38 Art. 23 and 24).

The only exceptions are the possibilities to reserve certain posts to its own nationals by a Member State for recruitment or promotion (Art. 45 (4) TFEU and *Regulation* 1612/68 Art. 8, (see *Section* 1 e) and to exclude non nationals of participating in management structures of public bodies (*Regulation* 1612/68, Art. 8).

It is also forbidden to apply any preference based on nationality for dismissal, as well as reinstatement or re-employment.

The principle of non discrimination on grounds of nationality applies not only to direct discrimination, i. e. to legislation, regulations and practices which are based upon the nationality of a candidate to a post or the holder of a post in the public sector, which are necessarily linked to a characteristic of the worker indissociable from his/her nationality. The principle of non discrimination also applies so-called 'indirect discrimination', i.e. measures instituting or maintaining a differentiation according to Member States which is not linked to the nationality of the relevant person. The

([6]) Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257/2, of 19 October 1968, English special edition: Series I Chapter 1968(II) P. 0475.

([7]) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/ EEC,75/35/EEC,90/364/EEC, 90/365/ EEC and 93/96/EEC, OJ L 158/77 of 30 April 2004.

prohibition of indirect discrimination and of obstacles to free movement of workers is not only protecting EU citizens from other Member States than the host Member State: it also protects a Member State's own citizens who make use of the right to free movement and later return to their country of origin.

A special mention has to be made of language conditions. A language requirement cannot be considered as necessarily linked to a characteristic indissociable from nationality, in other words, a language requirement cannot be the source of a direct discrimination. It might however be an indirect discrimination or an obstacle to free movement, as there are more than 23 different official languages in the EU Member States. Contrary to other potential obstacles to free movement, language requirements are taken into account expressly in EU legislation, which considers them as legitimate under certain conditions.

As a matter of principle, professional qualifications and skills, professional experience, seniority and the like, which have been acquired in another than host Member State, have the same value as those acquired in the host Member State, if they are equivalent in content. As far as equivalence is concerned, two situations may occur. *First*, there may exist EU legislation that has to some extent harmonised conditions the for access to employment or to advantages or benefits having a link with employment, or which have set rules for the recognition of qualifications as for instance *Directive* 2005/36 on the recognition of professional qualifications. In such a situation, the relevant provisions of the directive have to be applied. The transposition and application of *Directive* 2005/36 is not specific to the public sector. *Second*, if there is no relevant EU legislation for the type of employment sought or pursued – such as, for instance, employment in the sectors of transport or general administration – Member States' authorities are required to assess in an objective way whether the seniority, professional experience, skills or other, which have been acquired in another Member State correspond to what is required by its national legislation or regulations. A mere formal aspect, like for instance the denomination of a function, may not be taken into consideration in order to conclude to the absence of equivalence between what has been acquired abroad and what is needed according the host Member State's law.

It is possible for the Member State's authority to require the candidate or holder of employment to demonstrate that he/she has acquired the missing experience, knowledge or skills before taking service or obtaining a change in his/her working conditions; this is only admissible if the person's qualification or experience does not correspond with the content of relevant national legislation or regulations, or corresponds only partially to them. In many Member States, access to, and working conditions in the public sector, are set in detail in laws and regulations, without necessarily taking into account the fact that conditions of access or working conditions might be an obstacle to free movement. Professional experience and/or seniority is often either a formal condition for access to a recruitment competition in the public sector, or additional merit points are awarded for it during such a procedure (which places candidates at a higher position on the final list of successful candidates). The ECJ has been asked to judge whether such conditions are admissible([8]). According to these judgements, previous periods of comparable employment acquired in another Member State must be taken into account by Member States' administrations in the same way as applies to experience acquired in their own system. Further details about the application of this case law are given in the *Communication from the Commission on Free movement of workers* from 2002, (point 5. 3)([9]).

It results from Art. 45 (3) TFEU that indirect discrimination or obstacles to free movement are admissible if they result from "*limitations justified on grounds of public policy, public security or public health*". Such limitations are subject to the application of the principle of proportionality: they have to be appropriate in order to secure the specific Member States' interest of public policy, public security or public health; they have to be necessary in order to secure

([8]) See amongst others the Judgments of the ECJ of 23/ 02/ 1994, Scholz against Opera Universitaria di Cagliari and Cinzia Porcedda, case C-419/92 (ECR 1994, p. I-505); 15/ 01/ 1998, Schöning-Kougebetopoulou against Freie und Hansestadt Hamburg, case C-15/96 (ECR 1998, p. I-47); 12/03/1998, Commission against Greece, case C-187/96 (ECR 1998, p. I-1095); 30/11/2000, Österreichischer Gewerkschaftsbund, case C-195/98 (ECR 2000, p. I-10497); Judgment of 30/ 09/ 2003, Köbler, case C-224/01 (ECR 2003, p. I-10239); 12/05/2005, Commission against Italy, case C-278/03 (ECR 2005, p. I-3747); C-205/04: Judgment of 23/02/2006, Commission against Spain, case C-205/04 (ECR 2006, p. I-31); 26/10/2006, Commission against Italy, case C-371/04 (ECR 2006, p. I-10257).

([9]) Communication from the Commission, Free movement of workers – achieving the full benefits and potential, Brussels, 11.12.2002, COM(2002) 694 final.

the said interest, and there should not be another way to secure the same interest while having a lower impact on free movement.

As far as professional experience and seniority conditions are concerned, the ECJ has not accepted until now any of the justifications put forward by Member States in the framework of references for preliminary ruling submitted by national courts or infringement procedures. Member States have been presenting arguments relying on the specific characteristics of employment in their public sector, such as the fact that recruitment was done as a matter of principle by open competition; the wish to reward loyalty; differences in teaching programmes; differences in career structures; reverse discrimination that would harm their own nationals; difficulties in making a comparison; the principle of homogeneity of civil service regulations. In the relevant cases, the justifications either were not presented according to a clear, coherent and convincing argumentation, or they did not meet the requirements of the principle of proportionality.

In some cases the ECJ considers that the policy purposes put forward by a Member State are not covered by the concept of imperative grounds of public interest, which summarizes the indications of Art. 45 (3) and 52 (1) (on the freedom of establishment), i. e. "*grounds of public policy, public security or public health*". It has to be taken into account that most language versions – to start with the Dutch, French, German and Italian versions, which were the first original versions of the EEC Treaty where they first appeared –, use a more restrictive wording than the apparent meaning of 'public policy' – which is only clear to specialised lawyers – namely 'public order' (openbare orde, ordre public, öffentliche Ordnung, ordine pubblico), hence the notion of "*imperative*" grounds used by the ECJ.

2.2. The Exemption of 'Employment in Public Administration' in Art. 45 (4) TFEU

As indicated earlier, Art. 45 (4) TFEU states that "*The provisions of this Article shall not apply to employment in the public service*". In the absence of any specific directive or regulation that would have established a common understanding of what the Treaty mentions as "*employment in the public service*", the ECJ was eventually called to set criteria in this respect.

The English language wording of Art. 45 (4) can be misleading, due to the words "*employment*" and "*public service*". The other language versions, to start which French, German and Italian, as well as Dutch, which were the official languages of the EEC Treaty in 1957 make this wording clearer, but only to some extent. "*Employment in*" has the same meaning as the German "*Beschäftigung in*", but the French version says "*emplois dans*", and the Italian version "*impieghi nella*" which would be better translated by "*posts in*". EU institutions, applying the principle that exceptions to the rule have to be interpreted in a strict way, have always understood 'employment in' as meaning 'posts in', as such an interpretation is limiting the scope of the exception. The ECJ has indirectly faced this issue for the first time in its judgement of 12 February 1974 in *Sotgiu*([10]). The German Federal Court of Labour had asked the ECJ whether having regard to the exception provided for in Art. 45 (4) "*workers employed in the public service of a Member State by virtue of a contract of employment under private law, may be excluded from the rule of non-discrimination*".

The ECJ replied (in point 6 of its judgement) that the provision of Art. 45 (4) was "*to be interpreted as meaning that the exception made by this provision concerns only access to posts forming part of the public services and that the nature of the legal relationship between the employee and the employing administration is of no consequence in this respect*". The first part of the quoted sentence showed that the ECJ understood indeed 'employment in' as meaning 'posts in', as indicated by the French and Italian versions of the treaty. Furthermore the ECJ recalled in the same judgement (under point 11) that "*the rules regarding equality of treatment, both in the treaty and in Article 7 of Regulation no 1612/68, forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.* "

As a logical consequence, in order to decide whether a nationality condition may be applied by a Member State for accessing employment in the public service, Art. 45 (4) needs to be applied in a post by post analysis, and not to the public service considered as a whole. If a post in the public service is not being reserved to its nationals by a Member State, either

([10]) Judgment of 12/02/1974, *Sotgiu against Deutsche Bundespost*, case 152/73 *(ECR 1974, p. 153).*

on the base of a choice of the public authorities, or because it is not a post covered by the limitation of Art. 45 (4), the provisions of Art. 45 (1 to 3) and the whole of EU law on free movement of workers (directives, regulations and ECJ case-law) are fully applicable to the said post.

Where the English version says "*the public service*", the French, German and Italian version all use the wording 'public administration' (administration publique, öffentliche Verwaltung, pubblica amministrazione). In the United Kingdom, the expression "*civil service"* is being used as a synonym to public administration, but it is never used for local government, whereas in Ireland and Malta the expression "*public service*" is being used for public administration, both for national and local government. In many Member States, the concept of "*public services*" is not applied to public sector workers, but to organisations carrying out specific public functions (even in the form of public enterprises). Insofar as the concept of 'public service' might have a broader scope than the concept of public administration, the already mentioned rules for interpretation require thus to use the concept of public administration.

The problem which the European Commission and the ECJ had to face is that what is conceived as being part of either the 'public service' or 'public administration' varies quite considerably from one Member State to another, and has already been varying quite a lot over time. If the EU were to accept that each Member State applies its own definition of employment in the public service, the meaning of Art. 45 (4) and thus the scope of application of Art. 45 would vary considerably from one Member State to another. Such a variation would be contrary to the principle of equality between Member States of Art. 2 (2) TEU. It would also be contrary to the principle of uniform application of EU law which is inherent to the system of the Treaties. Furthermore, if the EU were to accept that each Member State apply its own definition, some might be tempted to use the definition of employment in the public service in order to reserve a significant part of the employment market to their own nationals, in contradiction with the objective of Art. 3 (2 and 3) TEU which is the basis of the free movement of workers.

In the context which has just been explained, there is nothing astonishing in the fact that the ECJ formulated its own criteria of the concept of "*employment in the public service*" in order to be applied in all Member States in the same way and to restrict as much as possible the limitation to the principle of free movement of workers which follows from Art. 45 par. 4. In its ruling of 17 December 1980, Case 149/79 Commission v. Belgium([11]) point 10 the Court held that the provision of Art. 45 (4) "*removes from the ambit of Article [45] (1) to (3) a series of posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the state and reciprocity of rights and duties which form the foundation of the bond of nationality*".

The ECJ is basing its interpretation of Art. 45 (4) on what is the purpose of the limitation to free movement of workers: the presumption that there are posts in the public service which are based on "*a special relationship of allegiance to the state and reciprocity of rights and duties which form the foundation of the bond of nationality*". This is in line with the concept according to which citizenship of the Union shall be additional to and not replace national citizenship. In order to define the posts in question, the ECJ then followed the reasoning given by Advocate General Mayras in his opinion on case 149/79. On the basis of a comparative examination of the legislation and practice reserving access of public administration to national of the Member States, Mayras proposed as a synthesis two characteristics of the functions exercised by the holders of such posts: they involved i) the exercise of public authority, and ii) the safeguard general interest. Mayras was applying to Art. 45 (4) the usual functional approach to the interpretation of community law which had been developed since the early 1960s by the ECJ. The ECJ says posts which involve "*direct or indirect participation*". It means that participation is not only the result of decision making powers formally exercised by the holder of a post, but may also result from the influence he/she may have, for instance, in advising decision makers.

Where the English translation of the judgement says 'exercise of powers conferred by public law' the French language version, following Mayras' opinion says "*exercice de la puissance publique*". The German language version uses a concept which is well known in German law, of "*Ausübung hoheitlicher Befugnisse*",

([11]) Judgment of 17/12/1980, *Commission against Belgium*, case 149/79 *(ECR 1980, p. 3881)*.

which is equivalent to the French “*exercice de la puissance publique*”. These different wordings rather correspond to the idea of “*exercising public authority*” as a function, whereas “*powers conferred by public law*” wrongly seems to refer to the formal source of those powers. As a matter of fact in many documents of the EU institutions, “*public authority*” is being preferred to “*powers conferred by public law*”.

The ECJ says “*duties designed to safeguard the general interests of the state or of other public authorities*”. This makes it clear that the posts which may fall under the definition of Art. 45 (4) are not limited to State public administration or the administration of central government, but may also be posts in local or regional government or in autonomous public bodies.

Subsequent judgements of the ECJ have eventually made it clear that these two criteria are not alternative (exercising public authority or safeguarding general interests) but cumulative (exercising public authority and safeguarding general interests). In order to understand how to apply these criteria to a given case, it is necessary to always keep in mind the purpose of the exception, i. e. the need of “*a special relationship of allegiance*”.

The European Commission adopted a sector by sector approach to the review of Member States’ practices for employment in the public sector in the late 1980s. In 1988 the Commission launched an action which was focussed on access to employment in four sectors: bodies responsible for administering commercial services, public health care services, teaching sector, research for non-military purposes. It was followed by numerous infringement procedures and had the effect that the Member States undertook reforms opening their public sectors. Only three infringement procedures eventually had to be referred to the Court, which confirmed its previous jurisprudence, in 1996. Such an approach was not contradicting the “*post by post*” analysis inherent in the criteria set by the ECJ. It was based on the assumption that in a number of sectors, like health services, education and transport, the likelihood of a post to involve the exercise of public authority and safeguarding general interests was far lesser than for posts in general public administration. In these sectors, posts which may be reserved to nationals if they involve the exercise of public authority and safeguarding general interests are much less numerous than in general public administration. Conversely, posts in general public administration may not be reserved to nationals if they do not involve the exercise of public authority and safeguarding general interests.

3. Main findings of the report on the state of play in the Member States

On the basis of the documentation available for the Report I wrote for the Commission, I identified three broad series of issues which need attention in the Member States and which have to be taken into consideration by Member States authorities, by experts working on the issues of free movement of workers and by the EU institutions: understanding free movement of workers in the public sector; identifying and removing obstacles to free movement of workers in the public sector; and understanding the functional approach to Art. 45 (4) TFEU. In this *Section* I will not give specific examples, as their choice might induce a distorted image of Member States’ compliance, and as the purpose of the Report and of this paper is by no means ‘blaming an shaming’; details on Member States’ compliance are to be found in Part II – Country files – of my Report.

3.1. Understanding the Consequences of Free Movement of Workers in the Public Sector

One of the problems with the documentation which was available to me was that very often only some of the relevant legislation, regulations and practice are identified in the documents, literature and responses to questionnaires. The reason of this lack of comprehensiveness lies with the concept of free movement of workers in the public sector itself, which has some outstanding features when compared with the more general concept of free movement of workers.

First, the public sector differs in an important manner from the private sector when it comes to free movement of workers.

As already mentioned in *Section* 2, for the purpose of free movement of workers, Member States’ authorities have a dual function, acting as regulators of employment in the public sector and also as employers. When trying to assess whether all the necessary is being done in a Member State in order to facilitate the achievement of the Union’s tasks, it is not sufficient to take into account general legislation and regulations applicable to employment in the public sector. All public authorities in a Member State need to be taken into account in examining the outcome of their regulatory functions, as well as their behaviour as public employers.

A comprehensive examination of public authorities activities is difficult in the Member States due to the fragmentation of the public sector. Horizontal fragmentation, i.e. fragmentation in different levels of government, has increased in the last decades in many Member States due to decentralisation, devolution, regionalisation etc. Vertical fragmentation is a normal consequence of the functional specialisation of public sector employers. Vertical fragmentation within the overall public sector appears in a differentiation between the functions of public administration and those of public enterprises; fragmentation within non commercial government activities may be due to the existence of bodies which are formally separate from the State, or the government of the level they are pertaining to; a third type of vertical fragmentation has developed over the two last decades, with the establishment of so called "*regulatory agencies*", or "*independent administrative authorities*"; a fourth type of vertical fragmentation is due to the development of so called "*executive agencies*"; a fifth type of vertical fragmentation is due to the traditional separation of ministries and government agencies according to policy specialisation.

From the point of view of EU law, the degree of autonomy of a public authority towards central government is irrelevant. As long as a regulatory activity of a public authority is concerned, or its activity as a public employer, the Member State is liable in case of non compliance of this activity with EU law.

Second, workers in the public sector are usually distributed in different legal categories. Some public sector workers are employed entirely according to common labour law, on the basis of contracts and collective agreements, as is usually the case with public enterprises. Some others are employed according to a very specific system of civil service, based upon legislation and regulations which differ both in form and substance from labour law, contracts and collective agreements. Some other workers in the public sector are partly submitted to specific legislation and regulations and partly to general labour law, contracts and collective agreements. The variety of systems from one Member State to another makes it hardly possible to compare the situation of public sector workers in a general way. There is no generally applicable correspondence between the form of applicable law (public or private, legislation, regulations or collective agreements, etc.) and its content.

Available documentation indicates that there is not a single Member State where all public sector workers are submitted to the same legislation and regulation; most of the documentation concentrates on the more specific civil service or public service regulations, without giving a comprehensive overview of the content of law and practice relevant for all different types of workers of the public sector. A full assessment of the situation with regard to free movement of workers needs a thorough examination of all the categories of public employment.

Third, available documentation indicates that in Member States and in literature there seems sometimes to be a somewhat too narrow perspective of the scope of free movement of workers in the public sector.

In some cases, the impression is that attention focuses only on the issues regarding citizens of other EU Member States who work or want to work in the host Member State, forgetting about the fact that also the host Member State's own citizens are beneficiaries of free movement. If they have made use of – or intend to make use of – their right to free movement as citizens, they become subject to EU law. Hence they benefit from the prohibition of discriminations which are indirectly based upon nationality (like the country where a specific experience has been acquired) and of obstacles to free movement of workers which cannot be justified by imperative grounds of general interest and in conformity with the principle of proportionality.

In other cases, available documentation gives the impression that public authorities or literature base their analysis on the assumption that if a post in public employment may be reserved to nationals according to Art. 45 (4) TFEU, the given post is totally out of the scope of EU law. Such an assumption is mistaken. First, as mentioned earlier, if the candidate to, or holder of a post which may be reserved to nationals is indeed a national of the host Member State, and if he has made use – or intends to make use – of his right to free movement, EU law on free movement of workers is applicable to his / her situation. Second, Art. 45 (4) contains an authorisation to reserve posts to nationals in certain circumstances, not an obligation. If a Member State decides to open up access to such posts to non nationals, for whatever reason, the exception of Art. 45 (4) is not any more applicable to such posts.

3.2. Identifying and Removing Obstacles to Free Movement of Workers in the Public Sector

Potential sources of discrimination and obstacles to free movement of workers in the public sector are being given special attention in the *Country files* and in *Chapter 4* of my Report. On the whole, available documentation does not point to an important number of clauses in general legislation and regulations which may be considered as such as prohibited obstacles to free movement of workers in the public sector. However, different sources indicate that there are indeed a number of obstacles to free movement of workers in the public sector in law and practice of the Member States.

First, *mutual recognition of professional experience*. Complaints to the European Commission, petitions to, and questions from, the European Parliament, as well as references for preliminary ruling to the ECJ have in the last two decades revealed the existence of specific issues of free movement of workers in the public sector linked to the recognition of professional experience raised. On the whole, available information does not allow making general statements on the existence or not of obstacles due to the requirement of professional experience. There are some specific cases where a legal provision is clearly an obstacle to free movement of workers. What is most often lacking in Member States is a provision in the relevant legislation or regulations that establishes or confirms that professional experience acquired in other EU Member States has to be taken into account on the same footing as professional experience acquired in the host Member State– whether by citizens of other EU Member States or by the host Member State's own nationals.

Second, *portability of working periods*. Complaints to the European Commission and petitions to the European Parliament as well as references for preliminary ruling to the ECJ have in the last two decades also revealed the existence of specific issues of free movement of workers in the public sector linked to the recognition of working periods accomplished in other Member States. Here again, available information does not allow to make general statements on the existence or not of obstacles due to taking into account seniority, and what is most often lacking is a provision that establishes or confirms the portability of working periods, i.e. that seniority acquired in EU Member States in situations similar to those which are relevant in the host Member State has to be taken into account on the same footing as professional experience acquired in the host Member State– whether by citizens of other EU Member States or by the host Member State's own nationals.

Third, language requirements. It is only natural that a language requirement exists for work in the public sector, but there are only rarely precise indications in legislation and regulations about the level of language required; or about the procedure for assessment of language knowledge. What is missing most in the available documentation is information on practice, in order to assess the proportionality of the language level required to the functions exercise, or the purpose of a language requirement if it is linked to a specific policy.

Fourth, *qualifications, skills and pensions*. Issues of professional qualifications which are needed to be entitled to exercise some professions and issues related to pension rights are clearly very important in order to fully allow for free movement of workers, in the public sector as in the private sector.

The issue of entitlement to exercise professions falls outside of the scope of the investigation asked by the European Commission, as it is specially dealt with in other frameworks. There are however specific issues in the public service, which are being dealt with in cases where there are specific procedures in which the professional skills or diplomas play a role in access to certain posts or for working conditions.

Fifth, *other issues*. Apart from the issues relative to professional experience, seniority and language requirements, and from the issues of professional qualifications for regulated professions related to pension rights, only few other specific issues emerge from the documentation that was available for my Report. The issues related to pension rights rare not dealt with in the Report, as there has been a recent reform *Regulation* 1408/71([12]), replaced as of 1 May 2010 by *Regulation* 883/2004([13]).

([12]) Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ L 14/2 of 5 July 1971(Consolidated version – OJ No L 28/1 of 30. 1. 1997

([13]) Regulation No 883/2004 of the European Parliament and of the Council, on the coordination of social security systems, OJ L 166/1 of 30 April 2004 as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council, on the coordination of social security systems, and determining the content of its Annexes, OJ L 284/43 of 30 October 2009.

In some Member States, the combination of training and competitions to access posts in the public service may generate hurdles for EU citizens which have made use of their right to free movement.

In most Member States, access to employment in the public service is usually open to EU citizens and EEA or Swiss citizens, not to their family members having a third country nationality. This is a question which needs to be considered, as Directive 2004/38 EC *on the right of citizens to move and reside freely* provides for equal rights for EU citizens and their family.

In some Member States, there seems to be a residence requirement for access to a post. A residence requirement for accessing a post, if it has to be fulfilled at the moment of application would be in breach of EU law. A residence requirement for exercising a function is a different issue: a requirement of residence which mentions the territory of the Member State would be contrary to free movement, at least for post which may not be reserved to nationals.

If the formal status of civil servant cannot be granted to non nationals, this might be considered as an indirect discrimination based upon nationality, even in the absence of difference in the content of working conditions. In order to assess whether such a provision is compatible with EU law, its purpose has to be examined: is it justified by imperative grounds of general interest and in conformity with the principle of proportionality?

If there is legislation, regulations or practice relative to secondment in public sector posts, there would be an issue of compliance with EU law if the possibility to receive seconded workers from the public or private sector were limited to the host Member State.

Last but not least, the issue of burden of the proof has to be mentioned here as a transversal issues relevant for all requirements for access or working conditions. Whereas it is only logical that burden of the proof rests on the candidate or worker when it comes to producing indispensable certificates, diplomas etc., I think that there should not be requirements for proof that put a higher burden on workers who make use of their right to free movement than on non mobile workers. If the situation is complicated, the procedure for examination of evidence should be organised in such a way that it does not constitute a specific obstacle to free movement. When it comes to determine whether access to a specific advantage, benefit of right may be limited, the burden of the proof that such a limitation is consistent with EU law should lie with the employer.

3.3. Understanding the Functional Approach to Posts Reserved to Nationals According to Article 45 (4) TFEU

As mentioned above in *Section* 2 of this paper, Art. 45 (4) TFEU provides that "*The provisions of this Article shall not apply to employment in the public service*" and criteria established by the ECJ in order to determine if a post may be reserved to nationals are that a post involves: i) direct or indirect participation in the exercise of public authority and ii) duties designed to safeguard the general interests of the state or of other public authorities.

Since the mid eighties, almost all Member States undertook to modify their legislation and regulations on access to public employment in order to adapt them to the definition which has just been recalled. The process of adaptation has sometimes encountered a temporary resistance, probably mainly because it implied changing some long established rules, but it shows that Member States' authorities now support the ECJ's interpretation.

Apart from a few cases where there is *prima facia* non compliance with EU law, available information points to the fact that more needs to be known about practice in order to assess a single Member States' situation. Such an assessment of practice is especially difficult due to the fragmentation of public sector employers which has been already mentioned.

It is undeniable that Member States have undertaken efforts in order to limit the posts which they reserve to their nationals and make them comply with the EU law criteria of participation in the exercise of public authority and duties designed to safeguard the general interests of the state or of other public authorities.

On the other hand, one may think that in all Member States there may still be posts reserved to nationals which do not comply with these criteria. This is due to some extent to the fact that the criteria set up by the ECJ cannot be applied in a mechanical way and therefore always leave some room for appreciation for the relevant authorities. It is also due to the fact that Member States' authorities have modified their legislation incrementally, in order to avoid open

conflicts with EU law, but very often without rethinking about the main issue: is there a need for a special loyalty bond which is necessarily linked to nationality in order to exercise certain functions in the public sector? EU institutions leave it to the Member States to appreciate the necessity of such a loyalty bond, and from a legal point of view this might be considered as an expression of the respect of Member States' identity.

4. Conclusion — Reform and Coming Trends: Public Sector Reform and Free Movement of Workers in the Public Sector

In most Member States, there have been reforms of public sector employment rules in order to ensure compliance with free movement of workers in the public sector. Most of these reforms have consisted in opening up access to employment in the public sector to EU citizens, whereas it was previously reserved to nationals. In some Member States there have also been more specific reforms of legislation and regulations on access to public employment and on working conditions in public employment, in order to eliminate obstacles to free movement which had appeared due to complaints to the European Commission or references for preliminary rulings to the ECJ. It seems that only rarely such reforms have been undertaken spontaneously by Member States; often they were the consequence of an infringement procedure started by the Commission or of a judgement of the ECJ. On the basis of available information there is no reason to think that this will change in the coming years, as long as Member States do not set up specific monitoring systems in order to ensure compliance with the principles of free movement of workers in the public sector not only in legislation and regulations, but also in practice.

Parallel to these specific reforms aimed at complying with EU law, public employment reforms have been going on in a number of Member States in the two or three last decades. In many cases, these reform lead to more or less de-regulation of public sector employment, sometimes in a rather radical way, by replacing legislation and regulations as a source of staff regulations by collective agreements. This being said, quite a number of Member State keep their traditional civil service system, most often based on special public law regulations, while adapting them to new trends in public management.

Deregulation may lead to the suppression of some existing clauses in legislation and regulations which might be the source of obstacles to free movement; but this does not mean that deregulation is the better way to grant full freedom of movement to workers in the public sector. It may even be the contrary: deregulation means that potential obstacles to free movement will be mainly the result of discretion exercised by public employers. If there are not appropriate rules for reason giving and systems of appeal, there is a danger that deregulation leads to more infringements. Furthermore, if there are no appropriate monitoring systems within Member States, the information function which is usually embedded in general legislation and regulations is at risk of disappearing. Hence deregulation needs a special effort of Member States'_ authorities in issuing general information and guidelines on free movement of workers.

Incremental reform, on the other hand, may well be a good way to adapt employment in the public sector to the needs of free movement. In order to facilitate such adaptations, specific procedures are needed in the reform process in order to use the opportunities of reform at the right moment. Agencies and offices involved in public service reform therefore need to give special attention to questions of free movement of workers in the public sector.

Defining family members of EU/EEA nationals who are third-country nationals and addressing their legal situation in host EU Member States

Ryszard Cholewinski, International Labour Office*

This article lays out the EU law governing the definition of family members and the entry, residence and legal situation of third-country family members of EU/EEA nationals as well as some of the key challenges relating to the proper application of EU rules, with reference to the findings of the report of the independent Network of Experts on the Free Movement of Workers in the EU (2009-2010).

1. Introduction

European Union (EU) free movement law applies to all EU/European Economic Area (EEA) nationals who move in order to exercise their right of free movement and residence in a Member State other than that of which they are a national and to their family members (as defined in Directive 2004/38/EC([1]) – hereinafter "EU Citizens Directive") who accompany or join them. Family members who are third-country nationals have derivative rights under EU free movement rules, with the result that national foreigners' legislation is not applicable to them in respect of their entry, residence and legal situation in the EU Member State where the EU citizen with the primary right of residence is working, or on their return with the EU citizen to his or her Member State of origin.([2])

This article lays out the EU law governing the definition of family members and the entry, residence and legal situation of third-country family members of EU/EEA nationals as well as some of the key challenges relating to the proper application of EU rules. It also refers to some of the findings of the recent report (2009-2010) of the independent Network of Experts on the Free Movement of Workers in the EU (hereinafter "Network Report")([3]) and a number of European Commission reports on free movement of workers.

2. Definitional Issues

Under Article 2 of the EU Citizens Directive, a family member of a EU citizen is defined as

- the spouse;
- the partner (including of the same sex) with whom the EU citizen has contracted a registered partnership on the basis of the legislation of a Member State, but only if the legislation of the host Member State (i.e. to which a EU citizen moves in order to exercise his/her rights of free movement and residence) treats registered partnerships as equivalent to marriage and in

(*) This article is based on a presentation made to a Conference on Lithuania-Poland Free Movement, Vilnius, 28 October 2010. The views expressed are solely those of the author and do not necessarily reflect or engage the views of the International Labour Office (ILO).

([1]) European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158/77; OJ 2004 L 229/35 (Corrigendum) [hereinafter "EU Citizens Directive"].

([2]) See Cases C-370/90, *Singh* [1992] ECR I-4265 and C-291/05, *Eind*, judgment of 11 December 2007. According to the European Commission, "the reason why EU law covers such returning migrants is that preventing them from relying on EU law against their Member State of origin could discourage nationals of a Member State from exercising their right to free movement in the same way as migrant workers from other Member States". European Commission, *Reaffirming the free movement of workers: rights and major developments* (COM(2010) 373 final, 13 July 2010) at p. 6.

([3]) Annual European Report on the Free Movement of Workers in Europe in 2009-2010, December 2010, available on the European Commission's website at http://ec.europa.eu/social/main.jsp?catId=475&langId=en.

accordance with conditions laid down in the relevant legislation of the host Member State; the direct descendants (children) who are under the age of 21 or are dependants and those of the spouse or partner as defined above; and

- the dependant direct relatives in the ascending line (i.e. parents, grandparents).

Under Article 3(2) of the EU Citizens Directive, Member States are also under the obligation to *facilitate* the entry and residence of

- any other family members (there is no restriction as to the degree of "relatedness") irrespective of their nationality, not falling under the Article 2 definition, who, in the country from which they have come, are dependants or members of the household of the EU citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the EU citizen; and

- the partner with whom the EU citizen has a (de facto) durable relationship, duly attested.

While Member States clearly have a discretion in laying down criteria that are to be taken into account in deciding whether to grant the rights under the Directive to other dependant family members and partners with whom the EU citizen has a durable relationship, they are required to carefully examine each case in the light of the objective of maintaining family unity, as specified in Recital 6 of the Directive.([4])

The European Commission has commented on the concept of marriage in the context of the EU Citizens Directive. Forced marriages are not protected by international or EU law, but they need to be distinguished from arranged marriages, which the Commission defines as marriages "where both parties freely consent to the marriage, although a third party takes a leading role in the choice of partner",([5]) as well as from marriages of convenience. Abuse of rights and marriages of convenience are discussed further below. Member States are also not obliged to recognize polygamous marriages lawfully contracted in a third country, but they are still required to take due account of the best interests of children of such marriages.([6]) Where dependence is a requirement (i.e. dependant children over the age of 21, dependant direct relatives in the ascending line, and for "any other family members"), this is understood as the factual situation of material support for that family member being provided by the EU citizen or by his/her spouse/partner.([7])

The Network Report finds that registered partners do not benefit from free movement and residence rights in ten Member States,([8]) although durable relationships in two of these Member States are covered.([9]) The notion of "durable" in Article 3(2)(b), which is not defined in the EU Citizens Directive, differs according to the Member State in question. In four Member States (Denmark, Finland, France and the United Kingdom), this is interpreted as two years, whereas six months in sufficient in the Netherlands. However, in both Finland and the Netherlands, a relationship is "durable" irrespective of its actual duration if a child is born out of that relationship.([10]) With regard to the other family members listed in Article 3(2), three countries (Bulgaria, Czech Republic and Finland) afford them the same rights as those family members listed in Article 2(2), while the Netherlands now only facilitates the entry of Article 3(2) family members rather than providing for a ***right of residence*** which was the previous position.

([4]) The Commission observes that Member States have a certain degree of discretion under Article 3(2), but that they "do not enjoy unrestricted liberty in laying down such criteria". Further, "in order to maintain the unity of the family in a broad sense, the national legislation must provide for a careful examination of the relevant personal circumstances of the applicants concerned, taking into consideration their relationship with the EU citizen or any other circumstances, such as their financial or physical dependence, as stipulated in Recital 6". See European Commission, *Communication to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* (COM(2009) 313 final, 2 July 2009) at p. 6. Similarly, the Commission notes that "the requirement of durability of the relationship must be assessed in the light of the objective of the Directive to maintain the unity of the family in a broad sense". Ibid. at p. 4.

([5]) Ibid.

([6]) Ibid. The Commission underlines, ibid. at p. 5, that in implementing the Directive Member States must always act in the best interests of the child as provided for in the 1990 United Nations Convention on the Rights of the Child, UN General Assembly resolution 44/25 of 20 November 1989.

([7]) Ibid. at p. 5 with reference to Cases 316/85, *Lebon* [1997] ECR 2811, at para. 22 and C-1/05, *Jia* [2007] ECR I-1, at paras. 36-37.

([8]) Estonia, Germany, Greece, Hungary, Ireland, Latvia, Malta, Poland, Slovenia and Sweden.

([9]) Ireland and Malta.

([10]) A joint mortgage to buy a home should also be taken into account in establishing whether a relationship is durable. Commission Guidance on the Directive, above n. 4, at p. 4.

3. Reverse Discrimination in the light of the European and International Human Rights Framework

It is important to remember the generous nature of EU law's treatment of EU citizens' family members irrespective of their nationality when compared to national law, and other regional and international legal frameworks. The majority of national rules in Member States on family reunification applicable to the reunification of EU citizens (i.e. those who have not exercised free movement rights) with their family members from third countries are considerably more restrictive resulting in reverse discrimination which remains permissible under EU law even after the introduction of EU citizenship. For example, to join EU citizens in some of these Member States, family members have to pass integration tests abroad, which would clearly be prohibited under EU law if applied to the same persons who are family members of EU citizens exercising free movement rights because they would be deemed as constituting an unjustified obstacle to free movement.(11)

It is also important to remember, however, that restrictions on family reunification in EU Member States need to comply with existing human rights obligations at the regional level, not least Article 8 of the 1950 European Convention on Human Rights (ECHR)(12) on the protection of the right to respect for family and private life (as read also with the ECHR's non-discrimination provision, Article 14),(13) Article 19 of the 1961 European Social Charter (and its revised 1996 version),(14) and Article 12 of the 1977 European Convention on the Legal Status of Migrant Workers(15) in respect of those 11 countries that have ratified it.(16) International labour and human rights standards – ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143),(17) which has been ratified by a number of EU Member States,(18) and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of the their Families (ICRMW),(19) which has not yet been ratified by a single EU Member State –, while drawing attention to the importance of the family as a fundamental unit of society, nevertheless contain rather weak obligations on family reunification, only urging States' parties to "facilitate" it.(20)

While reverse discrimination remains possible under EU law, the Network's reporting has found that six Member States(21) have now "assimilated" their national family reunification rules with the more generous EU framework.

4. Entry and Residence Rights

EU law on free movement applies to third-country national family members of EU citizens exercising their rights to free movement the same rules that are applied to EU citizens with the exception of different rules on visa and residence documents. However, these differences in the rules and their application should not become an impediment to the movement of persons belonging to this group. These third-country national family members have the ***right to enter*** an EU Member State with a valid passport (Article 5(1)) and an entry visa (if the person concerned is a national of a third-country from which a Schengen visa or a national visa is required unless the third-country national in question already possesses a valid residence card). If an entry visa is required, third-country national family members also have the *right* to obtain it(22).

(11) However, see the recent preliminary reference to the European Court of Justice in Case 115/11, *Imran* questioning the compatibility with EU law of the Dutch integration test abroad.

(12) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, European Treaty Series (ETS) No. 5. The ECHR has been ratified by all 47 Council of Europe Member States, which include the 27 EU Member States.

(13) See also Protocol No. 12 to the ECHR (4 November 2000, ETS No. 177), which provides for a general prohibition on discrimination by any public authority. As of June 2011, Protocol No. 12 has been ratified by 18 States parties.

(14) European Social Charter, 1961, 18 October 1960, ETS No. 35; Revised Charter, 3 May 1996, ETS No. 163. All 27 EU Member States have ratified at least one of these versions of the Charter.

(15) European Convention on the Legal Status of Migrant Workers, 24 November 1977, ETS No. 93.

(16) Albania, France, Italy, Portugal, Moldova, Netherlands, Norway, Spain, Sweden, Turkey and Ukraine.

(17) The text is available from the ILOLEX Database of International Labour Standards at http://www.ilo.org/ilolex/english/index.htm.

(18) Cyprus. Italy, Portugal, Slovenia and Sweden have ratified ILO Convention No. 143. Norway, member of the European Economic Area (EEA), has also ratified it.

(19) UN General Assembly resolution 45/158 of 18 December 1990. As at June 2011, the Convention has been ratified by 44 States partie s.

(20) ILO Convention No. 143, above n. 17, Article 13 and ICRMW, ibid., Article 44.

(21) Belgium, Bulgaria, Hungary, Italy, Luxembourg and Spain.

(22) Commission Guidance on the Directive, above n. 4, at p. 6 with reference to Case C-503/03, Commission v. Spain, judgment of 31 January 2006, para. 42. The Commission, ibid. at p. 6, has also stated that the entry visa must be a "short-term entry visa" and that third-country national family members should not be required to apply for long-term residence or family reunification visas.

The authorities of the Member States must issue it free of charge, expeditiously, and on the basis of an accelerated procedure (Article 5(2), second indent). It is also possible to enter without a valid travel document provided the third-country national can corroborate or prove by other means that s/he is covered by the right of EU free movement and residence. This possibility is found in Article 5(4) of the EU Citizens Directive which reflects the judgment of the European Court of Justice's in Case C-459/99, *MRAX*([23]). Entry cannot be denied to the third-country national family member by virtue of the fact that s/he is reported in the Schengen Information System (SIS) without an individual assessment that the presence of the person concerned constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and thus justified on grounds of public policy or public security([24]).

While the rules on entry of third-country national family members are generally complied with in EU Member States, the Network Report observes that problems persist in some Member States with the issue of entry visas or when crossing the border. For example, issuing a visa in the Czech Republic can take up to 15 days,([25]) and the provisions of the Schengen Borders Code([26]) continue to be applied to this group of persons in Hungary in respect of their entry and the issuing of a visa. In the United Kingdom, third-country national family members of EU citizens who have applied for residence cards and then travel abroad while the application is outstanding are required to apply for an EEA family permit at a British diplomatic post abroad before returning to the country. While this permit is issued free of charge and on a priority basis, it also needs to be supported by evidence that the EEA national is in the UK exercising his/her free movement rights and that the relationship is as claimed, which the UK rapporteurs contributing to the Network Report view as "highly problematic" contending that it is not reasonable for many persons to make such applications while on holiday or a short business trip abroad.

With regard to the ***right of residence***, there are no conditions in the first three months (Article 6(2)), with the exception of the possible requirement (applicable to both EU citizens and their family members) to report their presence to the authorities within a reasonable and non-discriminatory period of time after arrival (Article 5(5)). If the residence is for more than three months, third-country national family members need to be issued with a residence card, which is a more stringent requirement than in respect of EU citizens who may or may not – depending on the Member State concerned – have to register their residence and have a residence certificate issued. The residence card (valid for up to five years) has to stipulate that it is a "Residence Card of a family member of a Union citizen"([27]) and be issued to third-country national family members no later than six months from the date on which the application is submitted (Article 10(1)) on the presentation of an exhaustive list of supporting documents, namely: a valid passport; a registration certificate or, in the absence of one, any other proof of residence in the host Member State of the EU citizen whom they are accompanying or joining; and documentary evidence of the relationship and/or dependency (Article 10(2)).([28])

Third-country national family members retain their right of residence in the event of the death of the EU citizen if they have been residing in the host Member State as a family member for at least one year before the EU citizen's death (Article 12(2)). or in certain other specific circumstances.([29])

([23]) Case C-459/99, MRAX [2002] ECR I-6591.
([24]) Case C-503/03, Commission v. Spain, above n. 22.
([25]) However, such delays would appear to be acceptable in the view of the Commission, which has specifically stated, ibid. at p. 6, that "delays of more than four weeks are not reasonable" by analogy with Article 23 of Regulation (EC) No. 810/2009 of the European Parliament and of the Council establishing a Community Code on Visas (OJ 2009 L 243/1), which stipulates that applications are to decided on within 15 calendar days and that this period may be extended up to a maximum of 30 calendar days in individual cases, and exceptionally to 60 calendar days if additional documentation is needed in specific cases.
([26]) Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2006 L 105/1 (as amended).
([27]) In its Guidance on the Directive, above n. 4, at p. 7, the Commission underlines that "the denomination of this residence card must not deviate from the wording prescribed by the Directive as different titles would make it materially impossible for the residence card to be recognised in other Member States as exempting its holder from the visa requirement under Article 5(2) [of the Directive]". The residence card must also be issued as a self-standing document and not in the form of a sticker in a passport. Ibid.
([28]) Ibid. See also EU Citizens Directive, above n. 1, recital 14.
([29]) They also retain this right in the event of divorce, annulment or termination of the registered partnership provided that the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or the third-country national family member has custody of the children; or the divorce, annulment or termination of the registered partnership is warranted by particularly difficult circumstances, such as having been the victim of domestic violence during the course of the marriage or registered partnership; or the third-country spouse or partner has the right of access to a minor child and that a court has ruled that such access must be in a host Member State for as long as is required (EU Citizens Directive, ibid., Article 13(2)).

After five years of continuous lawful residence with the EU citizen, third-country family members have an automatic right to permanent residence in the host Member State (Article 16(2)). Continuity of residence is not affected by temporary absences not exceeding a total of six months a year (Article 16(3)). Third-country family members are to be issued with a permanent residence card within six months of submission of the application, and the card is automatically renewable every ten years (Article 20(1)). Importantly, acquisition of permanent residence affords third-country national family members even greater protection against expulsion in that they can only be removed from the host Member State on serious grounds of public policy or public security.(30)

As with entry, these rules relating to residence appear to be generally complied with, although a number of challenges are identified in the Network Report. Delays in issuing residence cards and permanent residence cards continue to be a serious problem in a number of Member States, particularly in Cyprus and the United Kingdom.(31) For example, in Cyprus, it can take up to one year to secure an appointment to obtain a residence certificate, although Ministry of Interior officials claim the backlog is steadily being reduced. In the United Kingdom, residence applications remain outstanding beyond six months despite the introduction of new procedures. Conditions attached to the right of residence not foreseen in the EU Citizens Directive are still applied in some Member States. For example, in the Czech Republic, additional documentation than that listed in the Directive (e.g. photographs) is requested prior to issuing a residence card to third-country national family members. A more minor anomaly can be observed in respect of Austria and Poland where EU citizens and their family members are required to report their presence within three and four days of arrival respectively (in Austria, this rule applies to EU job-seekers; whereas in Poland it applies to EU citizens and their family members if not staying in a hotel or another place connected with work, education or medical treatment), which is questionable in the light of Article 5(5) of the Directive which emphasizes that the Member State discretion requiring the person concerned to report his/her presence in the territory is to be undertaken "within a reasonable and non-discriminatory period of time".

(30) EU Citizens Directive, above n. 1, Article 28(2).

(31) Delays have also been reported in Luxembourg.

5. Implications of the *Metock* Judgment(32)

The judgment of the European Court of Justice in Case C-127/08, *Metock* stated clearly that national immigration rules restricting the free movement of third-country national family members to those who had prior lawful residence in another Member State are incompatible with the text and aim of the EU Citizens Directive and with the objective of the internal market. The ruling attracted considerable criticism in some Member States, notably in Denmark, to the extent that there were even calls for an amendment to the Directive. Nonetheless, the Network Report has found that all Member States comply with the judgment in their national laws and that their national courts do not appear to have a problem in applying the decision. Specifically, those Member States which put in place provisions to require prior lawful residence of third-country national family members in accordance with their interpretation of the previous Court decision in Case C-109/01, *Akrich*(33) (essentially clarified in the *Metock* judgment) have amended them to ensure that their law and practice are brought in line with the *Metock* ruling.(34)

6. Abuse of Rights: Marriages of Convenience and Fraud

The four third-country national family members in *Metock* were asylum-seekers whose applications had been definitively refused and who were married to EU nationals, although it should be underlined that none of the marriages under consideration in *Metock* were considered as a "marriage of convenience". Indeed, they were all considered valid marriages, but with the common thread that prior lawful residence in another Member State could not be established. The Commission has suggested Member States make more use of Article 35 of the EU Citizens Directive, which is concerned with abuse of rights whereby Member States may adopt necessary measures to refuse, terminate or withdraw any right conferred by the Directive in case of abuse of rights or fraud, such as marriages of convenience.

(32) Case C-127/08, *Metock*, judgment of 25 July 2008.

(33) Case C-109/01, *Akrich* [2003] ECR I-9607.

(34) Austria, Denmark, Germany, Ireland, Finland, the Netherlands, and the United Kingdom.

Interestingly, the Commission stated in its 2008 report on the Directive that "despite its importance, Article 35 was not transposed by all Member States".(35) Marriages of convenience for the purpose of the Directive are defined as marriages "contracted *for the sole purpose* of enjoying the right of free movement and residence".(36) Importantly, the Commission has underscored that "a marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage", and, moreover, that "the quality of the relationship is immaterial to the application of Article 35".(37)

However, any measures withdrawing rights must also be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31 of the EU Citizens Directive. In its guidance note for better transposition and application of the Directive, the Commission has stated that

"Measures taken by Member States to fight against marriages of convenience may not be such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate rights. They must not undermine the effectiveness of [EU] law or discriminate on grounds of nationality."(38)

Moreover, investigations into suspected cases of marriages of convenience must be carried out in accordance with fundamental rights, in particular the right to respect for family and private life and the right to marry in Articles 8 and 12 of the ECHR and Articles 7 and 9 of the EU Charter of Fundamental Rights.(39)/(40)The Network Report has found that in most Member States fraud and abuse of free movement rules amounts to refusal, termination or withdrawal of a residence permit. However, proving "a marriage of convenience" is more difficult to achieve in practice especially in the context of the EU Citizens Directive's requirement that measures adopted to pursue this aim should be "proportionate". In this regard, the Network Report questions whether some of the administrative hurdles in Denmark concerning the forms of documentation required of Danish citizens returning home with their third-country national family members after exercising free movement rights and who seek to apply for a residence card for them in Denmark are realistic to deliver retroactively (e.g. evidence of the purchase of daily necessities in the host Member State).

7. Access to Employment under Equal Conditions with National Workers

EU citizens and their family members, including those from third countries, do not only benefit from entry and residence rights but also important economic and social rights while in the host Member State – which are elaborated in the EU Citizens Directive and Council Regulation (EEC) No. 1612/68 on free movement for workers within the Community.(41) Family members, irrespective of nationality have the right to work (i.e. access to employment or self-employment).(42)

(35) European Commission, *Report to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* (COM(2008) 840 final, 10 December 2008) at p. 9.

(36) EU Citizens Directive, above n. 1, recital 28. Emphasis added.

(37) Commission Guidance on the Directive, above n. 4, at p. 15.

(38) Ibid. at p. 15. The Commission, ibid. at p. 16, also laid out "a set of indicative criteria suggesting the possible intention to abuse the rights conferred by the Directive for the sole purpose of contravening national immigration laws" (original emphasis), to be considered possible triggers of investigation: the couple have never met before marriage; the couple are inconsistent about their respective personal details (e.g. circumstances of their first meeting); the couple do not speak a language understood by both: evidence of a sum of money or gifts handed over for the marriage to be contracted (with the exception of money or gifts given in the form of a dowry in cultures where this is common practice); the past history of one or both of the spouses contains evidence of previous marriages of convenience or other forms of abuse or fraud to acquire a right of residence; development of family life only after an expulsion order was adopted; and the couple divorces shortly after the third-country national in question has acquired a right of residence.

(39) Ibid. at p. 17. The burden of proof also lies with the Member State authorities seeking to restrict rights under the Directive. Ibid.

(40) Charter of Fundamental Rights of the European Union, 18 December 2000, OJ 2000 C 364/1 (as updated, 10 March 2010, OJ 2010 C 83/389

(41) Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on free movement for workers within the Community, OJ 1968 L 257/2.

(42) EU Citizens Directive, above n. 1, Article 23.

They are also afforded equal access to employment rights, trade union rights, vocational training and "social and tax advantages",[43] and their children have equal access to education in the host Member State,[44] including access to study grants.[45]

The Network Report observes that in most Member States no work permit is required to access the labour market both for EU citizens and their family members, including those who are third-country nationals. However, some legal and practical obstacles continue to exist. In Cyprus, third-country national family members who have been granted a visa valid for one year may apply for a work permit, which, however, is restricted to employment in a few sectors, primarily in agriculture. It would appear that in Estonia, family members of EU citizens cannot work within the first three months of residence because they first need to have obtained a temporary or permanent right of residence, which effectively means only once they have been issued with the residence card. In addition, there are also practical obstacles relating to language requirements. Finally, in the United Kingdom, third-country national family members who wish to pursue an economic activity are hampered by the lack of accurate information issued on behalf of the UK Border Agency, which results in employers not being aware of their right to work or third-country national family members themselves not being aware of it.

8. Conclusion

If this article had been prepared a number of years ago, it would have had to be far more critical of the position in EU Member States regarding in particular the implementation of the rights of entry and residence of third-country national family members of EU citizens. Moreover, the article would also have been clouded by the uncertainty created by the Court of Justice's ruling in *Akrich*, which led to the adoption in some Member States of restrictive provisions in their national law concerning the entry and residence of a particular category of third-country national family members. Fortunately, the Court of Justice departed from this restrictive approach in its judgment in *Metock* – re-affirming once again the importance of an expansive interpretation of EU free movement law – and even though this judgment was not welcomed in every Member State, all have nonetheless since complied with it. In the meantime and also since the European Commission reported on the EU Citizens Directive in December 2008, further progress appears to have been made in all Member States, old and new, in the proper implementation of the Directive as it applies to third-country national family members of EU/EEA nationals.

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[43] EU Citizens Directive, ibid., Article 24(1) and Regulation 1612/68, above n. 41, Article 7.

[44] Regulation 1612/68, ibid., Article 12. Moreover, the Court of Justice has ruled that Article 12 imparts an independent right of residence to children of EU workers as well as to their primary carers and cannot be made conditional inter alia on their having sufficient resources or comprehensive sickness insurance (Cases C-310/08, Ibrahim, judgment of 23 February 2010, and C-480/08, Teixeira, judgment of 23 February 2010).

[45] Joined Cases 389/87 and 390/87, Echternach and Moritz [1989] ECR 723. Equal access to study grants is only afforded immediately to family members of EU citizens who are working because EU citizens who are not economically active and their family members must have resided in the Member State for at least five years (i.e. prior to the acquisition of the right of permanent residence) in order to obtain maintenance aid in the form of student grants or student loans, which is a permissible derogation from the equal treatment principle in Article 24(2) of the EU Citizens Directive, above n. 1.

Teixeira and Ibrahim: Looking back, looking forward or looking inwards?

Dr Helena Wray, Middlesex University

This paper examines the cases of Ibrahim and Teixeira which found that Article 12 of Regulation 1612/68 has survived intact the implementation of Directive 2004/38, the Citizens' Directive. The outcome is that EU migrant workers' children who are in education and their 'primary carer' can remain in the Member State without being subject to conditions of self-sufficiency long after cessation of work or departure, death or divorce of the worker. The article discussed the specific findings in the cases and their broader ramifications.

1. Introduction

This article discusses two judgments delivered by the Court of Justice in February 2010, *Teixeira v Lambeth LBC and Harrow LBC v Ibrahim*.([1]) Both cases were referrals from the UK and, while the event that triggered each dispute was a claim for housing assistance to local councils, the underlying issue was the outer limits of retained or derived rights i.e. rights that derive from the primary right of an EU family member to exercise free movement rights in another Member State. Sometimes, what might be expected as the normal hierarchy of dependency is reversed. Instead of children acquiring rights because of their parents' economic activity, it is the parent who derives rights they would not otherwise have because of the child's own right to reside. The child thus becomes the "anchor" for the parents.([2]) Derived rights permit third country nationals to benefit from EU law provisions on family reunification that are more generous than the domestic regimes within Member States. They therefore challenge the ability of national government to restrict their entry and stay and highlight issues of reverse discrimination against EU citizens who cannot benefit from EU law.([3])

The next *section* of this article considers the legal basis for the claims in *Teixeira and Ibrahim*, Article 12 of *Regulation* 1612/68, and its relationship with *Directive* 2004/38/EC. It goes on to consider the application of the rights in Article 12 to the facts in these cases, the findings of the Court of Justice and the ways in which these mark an extension of derived rights. There follows a commentary on the decisions from various perspectives. The expansive but uncertain nature of the judgments is considered and the implications for the children of EU citizens and their carers. The article then discusses the question of permanent residence for those benefiting from the rights identified in the decisions and, finally, the decisions are considered in relation to the rights of other EU nationals exercising rights under *Directive* 2004/38/EC and the nature of EU citizenship. It concludes that, while the reasoning in the decisions was logical and linear, it leaves untouched the tension between the freedoms that attach to those, including third country nationals, who have even the most tenuous link with the exercise

([1]) Court of Justice judgments of 23 January 2010, Cases C 480/08 (*Teixeira*) and C 310/08 (*Ibrahim*).

([2]) Currie, S. (2009) 'EU migrant children, their primary carers and the European Court of Justice: access to education as a precursor to residence under community law' Journal of Social Security Law 16(2) 76-105, 80.

([3]) On reverse discrimination and family reunification, see Walter, A. (2008) Reverse Discrimination and Family Reunification (Nijmegen: Wolf Legal Publishers).

of free movement rights, and the position of EU citizens who cannot bring themselves within the ambit of such rights.

2. Article 12 Regulation 1612/68

Both cases centred on the meaning of Article 12 of *Regulation* 1612/68 and its relationship with *Directive* 2004/38/EC (The "Citizens" *Directive*"). *Regulation* 1612/68, passed in October 1968, was entitled "on freedom of movement of workers" and, according to its Preamble, its objective was:

> the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to move freely within the Community in order to pursue activities as employed persons subject to any limitations justified on grounds of public policy, public security or public health.

The Preamble also stated that:

> Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country.

Most of the *Regulation* is concerned with ensuring that EU workers have the same rights as nationals in pursuing opportunities for employment. However, three articles refer explicitly to family members. In acknowledging the rights of family members at all, these articles represented an advance on the Treaty provisions where family members were not mentioned. *Regulation* 1612/68 thus represented a significant step in the development of enforceable rights for family members.(4)

Article 10 provides that family members may install themselves with the worker subject only to a condition of appropriate family housing (according to local standards). Family members are defined in ways that were later reflected and expanded upon in *Directive* 2004/38/EC. Article 11 provides that where an EU national is pursuing activity in another Member State as employed or self-employed (an anomalous reference in the *Regulation* that otherwise refers only to employment), the spouse and children under 21 shall also have the right to take up employment even if they are not Member State nationals. The critical article for the cases discussed here is Article 12, which reads:

> The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.
>
> Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.

At first glance, article 12 appears no more demanding than any of the other secondary rights in the *Regulation*. However, a right to education "under the best possible conditions" is not the same as, for example, a right to reside with a family member as its value depends, to a far greater extent, upon its continuation even when the original justification has disappeared. A child cannot be successfully integrated, as the Regulations aims to achieve, if there is uncertainty about their continuing right to education. It is undesirable that children's education should be subject to disruption as their parents' circumstances change. Unlike other family reunification rights, the claim becomes more not less critical as children grow up and embark on cycles of public examinations or higher education. The full potential of the right was perhaps not appreciated at the time of implementation because, as Advocate General Geelhoed observed in his Opinion in *Baumbast*, at that time, working patterns and family life were relatively stable and the impact of globalisation was not foreseen.(5) The regulation was thus silent as to what should happen when the child no longer resided

(4) See Starup P. and Elsmore, M. (2010) 'Taking a logical step forward? Comment on *Ibrahim* and *Teixeira* European Law Review 35(4) 571-88 at 572.

(5) Opinion of Advocate General Geelhoed delivered on 5 July 2001, *Baumbast v SSHD* Case C 413/99, paras . 22-7.

with the worker parent or the parent was no longer a worker and it was these questions, among others, that formed the basis of the subsequent court decisions.

Creating a right to education therefore represented a potentially far-reaching step but its scope was left to the Court of Justice to decide in the light of the complex circumstances of actual lives. Each of the cases on article 12 prior to *Teixeira and Ibrahim* advanced the position incrementally and, taken together, established the right as a strong one. The right was found to survive the parent ceasing to be a migrant worker or leaving the Member State, even if the child initially accompanied the family back to the country of origin, establishing the right to education as existing independently once established.([6]) It is not confined to secondary school level education or vocational training but extends to those in higher and primary education.([7]) It requires equal treatment as regards fees and in the provision of social assistance such as grants.([8]) The right is not confined to children below the age of 21 and subsists even if the child no longer resides with the worker, is no longer a dependant or the worker has died.([9]) It is exercisable regardless of whether educational opportunities exist in the other Member State.([10]) It applies to children who are not themselves Member State nationals and the child's "primary carer", who may not otherwise have rights to remain in the Member State, has the right to continue to reside there even after divorce or departure of the other parent to facilitate exercise of the child's right to education.([11])

There were ambiguities, notably around the question of self-sufficiency. As students are entitled to maintenance grants, as found in *Echternach and Moritz*, self-sufficiency was arguably not a precondition. The issue was side-stepped in *Baumbast* where the family was regarded as self-sufficient despite the absence of private medical insurance and the question remained unresolved.([12])

Some limitations to the right were identified. The court in *Gaal* found that the child must reside in the Member State with a parent at a time when at least one of his parents resided there as a worker.([13]) This appears to be a slight gloss on the words in Article 12 of the *Regulation*, which only require the child to be residing at the same time as the worker. Theoretically, the care might be undertaken by another relative, a point pursued below. Certainly, the right does not arise if the parent, who no longer resides in the host state, last resided there as a worker before the birth of the child.([14]) Nonetheless, the potential scope for permitting the long-term residence of children and their carers is substantial and open-ended in a way that did not apply to the workers themselves, whose right to reside could eventually be revoked.([15])

Each of the pre-*Teixeira and Ibrahim* judgements was based on the particular facts before the court at the time but also built on judgments made previously under different facts. For example, *Baumbast* followed the principle established in *Echternach and Moritz* that the right to education survived the worker's departure although, unlike in *Echternach and Moritz*, these children were still in primary education and were presumably more adaptable.([16]) *Baumbast* went on to recognise the derivative right of carers as was appropriate for these young children who, self-evidently, could not care for themselves. While, as the court found in *Teixeira*, it would not necessarily apply to an adult child in education, the same principle would presumably apply to older minor children. Moreover, the *Baumbast* decision was reached also on issues of proportionality rather than strict conformity to conditions in secondary legislation.([17]) Article 8 rights will also play a critical role in determining rights to remain, particularly where younger children are involved.([18]) Cumulatively, and given the broad definition of "worker" in EU law,([19]) the cases interacted to create a very strong and enforceable right to education for the children of internal EU migrant workers that may bring with it rights attaching to their parents.

(6) *Echternach and Moritz v Minister for Education and Science* Cases C 389 and 390/87; see also Starup and Elsmore n.4 above at 573.
(7) *Baumbast v SSHD* Case C 413/99; *Commission v Belgium* Case C-42/87.
(8) Echternach and Moritz v Minister for Education and Science Cases C 389 and 390/87; Casagrande v Landeshauptstadt Munchen Case C-9/74.
(9) *Baumbast* v SSHD Case C 413/99; EC Commission v Belgium Case C-42/87; Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor *Gaal* Case C-7/94.
(10) *EC Commission v Belgium* Case C-42/87; *Echternach and Moritz v Minister for Education and Science* Cases C 389 and 390/87; *Baumbast v SSHD* Case C 413/99.
(11) *Baumbast v SSHD* Case C 413/99.
(12) *Baumbast v SSHD* Case C 413/99 para. 92.
(13) *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal* Case C-7/94 para. 27.
(14) *Brown v Secretary of State for Scotland* Case C 197/86.
(15) Currie n.2 above at 87.
(16) Starup and Elsmore n. 4 above at 575.
(17) Currie n.2 above at 81.
(18) *Carpenter v SSHD* Case C-60/00 and the discussion in Currie n.2 above 92-3.
(19) See, for example, *Lawrie-Blum v Land Baden-Wűrttemburg* case C-66/85; *Levin v Staatssecretaris van Justitie* Case C-53/81; *Kempf v Staatssecretaris van Justitie* Case C-139/85.

Yet, although the actual derived statuses of child in education and of carer were not difficult to engage, their content was not specifically provided for under the *Regulation* and its extent remained uncertain. At what point would a child's right to residence terminate, particularly if their entire education had been obtained within the Member State? Would a carer be entitled to work, to claim benefits or to gain permanent residence in due course? These questions were not resolved either by the *Regulation* or by the subsequent cases.

Regulation 1612/68 is concerned with workers, not with those who exercise other types of free movement rights. Parts of the *Regulation*, including Articles 10 and 11, were repealed by *Directive* 2004/38/EC (the Citizens' *Directive*) but not Article 12. The rights that Article 12 conferred on the children of workers (and their carers) that were not reproduced under the *Directive* therefore remained in independent existence after enactment of the *Directive*. The relationship between the *Directive* and the *Regulation* was made more complex by the fact that the *Directive* also conferred derived rights on the children of EU migrants and their carers that are both more expansive (as they apply not only to workers' families) and more restrictive (because the derived rights apply only in some circumstances).

3. Directive 2004/38 EC

Turning now to the *Directive*, rather confusingly, the relevant article is also Article 12, which provides at 12(3) that:

> The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

Article 12(3) applies only in the event of departure or death of the Union citizen, not if he stops exercising his rights within the Member State or divorces. It applies however to children of all Union citizens, not just workers as in Article 12 of the *Regulation*. It contains no requirement as to self-sufficiency either by the child or by the parent with custody.

It is only in the case of the death or departure of the Union citizen that the right to remain in education is not subject to criteria of self-sufficiency. Where education is not in question (Articles 12(1) and 12(2)) or where divorce is the reason for separation (Article 13), conditions of self-sufficiency apply. Cessation of activity is not covered at all. The central question that arose in both *Ibrahim* and *Teixeira* was whether the right of a worker's child to education and the retained right of the carer of such child remained subject only to Article 12 of the *Regulation*, with its liberal interpretation, or should be read in conjunction with the narrower provisions of Article 12(3) of the *Directive* and, if so, whether Article 12(3) was also subject to the conditions of self-sufficiency found elsewhere in the *Directive*. Those representing Ms Ibrahim and Mrs Teixeira argued that Article 12 of the *Regulation* stood alone and was not in any way qualified by the *Directive*. The UK and Danish governments, argued that *Directive* 2004/38 was now the sole source of rights of residence despite the failure to repeal Article 12 of the *Regulation*.([20])

4. The referrals in *Ibrahim* and *Teixeira*

Ms *Ibrahim* was a Somali national married to a Danish citizen, Mr Yusuf. Mr Yusuf arrived in the UK in Autumn 2002 and worked until May 2003. From then until March 2004 he claimed incapacity benefit. He was then declared fit for work after which he left the UK before returning in December 2006. It was accepted by the parties that, some time after stopping work in May 2003, Mr Yusuf ceased to be a "qualified person" for the purpose of EU law.

Ms *Ibrahim* arrived in UK in February 2003 with the approval of the immigration authorities. The couple had 4 children, 3 of whom came to the UK with their mother and the fourth was born there. She and her husband lived separately from the time he left the UK in March 2004. She did not work and was reliant on benefits. In January 2007, she applied for housing assistance for herself and her children. She was initially refused on the basis that she had no right of residence. The case made its way to the Court of Appeal who made a referral to the Court of Justice asking whether, in the circumstances of this family, i.e.:

([20]) Starup and Elsmore n.4 above 573.

- a non-EU national spouse and EU national children accompany an EU national worker to the UK;
- the children begin primary education;
- the EU national subsequently stops working and leaves the UK;
- the spouse and the children are not self-sufficient;

The spouse and children enjoy a right to reside under Article 12 of *Regulation* 1612/68 without having to satisfy the conditions of *Directive* 2004/38 and whether Article 12 of *Regulation* 1612/68 is subject to a self-sufficiency and sickness insurance condition.([21])

Mrs *Teixeira* and her husband were both Portuguese nationals. They arrived in the UK in 1989 and she worked until 1991. Her daughter, Patricia, was born in 1991, after which she worked only intermittently and was not working when Patricia started school. She relied on benefits when not working. The parents divorced but both remained in the UK. In 2005, a court ordered that Patricia should live with her father but have as much contact with her mother as she chose. In 2006, Patricia enrolled on a childcare course and, in 2007, at the age of 16, she went to live with her mother. Her mother then applied for housing assistance as a homeless person and was refused. In appealing, Mrs *Teixeira* relied on Article 12 of *Regulation* 1612/68. Although she was an EEA national, it was accepted, arguably wrongly, that she did not come within Articles 7 and 16 of *Directive* 2004/38, under which she would have had an independent right to reside.([22]) She therefore relied on her daughter's education as the anchor for her derivative claim.

In *Teixeira*, the Court of Appeal made similar enquiries about the effect of the *Directive* 2004/38 on A.12 of the *Regulation* although there were some significant factual differences.([23]) As it was assumed that Mrs *Teixeira* had no independent right to reside nor any claim to permanent residence, the question was whether her rights were confined to those in *Directive* 2004/38 or whether *Regulation* 1612/68 could apply and, if so, was it subject to conditions of self-sufficiency. Mrs Teixeira was not working when her daughter started school but had worked previously and also intermittently since then. Was this sufficient to trigger A.12 of the *Regulation* given that she was not employed at the time Patricia started school?([24]) She did not become the primary carer until Patricia was 15 and she was over 18 by the time of the decision. Patricia might have a continuing right to education but did Mrs Teixeira still derive a right to reside from her?

Despite the similarities in the two cases, they were not decided jointly and they were the subject of two opinions by different Advocates General and two judgements (although delivered on the same day and by an identically composed court). In essence, it was found in both that there had been no intention to use *Directive* 2004/38 to step back from the expansive meaning given to Article 12 of *Regulation* 1612/68 by the previous ECJ case law. Key points were:

- Article 12 of *Regulation* 1612/68, which contains the right to education, is not subject to the restrictions in *Directive* 2004/38. Article12 was left untouched by the *Directive* and not repealed. It therefore remains as a stand-alone provision and is not subject to the conditions that attach to the right of installation previously found in Articles 10 and 11 and now found in Articles 12(1), 12(2) and 13 of the *Directive*.
- Although the right under Article 12 of the *Regulation* only arises because of the parent's prior activity as a worker, once in existence, it is an independent right that does not depend on the parents' continuing activity. It arises when a child installs him or herself as the family member of an EU worker. This situation may arise on or after entry to (or birth) in the Member State. All that is required is that the child has lived with one or both parents in a Member State while at least one of them was a worker. Once acquired, the child's right remains even if the parents are no longer entitled to reside under EU law.

([21]) Reference for a preliminary ruling from Court of Appeal (Civil Division) (England and Wales) lodged on 11 July 2008 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* (Case C-310/08) (2008/C 247/13).

([22]) Mrs *Teixeira*'s position is discussed in 5.5 below.

([23]) Reference for a preliminary ruling from the Court of Appeal (Civil Division) (England and Wales) made on 7 November 2008 *Maria Teixeira v London Borough of Lambeth*, Secretary of State for the Home Department (Case C-480/08) (2009/C 32/23).

([24]) It is not explained why Mr Teixeira's employment record or other activity could not provide the basis for Patricia's right to education and Mrs Teixeira's derived right. We are told little about Mr Teixeira and can only assume that he did not qualify in any capacity.

- Therefore, that the parent subsequently becomes inactive or leaves the Member State, even before the child starts school, is immaterial.

- The right of the child to education implies a right of the child's "primary carer" to reside in order to facilitate the child's education. This right arises from Article 12 of *Regulation* 1612/68 itself and is therefore not subject to the constraints in the *Directive*. The primary carer is not subject to a requirement of self-sufficiency and sickness insurance. That the father in *Bambaust* happened to be self-sufficient was not material to the decision on derived rights.

- Attaining the age of majority does not end the right of the child to education as that is independent of age or dependency. In principle, the adult child is assumed no longer to need the presence of the family member but that is a factual situation to be assessed in each case and the right to reside of the parent can continue if the child still needs the presence and care of the parent to pursue or complete their studies.

5. Commentary

5.1. An Expansive Approach

While the legal reasoning in *Teixeira* and *Ibrahim* was logical, the implications are far-reaching and have the potential to create further tensions between Member States, on the one hand, and migrant workers and the Court of Justice on the other. These cases strengthen the ability of third country national family members of EU national workers (and only workers, a limitation discussed further below) to use EU law to continue their residence in a Member State even if the primary relationship ended after only a short period, if the period of economic activity was brief and the family remains totally reliant on welfare.

The unspoken issue, particularly in *Ibrahim*, was the relative ease with which the status of "worker", the necessary pre-condition of the subsequent rights, had been acquired. The brevity of Mr *Ibrahim*'s work record was not discussed although the referring court drew attention to the factual differences between the position of the Yusuf/*Ibrahim* family and of the parties to preceding cases.(25) As Starup and Elsmore point out, Mr Yusuf did not just work for only a brief period (about seven months) but he no longer resided with the family who were dependent on public support and he was not otherwise economically active.(26) To complete the unfavourable impression, Mr Yusuf claimed incapacity benefit after he stopped work until he was declared fit to work whereupon he left the UK although he later returned. While his story is the stuff of populist newspapers, the Advocate General in *Ibrahim* confined himself to observing that that Mr Yusuf's activity in the UK, although brief, was "effective and genuine" and that there was no indication that "either he or his spouse attempted to improperly or fraudulently take advantage of the provisions of Community law".(27) The court did not refer to the issue at all. Consistent with cases such as *Metock*, the court was not prepared to regard what might be considered by national governments as opportunism (although we don't know that in regard to this family) to be a barrier to the exercise of rights.(28)

Mr Yusuf's seven months' work in the UK resulted in an extended commitment by the UK government to his family, including a commitment to welfare support. Thus, the decision extends the ability of EU law to go far beyond the sorts of rights that Member States would choose to grant to the family members of its own nationals or of its most desired and highly skilled migrants. The critical right, the right to education, crystallises even if the children are not in school at the time of the activity. Indeed, only two of the children were of school age when he was working. One was apparently not even born until after Mr Yusuf stopped work and must presumably be excluded from the decision although neither the Advocate General nor the Court mentions this.(29)

The Court justified this expansive approach on the grounds that to do otherwise would compromise the aim of integrating the migrant workers' family.(30) In the opinion on Teixeira, the Advocate General pointed out that if 'every interruption or cessation of the migrant worker's employment … also resulted in the automatic loss of his children's right of

(25) *Harrow LBC v Ibrahim* [2008] EWCA Civ 386 [51].

(26) Starup and Elsmore n.4 above at 581.

(27) Opinion of Advocate General Mazàk delivered on 20 October 2009 *London Borough of Harrow v Ibrahim* Case C-310/08, para. 21.

(28) *Metock and others v Minister for Justice, Equality and Law Reform* Case C-127/08.

(29) *Harrow LBC v Ibrahim* [2008] EWCA Civ 386 para.8. This would appear to put the child outside the scope of the *Regulation* according to *Gaal*. The point is discussed further below.

(30) *Harrow LBC v Ibrahim* Case C-310/08 para. 43; Case C-480/08, para. 43.

residence and, accordingly, they were obliged to interrupt their education, there is a risk of disadvantage' and this would lessen the incentive to exercise rights of free movement.([31]) The underlying rationale for the decision in *Baumbast*, to which extensive reference was made in these cases, was that failure to permit children of EU citizens to complete education "might dissuade that citizen from exercising the rights to freedom of movement laid down in Article 39 EC and would therefore create an obstacle to the effective exercise of the freedom thus guaranteed by the EC Treaty".([32])

This is all true but obstacles may be of varying degrees of significance and yet the judgments are expressed in absolute terms. In an instance such as that of Mr Yusuf, the connection, in any real sense, with obstacles to the exercise of Treaty rights has become vastly attenuated. It is a matter of conjecture whether a worker in his position would really be discouraged from moving to another Member State because there is not an unconditional right for his infant children to complete their education in the company of the other parent after the parties' as yet unanticipated separation, unemployment, divorce or other disruption.

Of course, some people may well be that farsighted but it is something of a stretch. In practice, it is more likely that political, as against legal commentary, will take place in an altogether different context and the case will be taken to demonstrate the increasing gap between domestic and EU rights. At a time when national governments are decreasing the opportunities for legal migration, family settlement and access to welfare by migrants, the cases are likely to increase the tensions that arise from perceptions of "reverse discrimination" and EU "over-reach". As Starup and Elsmore say, "An overall perception of what the judgment means may thus be more profound than the actual niceties of the governing law – especially in host societies and local communities where "integration" is not required or sought after."([33]) Many may consider that someone like Mr Yusuf, who had apparently such a limited commitment to work, should not, in fact, be encouraged to move by the inducement of unlimited access to education and financial support for his family. That belief may be heightened when the full potential of the right is understood.

5.2. An uncertain obligation

Aspects of the obligation contained in the *Regulation* remain difficult to delineate even after *Teixeira* and *Ibrahim*. Certainly, the continuation of an independent right outside the *Directive* means that this latter is now of limited relevance in interpretation. According to its Preamble, the purpose of *Directive* 2004/38 was "to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens".([34]) If rights are to be strengthened, then the *Directive* should not have the effect of reducing the rights originally found in the *Regulation*, as Advocate General Kokott pointed out in the opinion on Teixeira.([35]) Yet, failing to incorporate Article 12 of the *Regulation* into the *Directive* means that there was no opportunity to establish its relationship with the other rights in the *Directive* nor its own limitations so that the aim of simplification was thereby defeated. Starup and Elsmore suggest that the unexpected outcome of *Baumbast*, which was decided after the *Directive* was first proposed but before it was finalised, led to some uncertainty in the drafting.([36]) Whatever the reason, while both *Teixeira* and *Ibrahim* have established that Article 12 of the *Regulation* lives on independently of the *Directive*, the consequence is that important areas of its application remain uncertain.

5.3. Children

Teixeira found that the right to education crystallises when the child is installed in the Member State at the same time as the EU national working parent. It is not necessary that the child actually cohabits with the worker nor that he or she is working at the moment that the child commences education. The right terminates when education is completed (although, as discussed below, many of these children may be entitled to permanent residence before that time). Where there are several children in a family, the retained right presumably ends when the youngest child finishes education or, in the absence of special circumstances, reaches majority.

([31]) para. 44).

([32]) Opinion of Advocate General Mazàk delivered on 20 October 2009 *London Borough of Harrow v Ibrahim* Case C-310/08, para. 23.

([33]) Starup and Elsmore n.4 above 582, emphasis in original.

([34]) *Directive* 2004/38 Preamble para. 3.

([35]) Opinion of Advocate General Kokott delivered on 20 October 2009 *Teixeira v Lambeth LBC* Case C-480/08, para. 56.

([36]) Starup and Elsmore n.4 above 575-6.

This may be a protracted process. In Mrs Ibrahim's case, the third child had not yet started school when Mr Yusuf stopped work. Ms Ibrahim can presumably reside at least until he finishes education or reaches his majority.

What of the Ibrahim child who was born after cessation? According to *Gaal*, he is not covered by *Regulation* 1612/68.([37]) However, his education would have started before the older children completed theirs. It seems harsh and inconsistent for that child's right to remain continuously in education to be contingent on the elder children's fortunes. Indeed, for the forward thinking migrant envisaging every possible turn of events, such a possibility seems as capable of deterring the exercise of Treaty rights as disruption to an as yet unconceived child who is fortunate enough to be born before work is terminated. There seems little rationality in requiring the younger child to undergo the upheaval of switching education systems that his elder siblings had avoided through the application of Article 12 of the *Regulation*. Combined with the right to permanent residence that may have been accrued by these elder siblings at that stage, it may even amount to a breach of article 8 ECHR, respect for private and family life.([38]) If the child is an EU national, the principle of equal treatment should also prevail and he may benefit from the combined effect of judgments in *Chen* and *Zambrano* so that he and his carer may remain.([39]) But even if he were not, it is difficult to see how, in the absence of criminality or other countervailing reason, he, or his carer, could realistically be removed given that the child has lived there since birth. There is thus potentially an open-ended category of children who, along with their carer, might claim the right to education and residence without regard to self-sufficiency on the basis that, at some stage in early childhood or even before birth, they or a sibling were present in a Member State while, but not necessarily resident with, one parent was working there.

([37]) *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal* Case C-7/94.

([38]) See 5.5 below on permanent residence.

([39]) *Zhu and Chen v SSHD* Case C-200/02; *Zambrano v ONEM* case C-34/09; the children here are in a *Chen* type situation as they are living in another Member State. However, while the issue of self-sufficiency in such cases has yet to be definitively resolved, the judgment in *Zambrano*, where the situation was purely internal, suggests that the direction of travel is away from requirements of independent support.

5.4. Carers

As *Ibrahim* demonstrated, it is not necessary that the primary carer is an EU national. Ms Ibrahim, a Somali national, was, in fact, in a potentially stronger position than her EU citizen husband whose own right to reside lapsed some time after he stopped working. Had he not voluntarily left the UK, he would have lost his right to welfare support. Ms Ibrahim, by contrast, benefited from the finding that, under Article 12 of the *Regulation*, the children had a right to non-discriminatory treatment as regards their education, which would be compromised if the primary carer did not have the wherewithal to remain. Earlier cases had found that students with rights under Article 12 of *Regulation* 1612/68 were entitled to state assistance to cover the cost of their education and their maintenance and sickness insurance and an entitlement to welfare by the parent was consistent with that.([40]) It therefore seems that the primary carer has a right to reside in the UK irrespective of nationality and ability to maintain themselves and must be able to access welfare entitlements in the same way as nationals.

There is a gap between these instances and the more restrictive rights attaching to those exercising derived rights under the *Directive* 2004/38. As already indicated, these rights apply in all cases where Treaty rights have been exercised under the *Directive* (i.e. not only workers) but it is only in the case of the death or departure of the Union citizen that the right to remain in education is not subject to criteria of self-sufficiency (Article 12(3)). In other cases, under Articles 12(1), 12(2) and Article 13, conditions of self-sufficiency apply while cessation of activity is not covered at all. The net effect is that, under Article 12 of the *Regulation*, the children of a worker who ceases work or who

([40]) *Echternach and Moritz v Minister for Education and Science* Cases C 389 and 390/87; *Casagrande v Landeshauptstadt Munchen* Case C-9/74.

divorces can remain in education with their carer without conditions whereas the family members of other internal EU migrants may not. While it is perhaps logical that those whose right derives from self-sufficiency should be expected to remain at least independent of welfare, it is less clear why this expectation should apply to the self-employed and not to workers nor why death and departure are different to marriage breakdown or cessation of work.

The scope for differential treatment risks making apparently arbitrary distinctions between children in broadly equivalent situations. A partial explanation may be found in the *Teixeira* judgement where the court pointed out that former migrant workers will have contributed through taxes and contributions to the state's public funds and social assistance programmes.([41]) Even if the worker's personal contribution was not equal to subsequent welfare payments, collectively and as a group, migrant workers make a net contribution. Alternatively, Article 12(3) of the *Directive* might be read expansively to incorporate all the events encompassed in Article 12 of the *Regulation* ie divorce or cessation of activity (although the fact that divorce is specifically dealt with in A.13 suggests otherwise).

In both the cases discussed here and in the key preceding case of *Baumbast*, the primary carer was the other parent and the discussion was pursued in that context. The conclusions in Ibrahim and *Teixeira* referred only to parents as sprimary carers". Article 12(3) of the *Directive* refers to the "parent who has actual custody of the children" Article 12 of the *Regulation* however refers only to the child residing in the same Member State as the parent worker. The court in *Baumbast* used the term "parent who is primary carer".([42]) Nonetheless, might a "primary carer" might, in future, be a grandparent or aunt/uncle rather than a spouse or partner? Might rights under Article 12 of the *Regulation* arise without the child ever residing with the parent? Might a child have more than one"primary carer"?([43])

([41]) Opinion of Advocate General Kokott delivered on 20 October 2009 *Teixeira v Lambeth LBC* Case C-480/08, para. 81.
([42]) *Baumbast v SSHD* Case C 413/99 para. 75
([43]) See Starup and Elsmore n.4 above at 584.

5.5. Permanent Residence

Neither judgement dealt with the relationship between derived rights and permanent residence but it remains problematic. Once permanent residence has been obtained, questions about self-sufficiency and sickness insurance fall away so it is a valuable right.

Under A.16 of the *Directive*, EU citizens are entitled to permanent residence after five years lawful and continuous residence in the Member State as are family members who reside with the Union citizen continuously for five years. However, under Article 18, those who are not Union citizens and have exercised derived rights under Articles (12(2) and 13, must have met the conditions of self-sufficiency that applied to their stay. Article 12(3) is not mentioned.

Paragraph 17 of the Preamble to the *Directive* cites permanent residence for long term residents as key to Union citizenship and promoting social cohesion. Provision for permanent residence must be made for all Union citizens and their family members who have resided continuously with the EEA national in the host Member State for five years "*in compliance with the conditions laid down in this Directive*" and without becoming subject to an expulsion measure.

How exactly the entitlement arises is somewhat opaque given that many Union citizens and their family members may reside lawfully, as required under Article 16, but not in accordance with the conditions in the *Directive*, as set out in the Preamble. A third country national may, for example, be present as a student before becoming a family member. A2 nationals may have entered on work permits before or after accession. A Union citizen may remain in another Member State during periods of qualification and non-qualification under the *Directive*. For example, Mr Yusuf ceased to be a worker some time after he stopped work but if, instead of leaving the country, he had found another job, his worker status would have revived. There is therefore room for argument about whether the right to permanent residence is contingent on five continuous years exercising only the rights set out in the *Directive* or whether other types of residence may count. The former is, unsurprisingly, the interpretation preferred by national governments. For example, the UK regulations have adopted the wording of the Preamble into the implementing regulations and provide that the right accrues to EEA nationals who

have resided in the UK, or a family member who has resided with the EEA national, in accordance with the regulations for a continuous period of five years.([44]) This interpretation has had domestic judicial support.([45]) In one recent case, *Okafor*, the UK Court of Appeal found (unconvincingly in this author's view) that even residence under article 12(3) of the *Directive* does not create a right to permanent residence of either the children, who were Union citizens, or their father who was not (the mother had died).([46]) This was based on the absence of reference to conditions of self-sufficiency for permanent residence in article 12(3) and the exclusion of article 12(3) from the provisions of article 18, leading the court to conclude that permanent residence was not envisaged for those who benefit from article 12(3). A claim under article 16 of the *Directive* based on residence under article 12 of *Regulation* 1612/68 was dismissed summarily.([47])

There are counter-arguments however. The Preamble to the *Directive* suggests that permanent residence is seen as promoting social cohesion. In *Lassal*, the Court of Justice found that the right to permanent residence is a consequence of the integration of the Union citizen into the host society, even if this occurred prior to implementation of the *Directive*.([48]) Given that integration was the rationale for protecting the right to education under *Regulation* 1612/68, it is difficult to see how its fulfilment cannot equally end in permanent residence. Certainly, the contrary position is likely to result in instability and failure to integrate as the family knows that its stay is finite. Where, as in the case of *Ibrahim* and *Okafor*, the primary carer is a non-EU national, the future looks particularly bleak. How can it add to social cohesion for the Yusuf and Okafor children to know that the end of their education means the likely break-up of the family? Presumably, it was envisaged that the parent will return to a country left many years previously while the children must either exercise Treaty rights as EU nationals or return to the Member State of their nationality, where they may have never or only briefly lived. In such an event, another solution would probably be found either under EU or ECHR law and it is surely better that it is accepted sooner rather than later that this family's home is now in the UK.

While the court in *Ibrahim* and *Teixeira* did not rule on the issue, Advocate General Kokott in *Teixeira* did suggest that 'lawful residence' was not confined to the exercise of rights under the *Directive*. While "lawful residence" referred primarily to residence under the *Directive*, article 37 of the *Directive* provides that more favourable laws, regulations or administrative provisions laid down by a Member State are not thereby compromised. Mrs Teixeira may or may not have been exercising free movement rights throughout her stay but her right to remain was unchallenged by the UK authorities and she had a claim for permanent residence.([49]) As permanent residence is a right that exists independently of formal recognition, it may have been that she was already entitled to housing assistance in her own right and the entire case was unnecessary.

Mrs Teixeira did not function as her daughter's primary carer throughout the period in question so her claim to permanent residence could not be based upon her residence under article 12 *Regulation* 1612/68 but it is difficult to see, if Advocate General Kokott's argument is accepted, that such a claim would not normally arise where the carer is a Union citizen residing under the *Regulation*. It is true that the *Regulation* is not a law, *regulation* or administrative provision laid down by a Member State as set out in article 37 (although it may be argued that it derives its legal authority within the Member State ultimately from the legal act of that state) but it would be arbitrary for only rights of residence arising under EU law and which are not specifically provided for in the *Directive* to be excluded from the definition of legal residence given that the *Directive* AND more favourable national laws are included.([50])

The position is more complex where, as with Mrs Ibrahim, the carer is a third country national as, to qualify for permanent residence, residence must be with a Union citizen.([51]) However, the child concerned is often a Union citizen and will, on this argument, be residing lawfully for the purposes of permanent residence and the primary carer is, by definition, residing with them. If the child is not a Union citizen (as was the case with one of the

([44]) Immigration (European Economic Area) Regulations 2006 SI 2006/1003, para. 15.

([45]) *GN (EEA Regulations: Five Years Residence) Hungary*[2007] UKAIT 00073 approved in *HR (Portugal) v SSHD* –2009] EWCA Civ 371 para.22.

([46]) *Okafor v SSHD* [2011] EWCA Civ 499.

([47]) *Okafor v SSHD* [2011] EWCA Civ 499 para. 32.

([48]) *Secretary of State for Work and Pensions v Lassal* Case C-162/09 para. 37.

([49]) Opinion of Advocate General Kokott delivered on 20 October 2009 *Teixeira v Lambeth LBC* Case C-480/08, paras 115-21.

([50]) The Advocate General, in her opinion in *McCarthy,* argued that permanent residence could not be acquired solely through the exercise of rights under national law; Opinion of Advocate General Kokott delivered on 25 November 2010 *Shirley McCarthy v SSHD* case C-434/09 para. 57. The Court did not directly address the issue in its judgment but its conclusions impliedly support her view.

([51]) *Directive* 2004/38 Article 16(2).

Baumbast children), the position remains even more uncertain. Following *Lassal*, there might still be a right if there had been continuous residence for 5 years with the EU citizen spouse even before implementation of *Directive* 2004/38.(52) However, that will not necessarily be the case. Ms Ibrahim and her children, for example, lived with Mr Yusuf in the UK for only about 18 months.

In that situation, the position would seem to be that both the child and the carer's right to reside will end when the child finishes education or the carer's right will terminate when the child reaches majority and no longer needs care even if continuing in education. The result would be the splitting of the family unit or its removal to the carer's country of origin where a now adult child might never have lived. Given that residence has been lawful throughout, such an outcome seems arbitrary and disproportionate.(53) Might the court construct an argument that recognised not only A.8 considerations but also EU principles of proportionality and integration? Can arguments about integration into Member States as the rationale of permanent residence rights be discounted only on the basis of the nationality of the child when, in all cases, the child's right derived not from its own nationality but from the original exercise of Treaty rights by the EU citizen parent which could not be obstructed?

However, the acquisition of permanent residence under the derived rights provided for in the *Directive* is dependent upon conditions being met so the consequences of failing to do so must have been foreseen in these instances.(54) The outcome of a permanent residence right being available without such conditions is that a short period of work by an EU migrant worker may result in the right of children, who might start school only after the worker has stopped working and left the country, and their carer to settle in the new country without being subject to conditions of self-sufficiency at any point. However, the entire point of the *Teixeira* and *Ibrahim* decisions is precisely that the conditions in the *Directive* do not apply. One is back with the conundrum of having a separate set of rights that distinguishes certain migrants but which have not been adequately delineated.

(52) *Secretary of State for Work and Pensions v Lassal* Case C-162/09

(53) It may be that rights will arise under national law. For instance, under the UK indefinite leave to remain is available, subject to conditions, for migrants who have been lawfully resident for ten years (HC395 para. 276B).

(54) *Directive* 2004/38 Article 18.

5.6. Workers and EU Citizenship

The creation of a separate set of rights for some Union citizens and their families also complicates the notion of EU citizenship. Article 12 of *Regulation* 1612/68 applies only to the family members of workers and creates a layer of rights that, according to *Teixeira* and *Ibrahim*, still remains outside of and stronger than the framework of entitlements and obligations that make up the Citizens' *Directive*. While strengthening of rights might, at first glance, appear to advance a concept of European citizenship, by reinforcing a privileged place for workers' family members, it arguably achieves the opposite.

EU citizens who move but who are not workers are governed by the more restrictive provisions in the *Directive*. The reinforcement of the distinction between workers and others can arguably be seen as looking backwards not forwards, back to the economic origins of free movement rights and not forward to Union citizenship as "the fundamental status of nationals of the Member States when they exercise their right of free movement and residence."(55)

The contrast between the situation of workers and of other Union citizens becomes more apparent when it is recalled that Union citizens who have not exercised free movement rights are unable to take advantage of the rights to family reunification in the *Directive*, which, despite being weaker than under the *Regulation*, are nonetheless stronger than provided for under most national laws. The recent case of *McCarthy* illustrates the distinctions.(56) Mrs McCarthy was a dual Irish/UK national resident in the UK and unable to achieve family reunification with her third country national husband under domestic law. The question for the Court of Justice was whether her dual nationality enabled her to come within *Directive* 2004/38. The Court found that it did not avail her as she had not exercised free movement rights although there was a degree of ambiguity as to whether this was because she had not moved or because she was not working.(57)

(55) *Directive* 2004/38 Preamble para. 3.

(56) *Shirley McCarthy v SSHD* case C-434/09.

(57) Advocate General Kokott, who gave the opinion in both *McCarthy* and *Teixeira*, suggested that, had Mrs McCarthy been economically active, reverse discrimination against her might have been found unlawful: Opinion of Advocate General Kokott delivered on 25 November 2010 *Shirley McCarthy v SSHD* case C-434/09 paras. 41-44; Advocate General Sharpston advanced a more general argument about reverse discrimination in *Zambrano:* Opinion of Advocate General Sharpston delivered on 30 September 2010, *Zambrano v ONEM* case C-34/09, paras. 139-50.

While the reasoning that led to the outcomes in *Ibrahim* and *McCarthy* was logical to lawyers, in the broader context it raises questions of equality between citizens that are difficult to answer when so many critical advantages accrue from a fairly minimal exercise of the right to work in another country. Mrs McCarthy and those in her position might justifiably be puzzled as to why their reliance on benefits or their spouse's inability to speak English or their ages([58]) may preclude them from enjoying family life with their third country spouse in their own country while Danish national Mr Ibrahim's brief work-record permits his estranged third country wife and children to live there and claim the very same benefits, regardless of age and language capability.

6. Conclusion

Taken on their own, the decisions in *Teixeira* and *Ibrahim* are logical expositions of the law. However, in the broader context they remain problematic. They privilege moving to work above other types of free movement in ways that are still not fully elaborated or justified. They also reflect the longstanding principle that the status of "worker" is relatively easy to acquire, an important principle in ensuring that Member States accept their responsibilities under free movement provisions. But, when moving to work attracts rights that other types of movement do not, this ease of acquisition entrenches that privilege and may appear to reward opportunistic exploitation of welfare regimes. From a Brussels perspective, that may appear to be a necessary compromise to support the free movement regime. However, to national governments, who are under pressure to reduce migration and control access to welfare, and to their electorates who broadly support these aims, the cases may reinforce anti-European sentiment.

This is even more so given the perpetuation of "reverse discrimination" so that those who do not migrate within the EU have to suffer the full brunt of national restrictions. In answer to the question implied by the title, these decisions therefore look forward, to enhanced rights of free movement, and back, to the economic foundations of these free movement rights, but they also look inwards, to the conceptual and legal integrity of the free movement regime, at the cost of more politically and publicly palatable solutions.

That, of course, is not a decisive criticism or even a criticism at all. In practice, and given their lengthy residence, alternative solutions for both families were also not palatable, particularly for the Ibrahim family as Mrs Ibrahim was not a Union citizen and the family reunification regime in Denmark is arguably the most rigorous in Europe. Few people would wish the (imputed) sins of parents to be visited on children via disruption of their education and separation from their mother and carer although, given recent Court of Justice cases in the area, this was perhaps improbable in practice even without the decisions discussed here.([59]) There are no easy answers because the tension is not only one of reconciling two legal instruments but of reconciling the friction between the free movement rights that are fundamental to Union citizenship and domestic law which aims to control family reunification and access to welfare. The emerging debate on reverse discrimination suggests that the process of negotiating new compromises has only just started. Whichever way they face, the *Ibrahim* and *Teixeira* decisions are staging posts on a much longer journey.

([58]) Conditions on all these apply to those bound by UK domestic law: HC 395, paras. 277-89.

([59]) *Zhu and Chen v SSHD* Case C-200/02; *Zambrano v ONEM* case C-34/09.

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