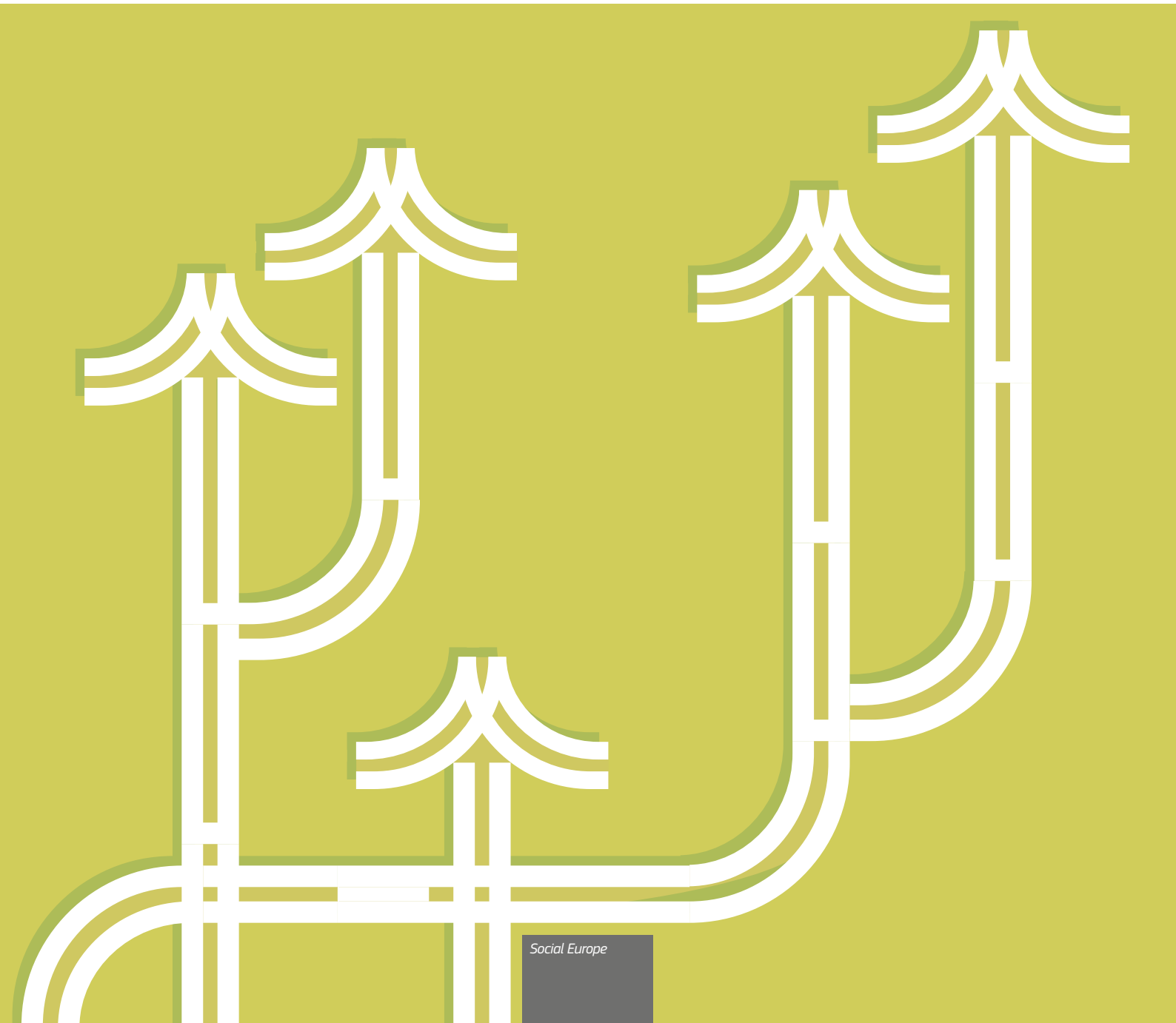
ISSN: 1831-922X

European Commission

June 2013
no 6

FMW

Online Journal on Free Movement of Workers within the European Union



Social Europe

The European Network on Free Movement of Workers within the European Union is composed of independent academic experts, coordinated by the Radboud University Nijmegen, the Netherlands, under the supervision of the European Commission. The network expresses personal views, which do not necessarily reflect the views of the European Commission. The network coordinates the FWM online journal, through its Board of Advisors, under the supervision of the European Commission.

More information on the European Union is available on the Internet (http://europa.eu).

Luxembourg: Publications Office of the European Union, 2013

Foreword

Improving the application of worker's rights

Paul Minderhoud, Coordinator European Network on Free Movement of Workers,
Radboud University Nijmegen, The Netherlands

On 26th of April the European Commission adopted a proposal for a Directive on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (COM (2013)236).

The proposal takes into account a number of concerns and policy recommendations aiming at the reduction in practice of discrimination based on nationality, and proposes measures which will help to remove unjustified obstacles to the free movement of workers.

The proposal is aimed at increasing the effectiveness of existing EU provisions on free movement of workers and to give full effect to the application of Article 45 TFEU and Regulation (EU) No 492/2011.

In this context, the proposed measures aim to ensure the better application of EU law on people's right to work in another Member State and so make it easier for people to exercise their rights in practice.

In this sixth edition of the Online Journal we have three contributions. In the first contribution Louise Ackers describes the dynamics of contemporary forms of intra-EU mobility exercised by a particular group of European citizens – namely academic researchers. She outlines some of the challenges these increasingly complex but commonplace types of mobility present for European citizenship and national employment and welfare systems. The second contribution by Calliope Spanou, the Greek Ombudsman, is a revised version of her final address held at the Conference on Free Movement of Workers, 15 and 16 November 2012 in Valletta, Malta. She stresses that it is important that the academic community upholds the ideals and principles of free movement and European citizenship while Ombudsman institutions can play the role of watchdog for the conformity to European legislation, defending corresponding rights.

The third contribution by Paul Minderhoud discusses the ambiguity in the rules on access to social assistance benefits for EU citizens in another Member State. This article was just finished before the Opinion of the Advocate-General was published in case C-140/12 (Brey), in which social assistance is more clearly defined and just before the Commission announced to start an infringement procedure against the UK for incorrect application of EU social security safeguards. Both events show the importance of the topic addressed in the article.

Contents

About the authors

Professor Louise Ackers, School of Law and Social Justice, University of Liverpool

Professor Louise Ackers' research focuses on highly skilled mobility and knowledge transfer processes. Much of her work has explored mobility in the context of science careers and the internationalisation of research. In addition to academic outputs she has worked closely with the research councils in the UK and with the European Commission in the development of policy on internationalisation, impact and research careers. She is currently coordinating an FP7 project on the careers, mobilities and impacts of doctoral graduates in the social sciences and humanities (Pocarim). She is also applying her expertise in this area to the specific context of mobile professional voluntarism in Uganda.

This article describes the dynamics of contemporary forms of intra-EU mobility exercised by a particular group of European citizens — namely academic researchers. It outlines some of the challenges these increasingly complex but commonplace types of mobility present for European citizenship and national employment and welfare systems.

Calliope Spanou — the Greek Ombudsman

Athens University Professor Calliope Spanou was appointed Ombudsman in Greece on 19 May 2011 following a decision by the special electoral body of the Greek parliament. Prior to that, she was Deputy Ombudsman from 2003.

Calliope Spanou has taught administrative sciences and public administration at the Faculty of Political Science and Public Administration at the University of Athens since 1989. She also taught at the universities of Amiens, Paris II and Versailles–Saint Quentin en Yvelines and at the National School of Public Administration. In addition, she was advisor at the National Centre of Public Administration and the OECD, a member of the Steering Committee of the European Group of Public Administration and former president of the Hellenic Political Sciences Association.

Legal harmonisation is an important and necessary but not sufficient condition for the exercise of free movement rights within the EU. Various obstacles remain, either as remnants of a domestically centred past, or as a result of resistance of domestic structures. The complexity of realities on the ground requires continuous monitoring and intervention in order to ensure that free movement is actually implemented. The current crisis may enhance protectionist reflexes. In such a context, it is important that the academic community uphold the ideals and principles of free movement and European citizenship while ombudsman institutions can play the role of watchdog for the conformity to European legislation, defending corresponding rights.

Paul Minderhoud, Coordinator, European Network on Free Movement of Workers

Dr Paul Minderhoud is an associate professor at the Centre for Migration Law of the Radboud University Nijmegen, the Netherlands. His dissertation is a socio-legal study into the differences between immigrants and native citizens in the implementation of the child benefits and disability insurance legislation in the Netherlands: 'Voor mij zijn ze allemaal gelijk', (Thesis Publishers, Amsterdam, 1993).

His main research interests are the legal and socio-legal aspects of immigration and social security. He is coordinator of the European Network on Free Movement of Workers and co-editor of the *European Journal of Migration and Law*.

This article examines the access to social assistance benefits under Directive 2004/38/EC by focusing on the issues concerning the implementation of Directive 2004/38/EC in the light of access to social assistance benefits for EU citizens in other Member States. A problem with the implementation of Directive 2004/38/EC is that it is not clearly defined when a EU citizen becomes an 'unreasonable burden' to the social assistance system. Leeway is given to Member States to examine whether financial difficulties may be temporary. As a result, Member States have developed their own definitions. Some legal experts hold the opinion that even before EU citizens have received a permanent residence right, it will be very difficult to deny them access to social assistance benefits. The policy and practice in the UK, however, show a different picture. By using a habitual residence test and a right to reside test, the social benefits system of this country seems to exclude inactive EU citizens effectively from entitlement during a certain period of time.

From 'partial migrations' to mundane transnationalism: socio-legal (re)conceptualisations of contemporary intra-EU migration

Professor Louise Ackers, School of Law and Social Justice, University of Liverpool ([1])

Recent years have witnessed various endeavours to 're-conceptualise' migration theory ([2]). The growing body of evidence on the empirical reality of contemporary migration behaviour together with the emphasis on the movements of the highly skilled in the 'knowledge economy' has challenged traditional migration theories. The fact that these rather narrow and historically specified conceptualisations of migration no longer capture the dynamics of intra-EU mobility and will no longer serve the stated purposes of the European Union in the context of the 'knowledge economy' has not gone unnoticed by legal scholars. Golynker (2006a) coins the concept of 'partial migration' to describe the kinds of mobilities many highly skilled intra-EU migrants ([3]) are engaging in and need to engage in if the 'grand societal challenges' facing the European Union are to be realised.

This paper presents a case study, drawn from a project concerned with the mobilities of researchers in the disciplines of social science and humanities ([4]), which provides an empirical illustration of the complex dynamics of what Golynker has called 'partial migrations'. Specific aspects of the case study are then analysed in the context of recent cases put before the Court of Justice.

From a legal perspective a significant shift has taken place from a situation where the rights and obligations associated with European citizenship were triggered by simple acts of intra-EU mobility (labour migrations) to encompass increasingly diverse and complex forms of transnationalism. Golynker suggests that the act of physical geographical relocation is no longer the sole or even primary 'trigger'. The question may be framed far more broadly in terms of how a person's activity 'confronts the legal systems' of more than one Member State. Certainly this approach captures the empirical reality of contemporary mobility and citizenship relationships. While the concept of 'partial' migration has taken the debate forward significantly and presents real challenges to migration theory, it suggests an incomplete process or 'glass-half-empty' approach. The term 'mundane transnationalism' captures the multi-faceted quality of contemporary, researcher, mobility conveying the transnational dynamics but also the routine and often punishing labour market processes that generate these forms of mobility, compromise the citizenship status and experience of 'migrants' and, ultimately, shape the evolution of national and European citizenship.

1. Introduction

The process of 're-conceptualising migration theory' has involved researchers from a range of disciplinary perspectives but most notably within human geography and sociology. The emergence of new theoretical approaches firmly grounded in empirical research not only makes for 'better theory', it also presents important opportunities for 'better policy'. Migration theory has an important role to play in supporting evidence-based approaches to research policy that both stimulate future initiatives and mitigate the unintended consequences of policy.

The potential for this is evident in recent changes in policies on researcher mobility. At both EU and UK level policymakers are beginning to take more nuanced approaches to incentivise diverse forms of mobility and international networking processes. The 'mobility imperative' is slowly evolving from its traditional preoccupation with longer term, bi-lateral, 'settlement-style' stays (labour migrations) to encompass fluidity and complexity, and nurture relationship-building. But research policy/funding is only one dimension of the critical resource framework shaping mobility motivations and experiences. As European citizens, moving within the territory of the European Union, researchers also have important legal and social rights. A historical exploration of the source of these citizenship rights reveals the importance of particular conceptions of mobility to the law-making process. As long ago as the 1960s the rights to free movement were described as an 'incipient form of European citizenship' (Bohning, W.R., 1972, cited in Ackers, 1998, p. 91). In the early days of European integration, the perceived

([1]) The author would like to thank Dr Stalford for her insightful comments.

([2]) The author participated in the conference 'Remaking migration theory: intersections and cross-fertilisations', University of Brighton and University of Sussex, May 2009.

([3]) The paper focuses on EU nationals.

([4]) http://www.liv.ac.uk/law-and-social-justice/research/pocarim

importance of increasing the ability of workers to move from their home country to reside in another for the purposes of work, usually on a permanent basis (to 'emigrate') resulted in the evolution of important social rights for those individuals and their families.

The fact that this rather narrow and historically specified conceptualisation of migration no longer captures the dynamics of intra-EU mobility and will no longer serve the stated purposes of the European Union in the context of the 'knowledge economy' has not gone unnoticed by legal scholars. Oxana Golynker (2006) develops the concept of 'partial migration' to describe the kinds of mobility many highly skilled intra-EU migrants are engaging in and need to engage in if the 'grand societal challenges' facing the Union are to be realised. A European Commission communication illustrates the perceived importance attached to mobility in the 'innovation union':

> 'Increased mobility is strongly associated with the creation of knowledge networks, improved scientific performance, improved knowledge and technology transfer, improved productivity and ultimately enhanced economic and social welfare.' (EC, 2010, p. 21)

The European Commission's communication 'Better careers and more mobility: a European partnership for researchers' (EC, 2008) suggests that 'the rules adopted several decades ago may not cover as efficiently newer forms of mobility of workers who frequently work on short-term contracts in different Member States' (p. 7). More specifically, it argues that, 'young researchers are also frequently supplied with atypical forms of remuneration which give limited access to social security and supplementary pension benefits under the applicable social security scheme' (p. 8). The EU charter and code ([5]) urges Member States to identify and remove legal obstacles to mobility for researchers requesting them to, 'continue their efforts to overcome the persisting legal and administrative obstacles to mobility' (paragraph 6) (Ackers et al, 2012).

Similar messages are evident in UK research policy. Universities UK suggests ways in which the university sector should organise itself to remain competitive in a time of 'unprecedented economic challenges' (2010, p. 3). Mobility is high on the agenda, 'UK researchers must become more mobile between sectors and between countries' (p. 4).

Informed by the theoretical literature emerging from a range of social science disciplines, Golynker presents a forceful argument in favour of extending the status of European citizenship as the legal basis for the extension of valuable free movement rights to those categories of migrants who would fail to qualify under the traditional classifications as 'migrant EU workers.' These are not hypothetical matters. They impact significantly on the employment and social status of knowledge workers affecting access to sick leave, maternity leave, healthcare and pensions, and a host of family-related rights. Extending full citizenship rights to 'partial migrants' could remove elements of discrimination that have left them vulnerable in comparison to traditional worker-citizens and incentivise forms of mobility fundamental to the economic ambitions of the EU. There is no doubt that the pressure on early-career researchers to move repeatedly in the current legal context seriously compromises their pension status and projected retirement income (Ackers and Oliver, 2008).

Cresswell reflects on the implications of 'sedentarist' thinking (evident in the legal provisions) that continues to reaffirm the 'commonsense segmentation of the world into things like nations, states and places … and actively territorialise[s] identities in property, region, nation and place.' He suggests that, 'the consequences for mobile people are severe' (2006, p. 27) and notes the impact on 'the weak' who are left, 'using and manipulating places produced by others' (p. 47). This statement certainly holds true for many researchers struggling to achieve some degree of employment security whilst negotiating international career trajectories.

For Golynker the starting point is to address the status of those employees for whom place of residence is no longer coterminous with the place of employment — in other words they do not live where they work. These may be 'frontier workers' who regularly 'commute' between bordering countries. In other cases individuals might remain in their home (or a member country) and work 'virtually' in another country using communication mechanisms to replace or substitute for physical presence. Or, a worker may take up residence in one Member State and continue to work in their home country or another country, perhaps engaging in various forms of virtual and physical mobility. For Golynker, a potential 'legal' solution to this jeopardy lies in the status of European citizenship. In its 'pure' or symbolic form, European citizenship derives directly from membership of one of the partner Member States and is based on nationality. Article 20 of the Treaty on the Functioning of the European Union (TFEU) makes it clear that, 'Every person holding the nationality of a Member State shall be a citizen of the Union'.

In practice this status does not convey an equality of social rights as the geography and temporality of residence and employment (length of residence in place)

([5]) The European Charter for Researchers describes the rights and duties of researchers and research institutions.

continues to shape entitlement. Golynker contends that basing entitlement more directly on citizenship helps to overcome the risks ([6]) associated with the kinds of fluid transnationalism that the EU is seeking to promote.

This paper draws on recent empirical work to show how 'newer forms of mobility' challenge existing concepts of Union citizenship and residence, placing mobile knowledge workers (researchers) in a vulnerable and contingent position. The empirical cases are drawn primarily from a study on the careers, mobilities and impacts of doctoral graduates in the social sciences and humanities (Pocarim) funded under the European Commission's framework programme. It complements this with examples taken from research with life scientists and physicists (Ackers and Gill, 2008; Ackers et al, 2010).

The paper opens with a case study drawn from the Pocarim study to illustrate the complexity and fluid quality of relationships and their legal implications.

2. Laura and Dave: a case study

Laura is British and did her first degree and master's at the same British university. After her master's she spent a year in Germany to learn German. She had a British partner (Dave) at that time who accompanied her. They supported themselves with some casual English teaching and work for a family member's business. They then returned to the UK to start doctorates as 'students'. One year before she submitted her PhD and whilst still registered as a student in the UK, Laura moved to Germany to take up a fixed-term research fellowship. In the 1st year of her fellowship she got married and had a baby. At this point Dave 'returned' (alone) to the UK to take up a lectureship. Laura continued to work in Germany for 4 years and then left to take up a lectureship in a British city some 300 miles distant from where Dave is living and working. Since starting the new position Laura has become pregnant with her second child. The couple have maintained several properties in Germany and the UK:

> 'We always kept 2 places going, one in the UK and one in Germany ... First of all it was a flat in [British city] which my parents had helped us buy. Then we paid rent for a place in [Germany]. Then we bought a place in [Germany] ... When Billy was born we sold the place in England and rented a small one-bedroom flat in [another British city] and moved to a bigger flat in [Germany] that we were renting which we've still got ... We did own the other flat in [Germany] which we've now sold. It is quite complicated. So now we've got the flat in [Germany]. We will rent it out or we'll give it up — we haven't quite decided yet. The rent is so low that you could actually keep it but the cost of childcare in the UK will probably make that impossible when the second baby is here.'

Laura now lives in her father's house with Billy and is planning to buy a house locally. Until the baby was born Dave travelled to Germany to meet Laura every 2 or 3 weeks. Once Billy was born they met every weekend. This commuting mobility ('living apart together') has continued shifting from an international (intra-EU) to an intra-UK quality. In practice the distance, time and costs associated with this travel will not have changed substantially.

Since returning to the UK she has been preparing to submit a thesis for the higher German doctorate (*habilitation*). There is no requirement/possibility to formally register for a *habilitation*. Laura explains the informal nature of the links/relationships involved:

> '[You have to have] a connection with a professor. You don't have to sign anything, it is informally agreed to present it to which ever faculty you are applying to have a *habilitation* in.'

Without this qualification Laura is unlikely to progress to secure employment in Germany. Asked why she is preparing for the *habilitation* Laura replies:

> 'So I've got the option if I want to. This is the thing with mobility — you think people move for permanent [positions] and if you move into a permanent job in the UK that's where you're going to end up. But actually I've got a plan B which is in some ways my plan A because I really miss Germany [but] it's hard to get a professorship there.'

This lead to a discussion around the normalisation of 'double' or what we have called in previous research 'retained' positions (Ackers and Gill, 2008):

> 'The people I know who've been professors in Germany and have left to come over here have generally kept some kind of position in their old university because they often want to go back. Sometimes it's paid depending if it's like an external examiner or something like that so that they've got a kind of foot-hold and all you need is someone with a nominal position at the university. The majority are probably unpaid.'

Laura gives an example of how retained positions work in the other direction. Her husband has applied for a fellowship in Germany — a full-time employment position — which would enable him to 'buy out' from

([6]) Williams (2012) applies the concept of risk to contemporary mobility.

his permanent position in England but without the risk of losing his job or indeed his social security/pensions status. He is also preparing a thesis for submission for the *habilitation* degree in Germany:

> 'He's working with Professor X at [German University]. There's an agreement that he can submit it there. You just need some sort of connection.'

Laura's case is not unusual and it shows how these kinds of complex and fluid living/working arrangements can extend deeply into career trajectories and the life-course. Previous research on the mobility of Polish and Bulgarian scientists revealed the prevalence of 'retained positions' in these migratory flows. Nearly all of our sample of 'returnee' Polish and Bulgarian scientists in this study could be labelled 'partial migrants' — as a consequence of simultaneous 'employment' and residency across multiple locations (Ackers and Gill, 2008).

The following sections identify particular aspects of Laura's status examining the legal implications. The discussion starts with a topic that has generated some controversy in research policy, namely the concept of early-career researcher and the implications of 'student' status.

3. The concept of 'worker' and its implications for mobile researchers

We noted (above) that both Laura and Dave did their doctorates in the UK as 'students' and not as employees or 'workers'. As Laura was moving directly into full time employment in Germany she would have acquired the status of a 'Community worker'. For the period until they were married, however, Dave's migration would not have triggered full European citizenship rights.

It is important to point out that this situation is not limited to doctoral stipends but, in many countries and contexts, extends to postdoctoral positions, particularly where these involve foreign recruitment. Andrea, a German researcher interviewed in a study on researcher mobility and pensions (Ackers and Oliver, 2008; 2009), did her PhD in the UK, completing at the age of 29. During this time she had student status and did not pay taxes or contribute to a supplementary pension scheme. She then moved to Belgium to take up a 2-year postdoc. This post was attributed a 'student' status and she received a tax and contribution-free stipend:

> 'I was registered as a student. They managed to make it a stipend so they didn't have to pay [employer contributions] … That's how they do international postdocs.'

A study on mobility in the social sciences (Ackers et al, 2008) identified similar situations in Portugal with a growth in the use of stipendiary schemes for postdoctoral positions (for both nationals and non-nationals). The Portuguese research bodies have also introduced a UK-style PhD system based on stipends and 'student status' rather than employment ([7]).

Despite the introduction of the status of 'citizenship of the Union', in reality the distinction between those citizens who are considered to be 'economically active' and those who are not remains of critical importance to free movement rights and social entitlement. The 'economically active' category includes 'workers' and the 'self-employed' ([8]) and this group are afforded superior rights. The question here is who qualifies as a 'worker'?

The Court of Justice has played a highly influential 'interpretive' role over the years ensuring that the concept of 'worker' is defined at European level. The leading case (Lawrie Blum ([9])) defines the essential features of an 'employment relationship' as requiring that, for a certain period of time, a person provide services of some economic value for and under the direction of another person, in return for which he receives remuneration in the broadest sense and regardless of the nature of the legal relationship between the employee and the employer, the duration or work or the amount of remuneration.

This definition has been found to apply in a whole range of situations involving part-time work, work with levels of remuneration falling below national subsistence levels (enabling claims against local social security systems) and cases where remuneration takes the form of 'in-kind' payments. The question for discussion here is how early-career research falls within this broadly construed category of 'work'. If it does, then mobile doctoral researchers will be entitled to full citizenship and social rights (and will be required to make relevant social and employment contributions) in the host state. If, on the other hand, they fall within the category of 'mobile students', they are treated as a particular category of 'economically inactive' migrants with more contingent rights. In particular, they will have to satisfy the 'resources requirement' demonstrating (in theory at least) that they have sufficient resources to support themselves in the host state (Dougan, 2005; 2008; Golynker, 2006b).

([7]) Research Fellows Statute, Portuguese Foundation for Science and Technology.

([8]) For the purposes of this paper we do not discuss the rights of the self-employed.

([9]) Judgment of 3 July 1986 in Case 66/85, *Lawrie-Blum* v *Land Baden-Württemberg* (ECR 1986, p. 2121).

The Frascati manual defines a researcher as someone who undertakes 'basic research', defining the latter as, 'experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundation of phenomena and observable facts, without any particular application or use in view' (OECD, 2002).

This kind of activity can be performed in a variety of different contexts and the context within which it takes place has major implications in terms of mobility rights. Mariana is a Polish woman who moved to the UK to do a PhD. She met her French partner in the same laboratory and later married and had a baby. Mariana benefited from a 3-year Marie Curie fellowship ([10]). In the past this scheme permitted employing institutions to decide whether to set fellows up as students or employees, leading to huge variations in employment status between employing institutions (Ackers, 2001). The scheme has since adopted the 'structuring' position of requiring institutions to set fellows up as employees, irrespective of national or institutional practice. Mariana is a clear beneficiary of this policy change. As an employee of the university she was entitled to full maternity leave under the occupational scheme. Asked whether she would have contemplated having a baby if she had been ascribed the same student status as her peers she replied, 'That would be much more difficult because I would like to have a baby and I knew that putting it later and later — there is never a really proper moment for that' ([11]). Mariana is very fortunate to have achieved employment status during her PhD and clearly qualified as a worker under EU law. This also immediately raised the status of her husband from that of a mobile EU student to the spouse of an EU migrant worker giving him full access to residency and social rights in the UK.

However, the majority of full-time doctoral researchers on research grants in the UK will not be afforded the status of employees in their university ([12]). The most recent Court of Justice case, Raccanelli ([13]), raised the issue of the concept of worker in two doctoral schemes operating at the Max-Planck Institute in Germany. The institute operated parallel schemes, one for nationals and involving an employment relationship and the second for foreign nationals and providing 'grants'. Raccanelli, an Italian national on the grant-based scheme, sought a declaration that, despite being 'foreign', he carried out the same duties as doctoral researchers on the employment-based scheme ([14]). In its judgment the Court of Justice stated that the comparison of activities (as stated in the Frascati definition) was not relevant, 'merely whether or not there were necessary elements for an employment relationship to exist, which was for the national authorities to ascertain'.

The Court of Justice reiterated the definition of work set out in Lawrie Blum (activities performed for a certain duration, under the direction of an institute in return for remuneration) and emphasised that this 'must not be interpreted narrowly'. Furthermore, it emphasised that under the relevant implementing secondary legislation ([15]) a worker should not be discriminated against in comparison with other EU nationals and 'shall enjoy the same social and tax advantages as national workers'. However, the Court of Justice identified a key distinction in sources of support:

> 'The recipient of a grant is under no obligation to work for the institute in question and instead may devote himself entirely to work relating to the thesis, whereas the holder of a BAT IIa half-time contract is under an obligation to work for the institute which employs him and may use the facilities for the purposes of his thesis only outside his working hours.'

The grant acceptance letter also included the phrase, 'The grant is paid as a contribution to living costs but not as consideration for your scientific work.' A subsequent supplementary agreement went further stating that, 'his stay as a guest does not establish any employment relationship'.

The German half-time contract scheme indisputably gave rise to an employment relationship. The terminology suggests a complete separation of the paid component and the unpaid (doctoral research) component. This is not dissimilar to doctoral schemes used in the UK such as graduate teaching assistantships where researchers are contracted to undertake a set amount of teaching within their doctoral funding 'package'. However, where the teaching is not paid additionally and is an integral part of the 'package' they do not make contributions or derive employment rights. Hourly paid part-time teachers using this funding to support themselves during their doctoral research are in a completely different situation as this activity will immediately generate an employment relationship. In practice there is a huge diversity in methods of funding PhDs. The 'knowledge economy' is a largely

([10]) This scheme is the European Commission's flagship programme providing research fellowships. Eligibility requirements include an international move (Van de Sande and Ackers, 2007).

([11]) The relationship between mobility and fertility is a topic of wide debate, with firm evidence emerging of a decline in female fertility in academic careers (Buber et al, 2011).

([12]) In 2008/9, 14% of UK PhD students were 'EU domiciled' (HESA, 2010).

([13]) Judgment of 17 July 2008 in Case C-94/07, *Raccanelli* (ECR 2008, p. I-5939).

([14]) It is common in German universities for doctoral researchers to be given a 0.5 (50% FTE) employment contract even though they are expected to work on a full-time basis. This is known as the BAT IIa half-time contract.

([15]) Article 7 of Regulation (EEC) No 1612/68.

rhetorical concept masking the messiness and poverty of research.

Perhaps the more interesting aspect of this case is not the comparison with the German scheme (which is often described by early-career researchers as a form of institutionalised 'slavery' ([16]) but whether the activity that Raccanelli was engaged in (and doctoral research in general) satisfies the constituent elements of a paid employment relationship.

It seems clear that the activity took place over a duration (at least 3 years), was under the direction of an institution/supervisor and also that there was a strong element of remuneration. The fact that the remuneration is designed to cover living costs seems irrelevant, not least given the outcome of a strong line of previous case-law — that remuneration may be in kind, may be very low and specifically, in the Bettray case ([17]), may take the form of 'board and lodgings'.

There is a much bigger question here that lies at the heart of the 'knowledge economy'. This concerns the role of the individual researcher in the generation of research capacity. The phrase used to describe Raccanelli's contract ('the recipient is under no obligation to work for the institute in question and instead may devote himself entirely to work relating to the thesis') fails to capture the role of researcher and their contribution to knowledge both within the institution and to the national and European knowledge economy. The degree of autonomy varies enormously, in practice, between disciplines and projects. That said, the vast majority of funded doctorates, clustering in the natural sciences, work in large collaborative teams and doctoral and postdoctoral researchers contribute enormously to the development of knowledge within these teams. Their knowledge is shared and exploited ([18]) within composite structures. Furthermore the push towards research excellence indicators and their critical importance in determining the income and status of research institutions (both universities and private-law establishments such as Max Planck Institutes) has required institutions to assess the aggregate contribution of its entire staff, very much including doctoral researchers. Doctoral researchers, irrespective of their nationality or funding source, are critical knowledge producers. The UK 'Concordat to support the career development of researchers' (RCUK, 2010) describes early-career researchers as, 'an essential part of their organisation's human resources and a key component of their overall strategy to develop and deliver world-class research' ([19]).

Unfortunately the Court of Justice did not take this opportunity to rule on a matter of key significance to many mobile researchers and to the development of the European research area (ERA) but chose to refer the matter back to national courts, 'to undertake the necessary verification of the facts'. It is interesting to note that authorities in the Netherlands have concluded that the European ruling, 'is completely in accordance with the judgment of the Dutch supreme court (Hoge Raad) in the case of a Dutch doctoral student working on a grant rather than an employment contract as his co-workers. In consequence they caution that, 'foreign doctoral students working on a grant may go to court in order to be compensated for damage caused by the discrimination, even if they accepted the grant contract' ([20]).

The issue of remuneration (as opposed to activity) was central to the Raccanelli case. Laura, Dave and Andrea were all receiving stipends during their doctorates so the question here was whether that form of remuneration qualified as 'pay'. The *habilitation* raises rather different issues. Both Laura and Dave would qualify as researchers in Germany under the Frascati definition but the relationships involved are unpaid and informal. Laura refers to the common practices amongst German researchers in the UK (for example) of engaging in unpaid work in Germany. The dominant motivation here is to retain relationships that may facilitate future mobility (returns).

In reality it is increasingly common for people seeking to gain progression in academic careers to accept/tolerate periods of 'employment' without pay ([21]). It is not at all unusual for individuals at early career stage to move to another country to take up positions that are not paid — or to remain at an institution once a contract has ended in the hopes of securing future funding, contracts and 'social capital'.

([16]) The phrase 'master–slave relationship' is frequently coined to describe this method of funding doctorates in Germany as it leaves researchers very much in the hands of their supervisors. Musselin refers to it more politely as a 'disciple to master relationship', emphasising the lack of autonomy afforded to many 'disciples' (2005, p. 139).

([17]) Judgment of 31 May 1989 in Case 344/87, *Bettray* v *Staatssecretaris van Justitie* (ECR 1989, p. 1621).

([18]) In the true sense of the word and also, unfortunately, quite often in the more commonly understood usage.

([19]) The revised UK concordat is designed to align the UK with the EU charter and code.

([20]) Cited at http://www.vawo.nl/en/scholarship-phds-are-not-employees

([21]) The growth in importance of internships and electives which play an increasingly critical role in building networks and gaining employment experience raises serious and largely 'hidden' questions in this regard.

4. Case study 2 — remuneration

The following example illustrates the role that 'unpaid work' plays in early-career research trajectories, often linked to mobility. Sonia engaged in unpaid work as a strategy to help her to access employment in her home country (Italy). In many other empirical cases individuals travelled to another country or stayed on on an unpaid basis. Sonia did her undergraduate degree at a British university spending 4 months each summer back home, 'it's not that I was present in the UK. I wanted the British education but not to live here'. Her degree included a placement year which she chose to spend in Italy 'because my plans were to go back after the degree'. Despite the fact that, 'throughout that placement [in an Italian research institute] I was unpaid' she describes herself as 'very lucky'. After completing her final year in the UK she returned to Italy to seek employment as a researcher. Her immediate problem was that the authorities did not recognise her degree and required her to do a whole series of examinations ([22]). Eventually Sonia met an English boyfriend and returned to the UK commencing a doctorate initially for the 1st year with no funding (apart from a fees-only scholarship). She then secured a 2-year Marie Curie fellowship but in this case was attributed student status. Her doctorate involved fieldwork in Italy so she split her time equally between the two countries.

Building on contacts made during her placement year, Sonia returned to Italy still hoping to develop a career there. She was given a position working on a project with a well-established researcher. However, she was not paid and had to cover her own research expenses commuting to the institute over 250 km away and undertaking fieldwork in remote locations; 'I would be there a few days a week in hotels basically as a consultant. I was expected to work with no payment in the hope that something would happen. I spent a whole year waiting for the promise of a 1-year job'. This situation proved costly and stressful and she eventually returned to the UK taking a 3-year fixed-term research position. After leaving that position she returned to the university of her PhD and at the time of interview was on a 1-year, part-time contract which had just been extended for 3 months. This is the institution and the city that she now really wishes to live and work in along with her new partner. On that basis she was prepared to take very temporary insecure part-time appointments effectively 'waiting' or 'queuing' for a position. She currently works half of the week on an unpaid basis. Since completing her degree in 1995, Sonia has never held a permanent employment position.

Bernadette has also engaged in unpaid work in order to retain links and build social capital whilst she 'waits' for a position. Bernadette is an Austrian researcher who came to the UK for 3 years immediately after her PhD on a fixed-term postdoctoral fellowship (with an employment contract). Due to the length of degrees in Austria she is now aged 40. Her husband is British, in exactly the same area of research but resident in Austria and also in an insecure position.

At the time of interview Bernadette's contract had expired and she was 'staying on' at the British university and continuing to work on a full-time but unpaid basis building her CV and waiting for a position either in the UK, Austria or a third country. Although she and her partner regularly visit each other and meet at other research locations on projects they have been 'living apart together' for over 4 years sharing two residences; the British employee residing in Austria and the Austrian employee (now unpaid) living in the UK.

That this issue of unpaid work should pose a problem for highly qualified 'knowledge workers' may come as something of a surprise. In reality it is an increasingly common yet 'hidden' phenomenon as early-career researchers clamour to gain the necessary know-how and know-who to progress into paid and hopefully secure positions. Many researchers accept/tolerate periods of 'employment' without pay.

There are many doctoral researchers in the situation faced by Sonia at the start of her doctorate, who are prepared to move abroad to commence a doctorate with no funding at all or fees-only funding (O'Brien, 2009). These researchers will be classified as 'students' rather than employees ([23]).

The examples above focused on the issue of 'remuneration' and the significance of this in defining doctoral research as a qualifying form of 'work'. We noted the Court of Justice's insistence that the concept of work is a Community concept defined by functional/objective criteria and not open to the divergent interpretation of individual Member States. Recent case-law indicates some 'slippage' in this respect with important implications for mobile researchers working in very flexible and insecure ('competitive') global labour markets. Golynker contends that, despite this functional definition, achieving the status of 'Community worker' is dependent not only on economic activity but on the 'correlation between residence and economic activity in another Member State' (2006a, p. 50). Put simply, location matters, and to qualify as a 'Community worker' you have to be economically active in a specific territory.

([22]) Despite clear laws and policies in the area of mutual recognition of qualifications, researchers continue to face serious obstacles.

([23]) Until the Bidar judgement UK research councils made 'fees-only' awards to EU nationals (see below).

5. Distinguishing places of residence from places of employment

The Court of Justice ruling in Baumbast ([24]) is of critical importance here to the status of individuals working in 'liquid' professions at the heart of the knowledge economy. In many of these cases, places of work are no longer coterminous with places of residence. It is quite usual for mobile researchers to have more than one position and more than one residence across international space. The complex temporal and spatial dynamics of this are exacerbated when individuals form international partnerships and start families.

Mr Baumbast was a German national, who, after pursuing an economic activity in the UK, was employed by German companies in work outside of the EU. Mr Baumbast continued to reside in the UK along with his Colombian wife and their children. However, the UK authorities refused to renew Mr Baumbast's residence permit on the grounds that he no longer qualified as a mobile Community worker and did not satisfy the conditions for a general right of residence. So, he lost his residency (and associated rights) and his partner lost her derived entitlement (as the spouse of a Community migrant worker). Baumbast argued that he should enjoy a more universal right of residence by virtue of the direct application of Article 20 TFEU (as a European citizen) irrespective of place of residence. In effect, Mr Baumbast was trying to achieve a reconciliation of the demands of his job (in terms of virtual communication and ongoing business travel to multiple locations) with the need for stability for his family. Golynker contends that:

> 'Community law should accommodate the situation where a Community worker or self-employed person would like to maintain the stability of residence in a Member State other than his own while exercising his right to carry out economic activity elsewhere.' (2006a, p. 49)

Much of the discussion concerned the derived rights his spouse gained as a mother of EU migrant children ([25]). The case raised another set of issues of more direct relevance to the current paper. Namely whether the benefits of European citizenship should remain so firmly attached to [long-term] residency given major shifts in employment processes requiring individuals to work beyond national and coterminous boundaries, potentially outside of the EU, in more flexible and mobile ways.

([24]) Judgment of 17 September 2002 in Case C-413/99, *Baumbast and R* (ECR 2002, p. I-7091).

([25]) Her children held EU nationality and as children of an EU national gained important social rights. For further discussion see Ackers and Stalford (2004; 2007).

Golynker argues that achieving the broader social and economic objectives of European Union, 'presupposes an ever more integrated economy with diversification of migration patterns as well as increasing complexity and dynamics of circulation of the workforce' (2006a, p. 49). For Golynker, the Baumbast case 'provides a perfect test of the universal quality of Union citizenship ... The universal right to move should encompass all possible forms of intra-Community movement as a trigger of Community protection. This would disengage the right of residence in another Member State from economic activity in that Member State' (2006a, p. 45).

The Court of Justice ruled that Mr Baumbast was entitled to remain in the UK on the basis of his Union citizenship ([26]), in common with other economically inactive migrants. This right is subject to a range of conditions including the requirement that he 'must not become an unreasonable burden on the public finances of the host state' (paragraph 90). In other words he has no claims against the UK welfare system. This places Mr Baumbast in an inferior position in comparison to his economically active peers whose work is physically rooted in the UK.

It would be interesting to see a researcher, such as Bernadette, bring this type of case. Due to the pressure to move in order to secure employment in his field Bernadette's British husband now lives in Austria. On that basis if the UK decided that she was no longer a worker (once her contract ended and she began unpaid work) she could not rely on her marriage to a British citizen as the basis for her citizenship/residency entitlement. Golynker's conceptualisation of 'partial migration' (living in one country and working in another) does not begin to capture the complexity of international partnering in the context of dual or same career, 'living apart together' or long-distance commuting relationships. However empirical research suggests that international careers both spawn and reflect the management of complex relationships (Ackers, 2010; Cox, 2008).

6. The right to permanent residence

Mr Baumbast (and Laura) would have been in a much stronger situation if they completed a period of 5 years' continuous employment and residence in the EU at some stage. The 'citizenship directive' ([27]) which came into force in 2006 sought to strengthen migrant citizens' rights. Article 16 introduced a 'permanent right of residence' for 'Union citizens who have resided legally for a continuous period of 5 years in the host Member State'. Furthermore, 'continuity of

([26]) Article 20 TFEU.

([27]) Directive 2004/38/EC.

residence shall not be affected by temporary absences not exceeding a total of 6 months in a year or by absences of longer duration for military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or third country' (paragraph 3). Once acquired, the right to permanent residence shall be lost only through absence from the host Member State for a period exceeding 2 consecutive years (paragraph 4).

As O'Brien explains, 'The permanent residence provision … is incapable of conveying a nuanced approach; quite simply, at 5 years' residence, the negative, residence-threatening effects of claiming solidarity benefits must cease' (2008, p. 4). It conveys an 'all-or-nothing' right that may be undermined by periods of employment/residence outside of the qualifying country of more than 6 months per year or, once the status is achieved, periods of continuous residence of over 2 years. These kinds of residency 'interruption' are highly usual, highly valued and, unfortunately in some cases, obligatory in research careers (Ackers, 2010). This is particularly so at early-career stage making it very difficult for many mobile early-career researchers to 'hit' the 5 year residency target.

Laura would not satisfy the conditions attached to permanent residency (in Germany). In reality the fixed-term contract directive ([28]), specifically designed to prevent abuse arising from the use of successive fixed-term contracts, may have unwittingly further disadvantaged researchers. Under the fixed-term contract directive employing institutions are required to justify the continued use of temporary contracts once an employee has been in continuous employment for a period of 4 years. At this point a further contract renewal should lead to a permanent contract. In practice universities have exercised 'creativity' to avoid the implications of permanency, either reducing the length of positions, splitting longer term positions or attempting to 'justify' subsequent temporary contracts on grounds of reliance on external funding (Oliver and Hooley, 2010).

7. Mobility and 'flexicurity'

The question remains as to how accommodating these new legal developments are to the diverse population of highly skilled 'partial migrant' researchers. My own work on research careers and mobility has placed significant emphasis on understanding the relationship between contemporary mobility, particularly in the research sector, and contractual insecurity, throwing fresh critiques on the traditional dichotomy distinguishing 'voluntary' from 'involuntary' migration (King, 2003; Ackers and Gill, 2008). One of the major drivers of research mobility is contractual insecurity and the dominance of fixed-term employment in early-career research positions (Ackers and Oliver, 2007). The vast majority of early-career researchers are moving for work rather than with work. And most positions are of quite short duration (1 to 3 years). On that basis, achieving 5 years' continuous residence and taking care not to jeopardise this by taking a position in another Member State for more than 2 years adds another complex dynamic to an already constrained decision-making process.

Analysis of UK data on academic employment (from the Higher Education Statistics Agency (HESA), 2010) reveals the important role that EU nationals play (Figure 1).

Figure 1. Academic employment function by nationality marker (%) — all English HEIs 2008–09

Employment function	UK nationals	EU nationals	Non-EU nationals	Not known	
Teaching only	71.8%	8.8%	7.5%	11.9%	100%
Research only	55.4%	21.1%	20.9%	2.6%	100%
Teaching and research	76.3%	9.5%	8.9%	5.3%	100%
Other	87%	4.8%	4.4%	3.8%	100%

Source: HESA 2010 (n = 170 504).

([28]) Directive 1999/70/EC.

The concentration of EU nationals in research-only positions maps directly onto contractual status. Nearly all (84%) of the EU nationals holding positions at the University of Cambridge, by way of example (Figure 2), are on fixed-term contracts. Put another way, temporary employment is the norm for non-nationals in UK research labour markets. In this context, job-to-job mobility becomes essential.

Figure 2. University of Cambridge: contract type by nationality marker (2008/9)

Nationality	Open-ended/permanent	Fixed-term contract	Total
UK	1 164 (41%)	1 710 (59%)	2 874
EU	179 (16%)	957 (84%)	1 137
TCN	210 (19%)	890 (81%)	1 100
Total	1 588	3 885	5 472

Source: HESA data, 2010.

The use of fixed-term contracts, typically involving periods of 1 to 3 years (but with many much shorter and some longer appointments) makes it very difficult for early-career researchers to benefit from the more generous rights attached to permanent residence. It is important to emphasise that in most cases researchers do not face one period of fixed-term employment. The 'usual' expectation is for at least two or three successive fixed-term postdoctoral positions, often involving international moves. This varies enormously between disciplines, with social scientists generally moving into permanent positions earlier and natural/life scientists spending many more years in temporary employment (Ackers et al, 2005; 2006). These researchers, engaging in exactly the kinds of intra-EU, interinstitutional and intersectoral mobility promoted as critical to the development of the EU as a 'knowledge economy' are seriously jeopardising their citizenship and social rights, leaving them highly vulnerable to personal 'risk'. And perceptions of this risk are closely associated with the leakage of women (and to a lesser extent men) from science careers (Ackers, 2010; Buber, 2001; Cox, 2008).

8. Frontier working (international commuting)

The concept of 'frontier working' has a long history in European law, designed to capture those situations, mainly in continental Europe, where a worker may live in one country and hop across the border regularly (perhaps daily) to go to their workplace in a neighbouring country. Reflecting this, the definition of frontier working is quite rigid and confined to cases in which the worker returns to their country of residence on at least a weekly basis to a bordering country (Golynker, 2006a, p. 67) ([29]). Many researchers engage in frontier-style mobility but typically with more variable frequency and spatiality. Golynker recognises these shifts in practices, arguing that, 'in the contemporary globalised context a frontier worker does not necessarily carry out his activity within the frontier region of two bordering Member States' (p. 67). Dave (Laura's husband) engaged in a pattern of frontier-style mobility for over 3 years when Laura lived in Germany. Unfortunately the spatial dimensions of his mobility (between the UK and Germany) would render him ineligible.

Stretching the concept of partial migration still further, Golynker argues that it should encompass forms of work that do not necessarily involve any form of physical mobility or co-presence. The 'IT revolution', she suggests, 'affects not only intellectual property but also human capital as the teleworker confronts both the legal system of the country of his/her residence and the legal system of the country where his/her employer is located … The growing importance of this new type of migration can hardly be overestimated and demands an innovative approach to protect social and economic rights' (2006a, p. 4).

9. European citizenship: the necessity of physical mobility?

Increasing attention has been paid in recent years to the growing importance of information technology and its impact on the ways in which people communicate and conduct their business/work ([30]). Golynker boldly contends that, because such technological advances enable people to work in one location without the necessity of physical presence in the traditional workplace, 'the concept of virtual labour mobility should be accommodated into the concept of free movement of persons in Community law' (2006a, p. 80). Although virtual migrants may not move physically the activities they engage in nevertheless imply that they 'confront the legal systems' of the countries they are living and working in.

([29]) Regulation (EEC) No 1251/70. For further discussion see Arnull et al (2000).

([30]) Larsen, Urry and Axhausen (2006); Kaufmann, Bergman and Joye (2004); and Flamm and Kaufmann (2006).

Both Dave and Laura are heavily involved in various forms of virtual mobility or 'teleworking'. Completing her UK-registered doctorate whilst living in Germany or completing *habilitations* in Germany whilst resident in the UK provide excellent examples. The following case illustrates some of the ways in which the territorial dimensions of knowledge work (or the relationship between what you do and where you do it) have evolved.

10. Virtual mobility

Yue is a physicist who lives in the UK and travels to CERN (a large scale experimental facility based in Geneva) every 4 months to spend a 'solid week' in meetings with around 200 researchers working on collaborative projects. For Yue, location (place) is not important; infrastructure is, and the international composition of the team: 'In particle physics, it [place] doesn't make that much difference. We always joke at conferences that we bump into the same people and they say, "I've changed jobs but all that's changed is my e-mail address". You're still working with the same people.'

Asked whether people in these situations relocate she replies: 'Some do, some don't. One of the students who finished his PhD (in the UK) moved to a different experiment. It is still based at CERN so he was going to move soon. His home institute was actually a Canadian institute but he never goes there. He works at CERN so it didn't really make much of a difference to him … It doesn't matter where your home institute is. You have to be prepared to travel all the time but the pressure to live abroad is declining as the opportunities for remote access and shorter meeting-related trips increase.'

Yue's situation (and that of her colleague) illustrates the declining importance of place, at least in terms of employment location and the ease with which an individual can 'work remotely' in a way not too distinct from teleworkers. In this more highly skilled type of work, a degree of co-presence is important to networking and communication, but it is not the place that matters but the people gathered in that place.

The Court of Justice discussed the legal implications of this kind of scenario, in the context of self-employment, in Carpenter ([31]). Mr Carpenter, a UK national, operated as the sole owner of a business selling advertising space. The business was established in the UK but a substantial part of the work involved customers established in other Member States. Mr Carpenter 'attended meetings for business purposes in other Member States.' He was married to a Filipino national who was granted temporary leave to remain as a visitor in the UK (for 6 months). Mrs Carpenter cared for her husband's children from a previous marriage. Her application for leave to remain in the UK was turned down and a decision taken to make a deportation order against her.

Mr Carpenter argued that his ability to exercise his treaty-based right (to provide services in another Member State) was dependent on his wife's right to reside in the UK. The court supported Mr Carpenter ([32]). As Golynker notes, 'this decision effectively explains that the element of physical movement within the Community is not a necessary requirement for the establishment of a link between the economic activity in question and Community law' (2006a, p. 83).

The question remains as to whether this view, taken in the context of a self-employed person, could be extended to an 'employed person'. Golynker cites Mlinek's perspective on this, that only work involving 'an explicit element of commuting' should be covered (2006a, p. 80).

Yue's description of working practices in particle physics illustrate the ways in which virtual forms of communication have come to at least partially substitute for physical mobility. These new forms of partial migration enable individuals to conduct their work and home life across a range of places; place, from an employment perspective at least, becomes less or even insignificant. That this remains the case has lead Bulterman to conclude that, 'it is not Union citizenship as such that brings a person within the scope of the EC Treaty, but the exercise of a Union citizenship right to free movement' (cited in Golynker 2006a at p. 79). Golynker contends that the Court of Justice ruling in Carpenter has changed this situation removing the requirement for 'an explicit element of physical movement across frontiers' (2006a, p. 81). If this is the case, then this potentially brings a whole new cadre of employees within the protection of European citizenship, embracing those engaged in forms of virtual labour mobility without the necessity of physical presence at a traditional workplace in another Member State.

In practice most researchers engaged in these forms of commuting are combining it with virtual working. Certainly this is the case in Yue's example. It is interesting to note that the European Commission's charter and code on the employment of researchers specifically identifies teleworking as a potential tool in its 'work–life balance' mechanism and urges Member States and institutions to consider using teleworking

([31]) Judgment of 17 September 2002 in Case C-60/00, *Carpenter* (ECR 2002, p. I-6279).

([32]) Referring to Article 56 TFEU (the freedom to provide services in another Member State), interpreted in the light of the fundamental right to respect for family life (Article 8, European Convention on Human Rights).

and sabbaticals to promote work–life balance (and gender equality).

11. Conclusions

This paper has addressed some critical socio-legal questions deriving from the attempts to re-theorise contemporary migration. The first section addressed some of the issues facing doctoral researchers working for no pay and researchers struggling with temporary and insecure contracts. Mobility, in these contexts, may pose a high risk, especially if they are classified as 'economically inactive' or if they are 'forced' to move as a result of employment insecurity.

The challenge here is to foster (not force) a diversity of mobilities and encourage those that genuinely contribute to the creation and transfer of knowledge and enhanced economic and social welfare whilst protecting as far as possible the status and quality of life of the individuals involved. In the context of research careers at least, ensuring that doctoral researchers are given the status of employees with all the rights and responsibilities that such status involves is one step forward. Taking steps to ensure that research institutions and professional organisations prevent the practice of allowing the employment of researchers without remuneration would remove some serious elements of both exploitation and elitism. Implementing the letter and spirit of the fixed-term contract provisions would also remove a source of insecurity that 'forces' high levels of often undesired mobility. These changes together ensure that mobile early-career researchers are afforded all the rights and responsibilities of other 'employees'. The second cluster of cases identified in the paper present more complex legal challenges beyond the scope of employment law. Indeed a researcher may have a perfectly effective employment contract or contracts but these may not relate directly to his or her residency status either at the time of contribution or the time(s) of claim. The result is a spatial disconnect in the location of contributions and claims.

The concept of 'partial migration' provides a useful mechanism to capture the complexity and fluidity of contemporary migration behaviour, particularly involving highly skilled 'knowledge workers' moving within the EU. The word 'partial' can be used to describe both the temporal quality of moves and/or their spatial dimension. Most importantly it forces us to reconsider the traditional characterisation of 'migration' as semi-permanent labour migration involving the leaving of one residential and employment space to occupy another in another country. Whilst some branches of migration theory have long recognised the limitations of this caricature, the sedentarist tendencies of legal systems have remained more resistant to change. And for good reason. Golykner's enthusiastic encouragement of the EU as a supranational body, to adopt an imaginative and reflexive response to the reality of contemporary mobilities, brings with it certain risks. Whilst grounding individual social rights in a membership (nationality-based) conceptualisation of citizenship de-territorialises claims, for the present time at least, contributions remain largely bounded. Extending supranational legal rights to 'partial migrants' challenges the fiscal basis of national welfare systems where territories/borders are fundamental to revenue (fiscal contributions). Put simply, individuals may claim against systems they have never and may never contribute to, threatening the sustainability of welfare systems and potentially leading to a scaling down of social protection (a 'race to the bottom') ([33]). This applies both to occupational (contributory)-based rights such as maternity leave and supplementary pensions, and also to claims against national welfare systems (for social security, healthcare and housing, and a whole platform of family rights including childcare and children's education). In theory, mobility represents less of a challenge to contribution-based rights providing that systems exist to support the effective transferability and aggregation of contributions and that individuals understand and trust these processes (which they do not at the present time). Social security rights funded through national taxation and often organised, funded and delivered at local level pose a much more serious problem in a European Union characterised by massive and increasing levels of welfare diversity. The fiscal challenge for systems is clear. Nevertheless it is important that this group of highly skilled but generally poorly remunerated workers (who lack the kind of corporate mobility packages afforded to many industrial employees, insulating them from the risks associated with international mobility) are properly protected and compensated ([34]).

If the mobility of knowledge workers is seen as fundamental to the enhanced economic and social welfare of the European Union as a whole then mechanisms need to be found to ensure that individuals do not carry a disproportionate burden of risk and have access to the wider panoply of benefits derived from European citizenship.

([33]) These issues were discussed in the rather different context of retirement migration in Ackers and Dwyer, 2002 and Ackers and Coldron, 2009.

([34]) The term 'compensation' is widely used in corporate relocation packages (Ackers and Oliver, 2009).

12. References

Ackers, H. L. (1998), *Shifting spaces — Women, citizenship and migration within the European Union*, Policy Press, Bristol.

Ackers, H. L. and Dwyer, P. (2002), Senior Citizenship? Retirement, Migration and Welfare in the EU, Policy Press, Bristol.

Ackers, H. L. (2003), *The participation of women researchers in the TMR Marie Curie fellowships*, European Commission.

Ackers, H. L. and Dwyer, P. (2004), 'Fixed laws, fluid lives: the citizenship status of post-retirement migrants in the European Union', *Ageing and Society*, Vol. 24, pp. 451–475.

Ackers, H. L. and Stalford, H. (2004), 'Children, citizenship and internal migration in the European Union', Ashgate, London.

Ackers, H. L. and Oliver, E. A. (2005), Adams, J., 'Researchers in higher education institutions — Scoping study of career development and human resource management', HEFCE.

Ackers, H. L., Gill, B., Coldron, K. and Oliver, E. A. (2006), 'Assessing the impact of the Roberts' review enhanced salaries and stipends on postdoctoral and postgraduate positions', Research Councils UK.

Ackers, H. L. (2004), 'Managing relationships in peripatetic careers: Scientific mobility in the European Union', *Women's Studies International Forum*, Vol. 27(3), pp. 189–201.

Ackers, H. L. and Gill, B. (2008), *Moving people and knowledge: Scientific mobility in an enlarging European Union*, Edward Elgar.

Ackers, H. L. and Oliver, E. A. (2007), 'From flexicurity to flexsecquality? The impact of the fixed-term contract provisions on employment in science research', *International Studies of Management and Organization*, Vol. 37(1), pp. 53–79.

Ackers, H. L. and Stalford, H. (2007), 'Managing multiple life courses: The influence of children on migration processes in the European Union', *Social Policy Review 19*, Policy Press, Bristol.

Ackers, H. L. and Oliver, E. A. (2008), 'Scientific mobility and pensions', Association of Certified and Chartered Accountants.

Ackers, H. L. and Gill, B. (2008), *Doctoral mobility in the social sciences*, Norface.

Ackers, H. L. and Oliver, E. A. (2009), 'Penalised for being mobile? National pension schemes as an obstacle to mobility for researchers in the European higher education area', Internationalisation handbook, European Universities Association and Academic Cooperation Association, RAABE Academic Publishers, pp. 1–20.

Ackers, H. L. and Coldron, K. E. (2009), 'European citizenship, individual agency and the challenge to social welfare systems: a case study of retirement migration in the European Union', Policy and Politics, Vol. 37(4), pp. 573–589.

Ackers, H. L. (2008), 'Internationalisation, mobility and metrics: a new form of indirect discrimination?', *Minerva*, Vol. 46(4), pp. 410–435.

Ackers, H. L. (2010), 'Internationalisation and equality — The contribution of short stay mobility to progression in science careers', in special issue of the *Journal Recherches sociologiques et anthropologiques: 'Transnational care dynamics: between emotions and rationality'/'Les dynamiques de soin transnationales: entre émotions et considérations économiques'*, Vol. XLI(1), pp. 83–103.

Ackers, H. L. et al, 'Impact assessment of the Marie Curie programme, Research DG, 2010.

Ackers, H. L. (2011), 'Place, temporality and purpose: contextualising internationalisation', paper to the Crassh Workshop, Cambridge.

Ackers, H. L. et al (2012), 'Excellence, equality and entrepreneurialism — Building sustainable research careers in the European research area', Expert Group on the Research Profession.

Arnull, A. M., Dashwood, A. A., Ross, M. G. and Wyatt, D. A. (2000), *Wyatt and Dashwood's European Union law*, fourth edition.

Balaz, V. and Williams, A. (2004), ''Been there, done that': international student migration and human capital transfers from the UK to Slovakia', *Population, Space and Place*, Vol. 10(3), pp. 217–237.

Bohning, W.R. (1972), 'The migration of workers in the United Kingdom and the European Community', *European Demographic Information Bulletin*, Vol. 3(3), pp. 159–160.

Buber, I., Berghammer, C. and Prskawetz, A. (2011), 'Doing science, forgoing childbearing? Evidence from a sample of female scientists in Austria', Vienna Institute of Demography.

Chalmers, D., Davies, G. and Monti, G. (2010), *European Union law*, second edition, Cambridge University Press.

Cox, D. (2008), 'Evidence of the main factors inhibiting mobility and career development of researchers', Rindicate, final report to the European Commission, contract DG-RTD-2005-M-02-01.

Craig,P. and de Búrca, G. (2007), *EU law: text, cases and materials,* fourth edition, Open University Press, London.

Cresswell, T. (2006), *On the move — Mobility in the modern western world*, Routledge, London.

Dougan, M. (2005), 'Fees, grants, loans and dole cheques: who covers the costs of migrant education within the EU?', *Journal of Contemporary European Research*, Vol. 1(1).

Dougan, M. (2008), 'Cross-border educational mobility and the exportation of student financial assistance', *European Law Review*, Vol. 33, pp. 723–738.

European Commission Communication — Better careers and more mobility: A European partnership for researchers (COM(2008) 317).

European Commission staff working document — A rationale for action — Accompanying document to the communication on the Europe 2020 flagship initiative — Innovation union (SEC(2010) 1161).

Golynker, O. (2006a), *Ubiquitous citizens of Europe: the paradigm of partial migrations*, Oxford: Intersentia.

Golynker, O. (2006b), 'Student loans: the European concept of social justice according to Bidar', *European Law Review*, Vol. 31, pp. 390–401

Golynker, O. (2009), 'Case C-158/07, *Jacqueline Forster* v *Hoofddirectie van de Informatie Beheer Groep*, Judgement of the Court (Grand chamber) of 18 November 2008', *Common Market Law Review*, Vol. 46(6), pp. 2021–2039.

Golynker, O. (2009), 'European Union as a single working–living space: EU law and new forms of intra-Community migration', *Theorising the Global Legal Order* (Halpin, A. and Roeben, V., eds), Hart Publishers, Oxford, pp. 145–167.

Flamm, M. and Kaufmann, V. (2006) 'Operationalising the concept of motility', *Mobilities*, Vol. 1(2), pp. 167–189.

Kaufmann, V., Bergman, M. M. and Joye, D. (2004), ‚Motility: mobility as capital', *International Journal of Urban and Regional Research*, Vol. 28(4), pp. 745–756.

King, R. (2002) 'Towards a new map of European migration', *International Journal of Population Geography*, Vol. 8(2), pp. 89–106.

Larsen, J., Urry, J. and Axhausen, K. W. (2006), *Mobilities, Networks, Geographies*, Ashgate, Aldershot, 2006.

Musselin, C. (2005), 'European academic labour markets in transition', *Higher Education*, Vol. 49, pp. 135–154.

O'Brien C. (2008), 'Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case-law and national solidarity', *European Law Review*, Vol. 33, pp. 643.

O'Brien, C. (2009), 'Social blind spots and monocular policy making: The ECJ's migrant worker model', *Common Market Law Review*, Vol. 46, pp. 1107–1141.

OECD (2002), Frascati manual 2002 — *The measurement of scientific and technological activities* — Proposed standard practice for surveys on research and experimental development.

Oliver, E. A. and Hooley, T. (2010), 'Researchers, fixed-term contracts and universities', VITAE, Cambridge.

Ouellette, J. (2007), 'Scientists in love: When two worlds collide', *Nature*, Vol. 445, 700–702.

Research Councils UK (RCUK) (2010), 'Concordat to support the career development of researchers'.

Universities UK (2010), 'The future of research'.

Van de Sande, D., Ackers, H. L. and Gill, B. (2007), 'Impact assessment of the Marie Curie fellowships', final report to the European Commission.

Williams, A. M. and Balaz, V. (2012), 'Migration, risk and uncertainty: theoretical perspectives', *Population, Space and Place*, Vol. 18, pp. 167–180.

Direct and indirect barriers to free movement of workers: the experience of a national ombudsman

Calliope Spanou ([1]), the Greek Ombudsman

The position of EU national migrant workers and their treatment in their host states has been at the centre of discussions during the Annual Conference on Free Movement of Workers in Malta on 15 and 16 November 2012. The focus has been primarily on legal issues. My work as the Greek Ombudsman is a source of experience regarding the implementation of this legislation, i.e. the problems which EU migrant workers encounter on the ground.

Free movement of nationals of Member States has been one of the main objectives of the European Economic Community since its foundation in 1957. Non-discrimination of workers on the basis of nationality and the development of corresponding policies to remove administrative obstacles and formalities have been stimulated by the pro-European momentum despite phases of slowing down. Starting from the movement of financially active persons, this principle gradually extended to various policy areas, leading to the harmonisation of the conditions in the various Member States, in order to ensure that the rights stemming from the treaty could be realised. Corollary rights further derived from these, such as rights of residence for jobseekers following a period of employment, but also for students and pensioners and generally persons able to financially support themselves. A basic rule was set, namely that beneficiaries may not become a burden on the social assistance system of the host Member State. These developments led to the introduction of European Union citizenship in the Treaty of Maastricht in 1992, and the definition, in the present treaty, of EU citizenship and the rights and obligations stemming from it (Articles 18 to 21 TFEU). For the Court of Justice of the European Union (CJEU), EU citizenship is a fundamental status of Member States' nationals. A large body of secondary EU legislation has been produced to make this happen.

For individual persons, professional or personal motives, climatologic considerations, etc. constitute the wider framework of decisions concerning free movement. This has been seen as an enriching process, a process of mixing talents, and cultures, towards a common European identity and the collective welfare. The idea and reality of national borders tended to take a back seat, strengthening the common European identity beyond the limited market logic as the driving force of the EU.

However, times are changing. The widening north–south divide, starting from economic disparities — partly due to inherent weaknesses of the European construction — seems to lead to a deeper fragmentation of the EU, to a backward process, to the awakening of old stereotypes and defensive attitudes. At the same time, policy responses to the problems not only fail to treat the economic aspects but are surrounded by discourse — and possibly actions — contrary to the ideals that have guided the European integration process. The EU is becoming less a common framework than an object of dispute, torn between countries and populations 'deserving' or 'non-deserving' to be part of it in a strict economic sense.

Up to recent times, internal migration in the EU has not been very significant, despite variations in living standards. As economic conditions are deteriorating this might change. Severe economic or political disadvantages may outweigh kinship bonds, domestic investment and cultural familiarity as counterincentives to migration. It may be interesting to assess in some time the impact of the new conditions. It seems that young educated people seek professional opportunities in some other Member States, even more so when they have already benefited from the united European space as students. This generation has not known anything else than free movement within the EU. This generation thinks in terms of a unified space. But what lies ahead? Borders may acquire a different meaning in times of economic difficulties and rising levels of unemployment. Has the EU been a 'fair weather' project?

What happens to the idea of free movement when the Prime Minister of the UK, for instance, declares that he would close the border to Greek nationals? How about EU citizens living and working in the crisis-hit countries, either by free choice or by economic necessity? What is at stake is clearly more than the exercise of free movement rights. It is the perception of Europe, the common European space, the major success story of the post-war era. The common European space has been the great ideal of our time. Protectionism as a result of the insecurity stemming from the economic crisis revives past attitudes. Stereotypes are on the rise as a means to protect more and more fragile living standards.

([1]) This contribution is a revised version of the final address, held at the Conference on Free Movement of Workers, 15 and 16 November 2012, Valletta, Malta.

I shall not improvise a premature answer to these questions. I just wish to draw attention to recent developments that potentially compromise the idea and practice of free movement rights.

As an Ombudsman, I insist on relying on facts, on actual experience. And experience shows that there is resistance to free movement rights beyond what legal rules prescribe. And therefore, free movement rights remain an unfinished business. I shall refer to aspects of this resistance from my experience and show what the Ombudsman can do in counterweight. It is however important to underline that the number of complaints to the Ombudsman regarding these issues remains limited.

Working in a different country means that a person needs to be integrated into a different and often complicated world of regulations directly or indirectly linked to the labour market and the organised professions. Apart from the legal complexities, which may be visible at first and often second sight, this experience brings migrants in touch with deeper structures of this society and polity. These include the structure and importance of interests and interest groups, informal processes and the knowledge of how to work the system.

In many cases regulations have been shaped for nationals and indirectly or even accidentally exclude other EU citizens; furthermore, bureaucratic procedures and barriers, perceptions of what to expect from the domestic administrative system, in terms of output but also in terms of length of time, accountability and rights of appeal, constitute factors affecting the reality of free movement rights. The issue therefore is not the implementation of European regulations, strictly speaking. It is rather the adjustment capacity, the responsiveness and flexibility of a national administrative system, its readiness to identify problems and barriers to labour mobility and even more to remedy the situation.

At a first level this has to do with the awareness and capacity of street-level bureaucrats and services; public employees may not be familiar with procedures that involve other national systems and there is no pattern of procedures to follow. However, beyond that, it involves on the one hand the adjustment capacity of a whole lot of established social and economic interests that the legal system may tend to protect and which try to obstruct the opening of professional opportunities to other EU citizens. On the other hand, the domestic system may also bear the secondary effects of general EU regulations and react in a spasmodic way, or at least with a short-term view, by raising further obstacles to the enjoyment of rights, especially when financial resources are primarily the issue. In both cases competition for scarce (employment) resources is the common feature. The economic crisis renders resources even scarcer; the resistance is expected to grow.

Factors affecting administrative responsiveness can be grouped in the following categories.

1. Administrative capacity.

   Lack of knowledge and experience with these — still rather exceptional — issues may explain the lack of adjustment capacity. Further, there might be reluctance of public employees to take the initiative and responsibility to solve the issue in conformity with European legislation. They thus create a bigger issue than the initial one by requesting the position of higher level authorities (e.g. Legal Council of State) or a court decision.

2. Vested interests. Preservation of prerogatives or more generally of the status quo.

   Vested interests are often involved either in shaping the general criteria or in the individual decisions concerning the recognition of professional qualifications. These interests may be protected by the existing legislative framework while inertia works in their favour. Delay or administrative incapacity may just hide what is really at stake. The obstructive power of vested interests might be the explanation.

3. Attempt to avoid secondary negative effects of EU legislation.

   This might be an intentional but inappropriate reaction to a real problem, caused by diversity of situations in which uniform rules come to be implemented.

In what follows, I shall highlight some examples of these explanatory factors, drawing on the experience of the Ombudsman.

1. Status of municipal citizen

Recruitment for part-time employment in municipalities was linked to the status of citizen of a certain municipality. This worked against EU citizens who could not be registered as such. In the past, the Greek Ombudsman had intervened and presented his arguments, encouraging the administration to request the opinion of the Legal Council of State

(2007) ([2]). It was then clarified that for EU citizens this registration should be replaced by the status of resident in the area of the municipality. However, the problem reappeared on another occasion, because the independent authority that supervises the competitive recruitment procedure was not aware of this solution ([3]).

In this case, it was also clear that the public employees handling the issue were reluctant to take any initiative and responsibility to solve it in conformity with European legislation.

2. Regulating professions

Administrative recognition of diplomas and qualifications is an important precondition for exercising certain professional activities. The meaning of 'regulated profession' needs clarification at the national level, in order to provide transparent rules concerning these activities.

Within the legal framework of the internal market of the European Union, all Member States are responsible for regulating access to specific professions by requiring possession of certain professional qualifications, which can be obtained within the national territory. This process however may constitute a hindrance to the free circulation of professionals within the European Union. As a solution to this problem, Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications was adopted, by setting out the rules under which mutual recognition of regulated professional qualifications can be facilitated. The relevant legislation (as later amended) was transposed into national law by Presidential Decree 38/2010. According to the aforementioned directive, 'regulated profession' is the professional activity the access to which is subject directly or indirectly, by virtue of legislative, regulatory or administrative provisions, to the procession of specific professional qualifications attested by evidence of formal qualifications, such as diplomas, certificates and other evidence issued by an authority in a Member state.

The Court of Justice, in Case C-164/1994, has decided that a profession cannot be described as regulated when there are in the host Member State no laws, regulations or administrative provisions governing the taking up or pursuit of that profession even though the only education and training leading to it consists of at least 4½ years of higher-education studies on completion of which a diploma is awarded and, consequently, only persons possessing that higher-education diploma as a rule seek employment in, and pursue, that profession.

As is obvious, the recognition of foreign professional qualifications is a complex procedure which requires examination case by case. The competent authority in Greece for the recognition of professional qualifications is the Council for the Recognition of Professional Qualifications (SAEP), a multi-faceted administrative body with its seat at the Ministry of Education. It should be noted that the Ombudsman's investigation undertaken after interested persons' claims has concluded that concerning the foundation and operation of SAEP there are instances of maladministration.

The Ombudsman's opinion has been founded on the fact that there are delays in designating the members of the aforementioned council as well as substantial disagreements between the members of the council, due to uncertainty as to the adequacy of education that had been delivered in other Member States and the pressure put on the administration by the representatives of corresponding professional organisations participating as members in the council.

The aforementioned reasons as well as the lack of the legal framework regulating some health sector professions are the main obstacles faced by those who request the recognition of their diplomas or qualifications.

The paradox is that the cases brought to the Ombudsman mainly concern Greeks who are holders of foreign qualifications and return to their country. It seems that the system of administrative recognition of professional qualifications tends to protect the rights of nationals not only at the expense of EU citizens but also at the expense of Greek nationals having studied and/or worked abroad.

([2]) The Greek Legal Council of State has stated (50/2007) that if it is required that the status of citizen of a certain municipality is a condition for the access to some work positions, this status concerning citizens of EU states should be substituted by the status of residence in the area of the municipality. Law 4057/2012, Article 9, paragraphs 26 to 29 replaced the condition of status of citizen of a certain municipality with the condition of permanent resident status in the area of the municipality in order to be awarded points for recruiting advantage to municipalities. The Greek legislator followed the jurisprudence in this point.

([3]) 'Special report 2009' (http://www.synigoros.gr/resources/docs/188554.pdf) (in Greek).

Thereby, it is of importance that the competent national authority be limited to the genuine implementation of Union law. Any other practice not only is negative for the state involved, without corresponding to any intrinsic gain, but it entails an important moral and financial burden for the persons involved.

3. Recognition of prior professional experience

EU citizens wishing to work as language teachers in public high schools may apply to be included on the priority list for recruitment on a yearly contract. The right to exercise the profession needs to be recognised by the relevant agency (Council for the Recognition of Professional Equivalence of University Degrees). In one case brought to the Ombudsman however, the Ministry of Education refused to take into account the years of prior service (teaching) in the education system of other EU countries, arguing that this service extended before the year of recognition of professional qualifications. This position stemmed from confusion between the years of prior service and the recognition of diplomas from other countries, which in the Greek system is assimilated to the granting of the diploma and produces legal effects only *ex nunc*. Thus EU citizens would lose all benefit from their prior professional activity.

What is particularly interesting in this case is that a rule which applies to Greek nationals (most of whom have never exercised their right to professional mobility) produces indirect discriminating effects with regard to EU law (now Article 45 TFEU). The underlying confusion between recognition of diplomas and time of prior professional experience is problematic because the latter cannot be nullified by a formal element, i.e. the date of the official recognition of professional qualifications.

Having argued along these lines, the Ombudsman's recommendation was shared by the Legal Council of State, which changed its former opinion and agreed with the Ombudsman that 'if the Greek state takes into account prior time of service for candidates, it cannot exclude EU citizens just because this service has been acquired prior to the date of recognition of the relevant diploma or professional qualification by the competent Greek authorities (National Academic Recognition Information Centre or Council for the Recognition of Professional Equivalence of University Degrees).' There has also been similar jurisprudence of administrative courts and the Supreme Administrative Court and against the Independent Authority for the Selection of Personnel ([4]).

([4]) http://www.synigoros.gr/resources/docs/180862.pdf and http://www.synigoros.gr/resources/epistolh-stp-prouphresia-ekpaideytikwn--3.pdf (in Greek).

A similar issue was raised when a Greek national returning to Greece requested the recognition of his time of service in Switzerland prior to the date of the agreement between the EU and the Swiss Confederation in 1999 (in force since 2002). The Directorate-General of Salaries and Pensions of the Ministry of Finance refused the recognition based on a negative opinion of the Legal Council of State that recommended to wait until a similar case pending before the CJEU was decided. The CJEU ruled that no time restriction could apply in this matter. Following the decision of the CJEU the Ombudsman came back to the ministry and asked for a change in its position on this issue. Indeed, the Legal Council of State reconsidered its former position.

4. Conditions to operate a language school

In a different case, a UK citizen was required to have a diploma in English as a foreign language in order to operate a language school. However, this diploma, by definition, is not awarded to British citizens. The requirement was clearly geared towards Greek citizens and indirectly excluded him as an EU national from this professional activity. The administration did not appear willing to adjust when the Ombudsman pointed out that the criteria used did not conform to the jurisprudence of the CJEU.

One may see that the Ombudsman has a role in pushing for the implementation of free-movement EU legislation, but also for the clarification of a series of specific questions arising in concrete cases. The Ombudsman represents an institutional means to defend one's rights in this area, avoiding the time- and money-consuming judiciary procedures, unless as a means of last resort.

5. Permanent residence as a condition for pension supplement

Coordination of social security systems aims at facilitating the free movement of citizens in the EU. Most social allowances do not depend on residence, but on employment. According to Regulation (EC) No 883/2004 on the coordination of social security systems (Article 58):

1. A recipient of benefits to whom this chapter applies may not, in the Member State of residence and under whose legislation a benefit is payable to him, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all

the periods taken into account for the payment in accordance with this chapter.

2. The competent institution of that Member State shall pay him throughout the period of his residence in its territory a supplement equal to the difference between the total of the benefits due under this chapter and the amount of the minimum benefit.'

The pension supplement is a non-contributory benefit to complement the pension under certain conditions. In order to prevent the possibility of abusive take-up, the Greek social security services required that potential beneficiaries from neighbouring countries (especially Bulgaria) not only prove residence but hold a permanent residence card; the latter is subject to a minimum condition of 5 years of residence (or less in some categories of beneficiaries). They also requested a number of documents proving that they actually reside in the country continuously and even proceeded to carry out checks to verify the place of residence. Permanent residence is not a condition for access to social security benefits according to the regulation. In the view of the administration, the legal basis for this practice was the rule that (according to Directive 2004/38/EC as opposed to Regulation (EC) No 883/2004) the right of permanent residence should not impose a burden on the welfare system of the country of residence. This administrative practice, which was included in administrative circulars, raises obstacles to beneficiaries, contrary to the provisions of the European regulation and beyond the competence assigned to social security services.

The Ombudsman formulated these objections and requested that the administration follow the rules set by the regulation. It proposed that in order to prevent the possibility of abusive take-up of the pension supplement, the administration should use the tools provided for by the regulation and raise the issue before the Administrative Committee for the Coordination of Social Security Systems, instead of breaching the letter as well the spirit of European legislation. It is understandable that the issue has gained in importance now that the country is going through difficult times, since it potentially leads to a waste of resources, increases deficits and leads to further cuts for those who are in real need. The Greek police — competent for European residents and for certifying residence — agreed with the recommendation of the Ombudsman and drew the attention of police authorities to check the possibility of falsified documents provided by potential beneficiaries in order to prove residence in the country. A recent law (Law 3996/2011, Article 34) provided for a residence clause, even for the EKAS ([5]). This benefit is not paid to pensioners of Greek social insurance organisms who do not reside permanently in Greece. This provision could be considered contrary to the principle of free movement of persons. The Greek Ombudsman has already signalled to the Ministry of Labour the need to harmonise its provisions with EU law ([6]).

6. Conclusion

These are examples of the issues the Greek Ombudsman faces. They confirm that legal harmonisation is an important and necessary but not sufficient condition for the exercise of free movement rights within the EU. Various obstacles remain, either as remnants of a domestically centred past, or as a result of resistance of domestic structures. The complexity of realities on the ground requires continuous monitoring and intervention in order to ensure that free movement is actually implemented. The current crisis may enhance protectionist reflexes. In such a context, it is important that the academic community uphold the ideals and principles of free movement and European citizenship while Ombudsman institutions can play the role of watchdog for the conformity to European legislation, defending corresponding rights.

([5]) This allowance forms a mixed social security benefit, due to the application of both social insurance (coverage of pensioners) and social assistance principles (entitlement conditions include lack of resources). It is paid to pensioners faced with subsistence problems not met through personal or family sources. Its objective is to supplement the income resources of low-income pensioners through income-tested benefits. It constitutes therefore a supplementary 'targeting' measure that was adopted instead of the direct increase of the minimum amount of the pension.

([6]) 'Annual report 2012', pp. 47–48.

Access to social assistance benefits for EU citizens in another Member State

Paul Minderhoud, Centre for Migration Law, Radboud University Nijmegen, the Netherlands

1. Introduction

This article focuses on the issues which have been raised regarding the implementation of Directive 2004/38/EC ([1]) in the light of access to social assistance benefits for EU citizens in other Member States. This directive regulates the entry and residence of EU citizens and their family members in another Member State.

Directive 2004/38/EC makes a distinction between residence up to 3 months, residence from 3 months to 5 years and residence for longer than 5 years. Different preconditions for residence apply in each of these three categories. Furthermore, the treatment of economically inactive persons differs from the treatment of economically active persons. For each category there are different rules regarding access to social assistance benefits.

The directive gives all EU citizens a right to entry to any EU state without any conditions or formalities, other than the requirement to hold a valid identity card or passport, for 3 months (Article 6). It is, however, explicitly stated in Article 24(2) that the host Member State shall not be obliged to confer any entitlement to social assistance during these first 3 months of residence.

According to Article 7(1) of Directive 2004/38/EC Union citizens only have the right of residence on the territory of another Member State for a period of longer than 3 months if they (as far as relevant for this chapter):

a. are workers or self-employed persons in the host Member State; or

b. have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State ([2]).

Union citizens who have resided legally for a continuous period of 5 years in the host Member State shall have the right of permanent residence there ([3]). This means that after 5 years, a right of permanent residence is given to Union citizens (and their family members), without any further conditions, even if these persons do not have sufficient resources or comprehensive sickness insurance cover.

2. Entitlement to social assistance benefits?

A big problem is the ambiguity of the wording of Directive 2004/38/EC regarding entitlement to social assistance benefits. On the one hand the directive only allows inactive persons to use their free movement rights if they have the necessary resources. On the other hand it includes all kinds of signals that when these inactive persons apply for a social assistance benefit, this should be granted and this will not mean automatic expulsion of these inactive EU citizens.

Lenaerts and Heremans have spoken in this context of a balancing act between the interest of awarding social rights as a consequence of the right of free movement against the interest of safeguarding the national welfare systems ([4]).

Articles 14(1) and (2) of Directive 2004/38/EC regulate the retention of the right of residence.

On the basis of Article 14(1):

> 'Union citizens and their family members shall have the right of residence provided for in Article 6 [right of residence up to 3 months], as long as they do not become an unreasonable burden on the social assistance system of the host Member State.'

Article 14(2) reads:

> 'Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.'

This wording seems to imply that an appeal to social assistance will lead to an ending of the right of residence for those inactive persons who stay in another Member State for less than 5 years. But this is not the case, because according to Article 14(3):

([1]) 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 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, 30.4.2004, p. /77. The transposition period of the directive ended on 30 April 2006.

([2]) There is a section (c) regarding students I will not deal with here.

([3]) See Article 16(1) of Directive 2004/38/EC.

([4]) Lenaerts, K. and Heremans, T., 'Contours of a European social union in the case-law of the European Court of Justice', *European Constitutional Law Review*, 2006, pp. 101–115.

> 'An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State'.

'Unreasonable burden' is not further defined in Article 14, but is described in recital 16 of the preamble:

> 'As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or jobseekers as defined by the Court of Justice save on grounds of public policy or public security.'

The abovementioned ambiguity of Directive 2004/38/EC can also be found in Article 24. On the one hand, Article 24(1) provides for equal treatment for all Union citizens (and their family members) residing on the basis of this directive in the territory of the host Member State. But, on the other hand, according to paragraph 2 of this article the host Member State shall not be obliged to confer entitlement to social assistance during the first 3 months of residence or for jobseekers looking for employment, nor to grant maintenance aid for students, who have no right of permanent residence yet.

In an attempt to clarify several aspects of Directive 2004/38/EC the former Directorate-General for Justice, Freedom and Security published in 2007 a 'Guide on how to get the best out of Directive 2004/38/EC' ([5]). This guide states that:

> 'If your right to reside is conditional upon having sufficient resources not to become a burden on the social assistance system of the host Member State during the period of residence (i.e. when you study or are an inactive person there), it might be terminated once you become an unreasonable burden on the social assistance system.
>
> This does not mean that you cannot apply for social assistance there when you are in need. However, in this case the host Member State is entitled to examine whether it is a case of temporary difficulties and after taking into account the duration of your residence, the personal circumstances and the amount of aid granted, it may consider that you have become an unreasonable burden on its social assistance system and proceed to your expulsion. An expulsion measure can in no case be the automatic consequence of recourse to the social assistance system.
>
> Should you be expelled on these grounds, the host Member State cannot impose a ban on the entry and you can return back at any time and enjoy the right to reside if you meet the conditions described above.
>
> This limitation does not apply to categories where the right to reside is not subject to the condition of sufficient resources, such as workers or self-employed persons.'

In July 2009 the Commission published a communication 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 ([6]). It repeated that in assessing whether an individual whose resources can no longer be regarded as sufficient and who was granted the minimum subsistence benefit is or has become an unreasonable burden, the authorities of the Member States must carry out a proportionality test. To this end, Member States may develop for example a points-based scheme as an indicator. Recital 16 of Directive 2004/38/EC provides three sets of criteria for this purpose.

1. Duration — For how long is the benefit being granted? Is it likely that the EU citizen will get out of the safety net soon? How long has the residence lasted in the host Member State?

2. Personal situation — What is the level of connection of the EU citizen and his/her family members with the society of the host Member State? Are there any considerations pertaining to age, state of health, family and economic situation that need to be taken into account?

3. Amount — Total amount of aid granted? Does the EU citizen have a history of relying heavily on social assistance? Does the EU citizen have a history of contributing to the financing of social assistance in the host Member State?

([5]) See: http://ec.europa.eu/justice/citizen/files/guide_2004_38_ec_en.pdf

([6]) COM(2009) 313.

The communication emphasises that as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member States, they cannot be expelled for this reason.

Although this guide and communication were meant for clarification, it still leaves discretion for the Member States to define the concept of unreasonable burden. Unsolved questions seem to be: when is it a case of temporary difficulties, how long should the duration of residence have been, which personal circumstances should be relevant and how much aid granted is too much?

3. Transposition issues of the directive

Directive 2004/38/EC has had a somewhat paradoxical career in this field. As I will discuss below, it has been claimed as the catalyst for reduction of EU citizens' social rights as well as a clarification of entitlements. An important issue is that in some Member States the implementation of Directive 2004/38/EC has also been used to limit the access of jobseekers to job-seeking allowances. Another issue of interest is the determination of when a Union citizen becomes 'an unreasonable burden' in various Member States ([7]).

3.1. Social assistance during the first 3 months of residence

In many Member States the transposition of Directive 2004/38/EC was used as an occasion to introduce clauses in their social law explicitly excluding EU nationals and their family members from entitlement to public assistance during the first 3 months of residence in another Member State, referring to Article 24(2) of the directive. A good example in this respect is the Netherlands. On the occasion of the transposition of Directive 2004/38/EC the Dutch government changed the Social Assistance Act and introduced legislation excluding all EU citizens explicitly from social assistance benefits during the first 3 months of their stay. Under the old legislation these EU citizens were formally entitled to social assistance from the moment they entered the Netherlands. However, an appeal on social assistance would lead immediately to a termination of their residence status and consequently to a loss of social assistance entitlement ([8]).

To prevent discrimination the Dutch government took the opportunity of this change of legislation to introduce in the Social Assistance Act the condition of habitual residence for the entitlement of social assistance for all claimants (Dutch or non-Dutch). Also, Dutch citizens who came from abroad would not be entitled any more to social assistance for at least the first 3 months of their residence because they would not be seen as habitual residents immediately. This introduction was challenged in the First Chamber because it was seen as being in breach of the Dutch constitution, which in Article 20(3) entitles every Dutch citizen to social assistance, being an habitual resident or not. After the Secretary of State for Social Affairs had assured the First Chamber that this change of legislation did not mean that there was a waiting period of 3 months for Dutch citizens who came from abroad to the Netherlands, the bill was approved ([9]). This solution raises the question of whether it is possible in the light of Article 18 of the Treaty on the Functioning of the European Union (TFEU) to impose this 3-month waiting period on EU citizens or not.

To complicate matters even further, according to the directive it is not forbidden for Member States to provide social assistance in these first 3 months of residence. Recital 21 of the preamble states that:

> 'It should be left to the host Member State to decide whether it will grant social assistance during the first 3 months of residence, or for a longer period in the case of jobseekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.'

This recital has led to discussion in Sweden on how to apply the derogation of Article 24(2) of Directive 2004/38/EC. Sweden has used this discretion in the end to give EU citizens during the first 3 months of residence access to essential healthcare and working allowances in strictly regulated cases.

([7]) This information is for a large part based on the national reports which have been written for the European Network on Free Movement of Workers, which is coordinated by the Centre for Migration Law in Nijmegen. The reports are available on the websites of the European Commission (http://ec.europa.eu/social/main.jsp?catId=475&langId=en) and of the Centre for Migration Law (http://www.ru.nl/law/cmr/projects/fmow-2/national-reports-fmw).

([8]) Job-seekers do not have access to social assistance benefits during the time they are looking for a job in the Netherlands.

([9]) *Handelingen EK* 2005–06, No 36, pp. 1747–53, *Staatsblad* 2006, 373 and 456.

3.2. No access to social assistance benefits for jobseekers?

In some other Member States the implementation of Directive 2004/38/EC has been used to limit the access of jobseekers to job-seeking allowances. A good example is Germany, where an amendment of the Social Code II ([10]) (the second book of the Social Code) changed the rules on entitlement to social benefits as a jobseeker by making use of the restrictions of Directive 2004/38/EC under Article 24(2).

According to this amendment no foreigners, including EU citizens whose right of residence derives exclusively from the purpose of looking for employment, are entitled to jobseeker's allowance ([11]).

According to the drafting history of this new provision ([12]), the legislator wanted deliberately to exclude access to social benefits for foreigners entering Germany for the purpose of seeking employment. Contrary to the previous, less restrictive provisions, which granted an entitlement to every foreigner on the basis of ordinary residence in Germany, access to social benefits under the Social Code II (*Arbeitslosengeld II:* jobseekers' allowances) is excluded explicitly even beyond the time period of 3 months in accordance with Article 24(2) of Directive 2004/38/EC.

This change of legislation has been challenged before several German social courts with different results. In early 2008 the social court of Nürnberg held the opinion that EU citizens, whose right of residence in Germany derives only from the fact that they are jobseekers, should have no entitlement to any social assistance at all. To get more clarity on this issue the court referred to the Court of Justice for a preliminary ruling. The answer of the Court of Justice came in the Vatsouras and Koupatantze judgment ([13]) in which the Court of Justice examines the possibility of refusing a social assistance benefit to jobseekers who do not have the status of workers. In that regard it noted that, in view of the establishment of citizenship of the Union, jobseekers enjoy the right to equal treatment for the purpose of claiming a benefit of a financial nature intended to facilitate access to the labour market. A Member State may, however, legitimately grant such an allowance only to jobseekers who have a real link with the labour market of that Member State. The existence of such a link can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question. It follows that citizens of the Union who have established real links with the labour market of another Member State can enjoy a benefit of a financial nature which is, independent of its status under national law, intended to facilitate access to the labour market. It is for the competent national authorities and, where appropriate, the national courts not only to establish the existence of a real link with the labour market, but also to assess the constituent elements of the benefit in question. The objective of that benefit must be analysed according to its results and not according to its formal structure. The Court of Justice points out that a condition such as that provided for in Germany for basic benefits in favour of jobseekers, under which the person concerned must be capable of earning a living, could constitute an indication that the benefit is intended to facilitate access to employment.

Benefits of a financial nature which, independent of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38/EC. But the Court of Justice also adds that examination of this question has not disclosed any factor capable of affecting the validity of Article 24(2) of Directive 2004/38/EC.

The German federal authorities have argued that the exclusion clause under Section 7(1) of the Social Code II continues to be applicable with respect to foreigners who are staying in Germany exclusively for the purpose of seeking labour since the social benefits under this clause can be attributed to social assistance in the sense of Article 24(2) of Directive 2004/38/EC. It is to be expected that the question will again come up for the social courts since it is argued that the view taken by the Federal Ministry for Labour and Social Affairs is not in line with the jurisprudence of the Court of Justice ([14]).

An interesting other approach was followed in a recent judgment from the *Bundessozialgericht* (the highest court in social security cases in Germany) delivered on 19 October 2010 (B 14 AS 23/10 R) ([15]).

This case concerned a French citizen who moved to Berlin in 2007. As he had a small job for a little while, he first had a right to stay in Germany as a worker. After he was made unemployed, he retained his right

([10]) Law of 24 March 2006, BGBl. I, p. 558.

([11]) Section 7(1) of Social Code II.

([12]) Cf. Bundesratsdrucksache 550/05; Bundestagsdrucksache 16/11, p. 80.

([13]) Judgment of 4 June 2009 in Joined Cases C-22/08 and C-23/08, *Vatsouras* and *Koupatantze* (ECR 2009, p. I-4585).

([14]) See 'Report on the free movement of workers in Germany in 2009-2010' (http://www.ru.nl/law/cmr/projects/fmow-2/national-reports-fmw).

([15]) http://juris.bundessozialgericht.de/cgi-bin/rechtsprechung/list.py?Gericht=bsg&Art=en

as a worker for 6 months on the basis of Article 7(3)(c) of Directive 2004/38/EC ([16]).

During this period he was entitled to the Social Code II jobseeker's allowance, which was the same benefit that was disputed in the Vatsouras case. After these 6 months his residence right was based on the fact that he was still looking for work and therefore was a jobseeker ([17]). The German authorities however stopped his Social Code II benefit, which excludes foreign jobseekers from entitlement, as we have also seen above in the Vatsouras case.

However, according to the German court this refusal is in breach of Article 1 of the European Convention on Social and Medical Assistance, which is a treaty concluded in 1953 under the auspices of the Council of Europe ([18]). Article 1 of this convention reads:

> 'Each of the contracting parties undertakes to ensure that nationals of the other contracting parties who are lawfully present in any part of its territory to which this convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance provided by the legislation in force from time to time in that part of its territory.'

According to Article 2, for the purposes of this convention the term 'assistance' means in relation to each contracting party all assistance granted under the laws and regulations in force in any part of its territory under which persons without sufficient resources are granted means of subsistence and the care necessitated by their condition, other than non-contributory pensions and benefits paid in respect of war injuries due to foreign occupation.

The German court ruled that although the personal scope of this Social Code II jobseeker's allowance is different from the personal scope of the German social assistance benefit (*Sozialhilfe*), both have the character of a general social assistance law (*Fürsorgegesetz*) and therefore both fall under the definition of Article 2 of the convention. This is in contrast with the decision of the Court of Justice in the Vatsouras case, which stated that the Social Code II jobseeker's allowance was not a social assistance benefit in the sense of Directive 2004/38/EC.

As the Frenchman in this case was lawfully residing as a jobseeker in Germany based on Article 14(4)(b) of Directive 2004/38/EC, and as German citizens who were in the same position did receive this jobseeker's allowance, the German court decided the Frenchman had to be treated equally.

The Frenchman had also made the argument that the Vatsouras judgment was applicable in his situation, but the court said it was not necessary to deal with this argument, given the fact he was already entitled under the European Convention on Social and Medical Assistance.

The meaning of this decision of the German court does not apply to all EU citizens, but is only applicable to nationals of the contracting parties. The contracting parties as far as relevant here are: Belgium, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Italy, Luxembourg, Malta, the Netherlands, Portugal, Sweden and the United Kingdom.

Turkey is also a contracting party, but Turkish citizens cannot derive a right of residence as a jobseeker in EU law as EU citizens can. Iceland and Norway are also contracting parties and have the right of residence as a jobseeker because Directive 2004/38/EC has been integrated into the EEA agreement.

An interesting aspect of this case is the influence of an 'old' Council of Europe convention in relation to European citizenship. This relation occurred before, albeit in the opposite direction, in the Martínez Sala judgment of the Court of Justice ([19]). Ms Martínez Sala was a Spanish citizen in Germany who had a very weak residence status but who could claim a lawful residence position on the basis of Article 6(a) of this same convention. This lawful residence position gave her the same entitlement to child allowances as German citizens according to the equal treatment provisions of the Treaty establishing the European Community (TEC). In the abovementioned case of the *Bundessozialgericht* it is the other way around. Here the right of residence is based on EU law, but the entitlement to the benefit is derived from the European Convention on Social and Medical Assistance.

In reaction to the decision of the German court, the government of Germany on 19 December 2011 registered this provision to the annex of this convention, which lists provisions excluded from the scope of

([16]) Article 7(3)(c) reads: 'For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:
[...]
(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first 12 months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than 6 months'.

([17]) See Article 14(4)(b) of Directive 2004/38/EC.

([18]) http://conventions.coe.int/Treaty/EN/Treaties/Html/014.htm

([19]) Judgment of 12 May 1998 in Case C-85/96, *Martínez Sala v Freistaat Bayern* (ECR 1998, p. I-2691).

the convention ([20]). Implementing rules explain that the convention now no longer applies Section 7 of the Social Code II (SGB II) ([21]). The judgment of the German court has effectively been reversed by the executive. However, there are court challenges to this position based on public international law but not EU law ([22]).

3.3. When does a Union citizen become an unreasonable burden?

Another issue that raises problems is the determination of when a Union citizen becomes 'an unreasonable burden'. In the Netherlands, the government has developed a kind of sliding scale to answer this question. This scale was made tighter in 2012. According to those new rules, during the first 2 years of residence an appeal by an EU national on social assistance or on social care in a hostel for more than 8 nights will cause an expulsion order. In the 3rd year the criteria for an expulsion decision are: social assistance for more than 2 months or complementary social assistance for more than 3 months or social care for 16 nights or more. In the 4th year, 4 to 6 months' social assistance or social care for more than 32 nights; and in the 5th year, 6 or 9 months' social assistance or social care for more than 64 nights ([23]). Similar to the Dutch sliding scale, the authorities in the Czech Republic use a 'system of points'. If a non-active EU citizen (who had registered for a stay longer than 3 months) claims a social assistance benefit, the competent authority examines whether a person concerned could become an 'unreasonable burden on the social assistance scheme'. For non-active persons there is a system of points attributed to certain facts or characteristics of the person concerned. The facts that are taken into account are mainly the previous length of residence, previous length of employment or self-employment in the Czech Republic, previous periods of study in the Czech Republic and the possibilities of finding a job. There is a discretionary power to take into account whether the person concerned has only temporary difficulties, his/her personal circumstances, family commitments and the potential amount of benefit. The fewer points one gets, the sooner he/she will be seen as an unreasonable burden. This information will be given to the Aliens and Border Police, who can initiate an expulsion procedure. In Finland the Aliens Act laying down the grounds for refusing EU citizens' and their family members' entry was amended in the light of transposing Directive 2004/38/EC as follows:

> 'An EU citizen's and her family member's entry to Finland may be refused if her right of residence has not been registered or she has not been issued with a residence card and if she:
> [...]
> (2) by resorting repeatedly to social assistance as provided in the Act on Social Assistance, or to other comparable benefits, or by other comparable means, during her short stay in the country burdens unreasonably the Finnish social assistance system.' ([24])

Those who burden unreasonably the national system of social assistance shall not be regarded as having a right of residence, and if a person does not have a right of residence, his/her entry may be refused. What constitutes an unreasonable burden to the social assistance system shall be decided case by case in Finland. Refusing entry is not an automatic consequence of burdening the social assistance system. Referring to the Court of Justice judgments on Trojani ([25]) and Grzelczyk ([26]), it was stated in the proposal for the act that refusing an EU citizen entry on the ground of lack of resources comes into question only in very rare cases.

Belgium, however, withdrew in 2012 the residence permits of over 2 000 EU citizens who had received social assistance for more than 3 months. They were not actually expelled, but were invited to leave the country. It concerns mostly citizens from Romania ([27]).

4. United Kingdom: the right to reside test

In 2004 the UK used the accession of the 10 new Member States to restrict substantially the access to social benefits for all EU migrants. In order to access benefits following the change of regulation, applicants must now show they have a right to reside in the UK. These regulations were intended to deal primarily with those who are not economically

([20]) It may be found online on the Council of Europe website (http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=014&CM=8&DF=9/17/2006&CL=GER&VL=1).

([21]) See Geschäftsanweisung SGB II No 8 v. 23.2.2012 — Vorbehalt gegen das Europäische Fürsorgeabkommen (EFA), Geschäftszeichen SP II 21 / SP II 23 – II-1101.1, available online (http://www.arbeitsagentur.de/nn_166486/zentraler-Content/HEGA-Internet/A07-Geldleistung/Dokument/GA-SGB-2-NR-08-2012-02-23.html).

([22]) See the 'Report on the free movement of workers in Germany in 2011-2012' (http://www.ru.nl/law/cmr/projects/fmow-2/national-reports-fmw).

([23]) Paragraph B10/4.3 of the Dutch aliens circular 2000.

([24]) Section 167(2) of the Finnish Aliens Act.

([25]) Judgment of 7 September 2004 in Case C-456/02, *Trojani* (ECR 2004, p. I-7573).

([26]) Judgment of 20 September 2001 in Case C-184/99, *Grzelczyk* (ECR 2001, p. I-6193).

([27]) http://www.deredactie.be/cm/vrtnieuws.english/news/1.1388657 (last visited 24 April 2013).

active. The regulations are intended to prevent those EU migrants who have no right of residence in the UK — because they are neither EU workers, relevant dependents, nor self-sufficient and entitled to residence in their own right — from claiming a range of benefits. The British government claimed that there was no systematic way under UK law and practice to identify and refuse these benefits to those who were not entitled under Union law. The habitual residence test which was introduced in the mid 1990s did not perform this role, focusing on the fact of residence rather than its legality or legal basis. The solution to this problem was to add a new requirement for eligibility for the relevant benefits. Applicants have to show that they have a right to reside in the UK and no one without such a legal basis for residence will be regarded as habitually resident ([28]).

The changes in 2004 mean that there are now two stages to the habitual residence test:

- an initial test to determine whether the person has a 'right to reside'; and
- the original habitual residence test.

Any person who does not have a right to reside automatically fails the habitual residence test. A person with a right to reside must also satisfy the main habitual residence test to be entitled to benefit. The term 'habitual residence' is not defined in regulations, so in order to determine whether a person is habitually resident, a decision-making officer considers a variety of factors about the person's circumstances. European case law has established that factors to be considered include:

- the length, continuity and general nature of actual residence;
- the reasons for coming to the UK;
- the claimant's future intentions.

EEA nationals who are lawfully employed or are self-employed have a right to reside as an employed or self-employed person. Those who are economically inactive — such as students, pensioners or lone parents — only have a right to reside provided they have sufficient resources to avoid becoming a 'burden' on the social assistance system. The right of EEA nationals to reside in the common travel area is set out in the Immigration (European Economic Area) Regulations 2006, which implement Directive 2004/38/EC ([29]).

The right to reside test applies to benefits that are social security benefits and fall within the scope of Regulation (EC) No 883/04 on the coordination of social security systems (income support, state pension credit, income-based jobseeker's allowance, income-related employment and support allowance, child benefit, child tax credit and health in pregnancy grant) and benefits that are not covered by Regulation (EC) No 883/04 but are social advantages under Regulation (EU) No 492/2011 (housing benefit, council tax benefit, social fund crisis loans and housing assistance from local authorities).

The bottom line of the right to reside test is that an EU citizen who has no permanent residence in the UK and who is without means or work will not be treated under UK law as eligible for these benefits.

A leading case concerning a Swedish national and a Norwegian national (both born in Somalia) shows the effect of the right to reside test for all European citizens. In a ruling in 2007 by a British court of appeal both were refused social benefits on the basis that they did not fulfil the terms of the right to reside test ([30]). Neither claimant was, at the relevant time, a worker or otherwise economically self-sufficient, and each claimed social benefits, having their claim initially rejected on the basis that they did not have the right to reside in the UK, as a result of the test introduced as from 1 May 2004. The court concluded that the right to reside is only conferred upon British citizens, certain Commonwealth citizens, 'qualified persons' as defined by the UK Immigration (European Economic Area) Regulations 2000 and others protected by national law. The court considered that as the claimants did not fulfil the requirements for 'qualified persons' status, they had no right to reside, and subsequently no right to the benefits sought, which are now dependent on fulfilment of the terms of the new test. In particular, this means that those EU citizens who are neither workers nor in possession or receipt of funds from other sources to qualify as self-sufficient will be excluded from receipt of these benefits.

In this *Abdirahman* ruling, the secretary of state presented the argument to the court of appeal that the cases did not fall within the scope of the Treaty on

([28]) Toner, H., 'New legislative and judicial developments in EU citizenship', in Shah, P. and Menski, W. (eds), *Migration, diasporas and legal systems in Europe*, Routledge-Cavendish, London, 2006. See also White, R., 'Residence, benefit entitlement and Community law', *Journal of Social Security Law*, 2005.

([29]) http://www.legislation.gov.uk/uksi/2006/1003/contents/made

([30]) Joined Cases ss [2007] EWCA Civ 657 *Nadifa Dalmar Abdirahman* v *Secretary of State for Work and Pensions* (2006/1639) and *Ali Addow Ullusow* v *Secretary of State for Work and Pensions* (2006/1668), 5 July 2007.

European Union (TEU) because EU law did not extend to cases where no right of residence exists under either the TEU or the relevant domestic law and that therefore the question of indirect discrimination contrary to Article 12 TEC (now Article 18 TFEU) does not arise. The court of appeal accepted this argument and added that if there was indirect discrimination against non-UK nationals, this was justified as a legitimate response to the manifest problem of 'benefit tourism'. This same line of reasoning was used in the judgment of the Supreme Court of 16 March 2011 in the Patmalniece case, which dealt with the compatibility of the right to reside requirement for social security benefits which fall within Regulation (EEC) No 1408/71 (now Regulation (EC) No 883/04) ([31]).

4.1. Special problems for A8 and A2 nationals

As already mentioned, the right to reside regulations came into effect on the same date of the accession to the EU as the 10 new Member States (1 May 2004). At the same time a worker registration scheme was introduced to control access to the labour market for workers from the so called A8 countries (Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia) ([32]). Nationals of these states were able to take up employment in the UK, providing they were authorised, under the scheme. If they did not have a job but came to the UK to seek employment, they would need to be self-sufficient in order to have a right to reside. According to this UK worker registration scheme, A8 nationals who stopped working before completing 1 year with an authorised employer did not have the right to reside as a worker as well. Without this right to reside they were excluded from receiving social benefits ([33]). This obligation to register under this scheme ended on 1 May 2011, when the transitional arrangements on the free movement of workers from the A8 countries came to an end. Before that time, the European Commission already considered the scheme contrary to the transitional arrangements because it allowed the UK not only to restrict the right of nationals from the abovementioned Member States to move to the UK to work, but also to discriminate when paying benefits. On 28 October 2010 the Commission officially requested that the UK end these discriminatory conditions, which was a bit late perhaps ([34]). With the end of the worker registration scheme from 1 May 2011, the infringement procedure on this issue has ended as well.

But A2 nationals (Bulgarians and Romanians) still must have authorisation (in the form of a work permit) to work in the UK. They cannot retain worker status or reside as jobseekers unless they have completed 12 months of authorised work. The transitional arrangements for these two countries will come to an end on 1 January 2014. Croatians, who will join the EU on 1 July 2013, will encounter the same problems as Bulgarians and Romanians have now.

5. Conclusion

The 2004 directive on free movement has made immigration of inactive EU citizens (and their family members) easier. Every EU citizen now has a right of residence for up to 5 years in any Member State, although it is conditional. After that, he or she will receive the right to permanent residence, with full social protection.

A problem with the implementation of Directive 2004/38/EC is that it leaves room for different interpretations in situations where an inactive EU citizen without a permanent residence right applies for a social assistance benefit. It is not clearly defined when an EU citizen becomes an 'unreasonable burden' on the social assistance system. Leeway is given to states to examine whether financial difficulties may be temporary. As a result, states have developed their own definitions and ways of implementing the directive on this point.

Is it possible to deny EU citizens access to social assistance benefits before they have a permanent residence? And is it possible to prove that any one person has become an 'unreasonable' burden on a country? Hailbronner has argued that 'in any individual case it will hardly ever be possible to show the unreasonableness of a burden. The social system as such cannot be substantially affected by an additional beneficiary' ([35]). And according to Martinsen it may be difficult for a Member

([31]) *Patmalniece* v *Secretary of State for Work and Pensions* [2011] UKSC 11. See the extensive analysis of this judgment by Mel Cousins in 18 *Journal of Social Security Law*, pp. 136–142, 2011.

([32]) Until 1 May 2011 A8 nationals were obliged to apply to register under the 'worker registration scheme' (WRS) within 1 month of starting a job. The registered A8 national would then receive a 'registration certificate' and a 'registration card'. The worker registration card was only issued the first time that the worker applied to register, and would continue to be valid even where an A8 national changed employment. The worker registration certificate, on the other hand, was specific to an employer and therefore had to be changed every time the A8 national changed employment during the registration period.

([33]) An important judgment which directly addressed A8 nationals was given by the UK House of Lords on 12 November 2008, in a case concerning a claim for social benefits by a Polish national which was refused. See *Zalewska* v *Department of Social Development* (Northern Ireland), [2008] UKHL 67. See http://www.bailii.org/uk/cases/UKHL/2008/67.html

([34]) http://ec.europa.eu/social/main.jsp?langId=en&catId=457&newsId=917&furtherNews=yes

([35]) Hailbronner, K., 'Union citizenship and social rights', in Carlier, J.-Y. and Guild, E. (eds), *The future of free movement of persons in the EU*, Bruylant, Antwerp, 2006, pp. 65–79.

State to prove that an EU citizen is an 'unreasonable burden' on the social system when, as has been demonstrated in the case-law of the Court of Justice, recourse to social assistance in itself is not sufficient reason ([36]).

So far, the Court of Justice, however, has not allowed unconditional access to social assistance benefits of the host state. A first condition is always that the applicant has to have legal residence in the host state. In several cases the Court of Justice has formulated additional conditions that the applicant should 'have a genuine link with the employment market of the state concerned' (Collins, paragraphs 67–69) ([37]), or 'need to demonstrate a certain degree of integration into the society of the host state' (Bidar, paragraph 57) ([38]). And the Court of Justice also recognises the right of the host Member State to stop the right of residence of the person concerned, even if it may not become 'the automatic consequence of relying on the social assistance system' (Grzelczyk, paragraph 43 ([39]) and Trojani, paragraph 36) ([40]).

Lenaerts and Heremans indicate that on the one hand the Court of Justice has made it clear that Article 18 TEC (now Article 21 TFEU) cannot be a 'letter of safe conduct' for social tourism, but on the other hand shows that a society can no longer limit its solidarity to its nationals and should include all persons who demonstrate a sufficient degree of integration in that society. A request for a minimum subsistence allowance can by itself be considered as an unreasonable burden, but when, as in the Grzelczyk case, a student will clearly only require this support for the duration of 1 year, the pressure on the system is reduced and the balancing act changes ([41]).

However, the policy and practice in the UK show a different picture. By using a habitual residence test and a right to reside test, the social benefits system of this country seems to exclude inactive EU citizens effectively from entitlement during a certain period of time. But what is the validity of the right of residence test?

The judgments in the British cases could be challenged. They stress that the right to reside in the UK is linked to domestic law and not to Union law, which is odd, given that the domestic law is designed to implement Union law ([42]).

In my opinion there is a right of residence under EU law for inactive EU citizens without a permanent residence status even if they apply for social assistance benefits. This application can lead to the withdrawal of their residence right, but this right cannot be withdrawn automatically on the basis of temporary reliance on social assistance. After the introduction of Directive 2004/38/EC the reasoning of the *Trojani* case that there is no right of residence under EU law because Mr Trojani did not satisfy the condition of having sufficient resources has to be modified.

Although a non-national citizen of the Union, applying for a benefit because of lack of resources, does not derive a right of residence directly from Article 18 TFEU, this citizen derives a right of residence from Directive 2004/38/EC until the moment this right is withdrawn, when he or she has become an unreasonable burden to the social assistance system.

In March 2013 the UK, together with Germany, the Netherlands and Austria, sent a letter to the European Commission asking for measures to allow EU Member States to limit access to basic social benefits to other EU nationals ([43]). The European Commission is opposed to changing the rules and stresses that there are already measures to expel EU citizens who abuse a country's welfare system.

([36]) Martinsen, D. S., 'The social policy clash: EU cross-border welfare, Union citizenship and national residence clauses', paper prepared for the EUSA 10th Biennial International Conference, Montreal, 17–19 May 2007.

([37]) Judgment of 23 March 2004 in Case C-138/02, *Collins* (ECR 2005, p. I-2119).

([38]) Judgment of 15 March 2005 in Case C-209/03, *Bidar* (ECR 2004, p. I-2703).

([39]) Judgment of 20 September 2001 in Case C-184/99, *Grzelczyk* (ECR 2001, p. I-6193).

([40]) 7 September 2004, C-456/02. See also Verschueren, H., 'European (internal) migration law as an instrument for defining the boundaries of national solidarity systems', *European Journal of Migration and Law*, 2007, pp. 307–346.

([41]) Lenaerts, K. and Heremans, T., 'Contours of a European social union in the case-law of the European Court of Justice', *European Constitutional Law Review*, 2006, pp. 101–115.

([42]) Mitsilegas, V., 'Free movement of workers, EU citizenship and enlargement', *Immigration, Asylum and Nationality Law*, Vol. 21, No 3, 2007.

([43]) http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf

KE-XD-13-001-EN-N

Publications Office