

EUROPEAN UNION CITIZENSHIP, NATIONAL WELFARE SYSTEMS AND SOCIAL SOLIDARITY

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***Abstract.** The purpose of the present contribution is to explore how the ECJ seeks to respect the principles underpinning national welfare systems, notably social solidarity, whilst ensuring that Member States comply with the substantive law of the European Union, in particular with the Treaty provisions on the fundamental freedoms and EU citizenship. It is submitted that in order to reconcile those two interests the ECJ has taken the view that nationals of the host Member State must show a certain degree of financial solidarity with the nationals of other Member States who have established a ‘genuine or real link’ with the society of that State. With a view to establishing the existence of such a link, national authorities of the host Member State must engage in a case-by-case assessment of the personal circumstances of the EU citizen claiming social benefits. However, Förster is an important exception to the individual application of the ‘genuine or real link’ test. Although Förster does not overrule Bidar as a matter of principle, it exempts the host Member State from examining the personal situation of economically inactive students who apply for maintenance grants or student loans but have not yet completed a five-year period of residence. Moreover, compliance with residence requirements is an important factor which may determine the extent to which a person has become integrated into the society of the host Member State;*

* All opinions expressed herein are personal to the author.

but it is by no means the only one. Other factors, such as the fact that the person claiming social benefits has previously worked in the host Member State or is a national of that State, may be of relevance. Finally, this contribution supports the contention that it is possible to read Collins, Bidar, and Nerkowska consistently, on the ground that residence requirements do not carry the same weight for the establishment of links with the society of the host Member State as for the dissolution of the existing links with the society of the home Member State. This distinction encourages free movement of EU citizens: they should be able to exercise their right to free movement without having to fear that the strong ties they maintain with the society of their home Member State will be loosened.

Keywords: EU citizenship, free movement, social solidarity, national welfare systems, 'genuine or real link', integration, social benefits.

Introduction

Social solidarity is based upon the principle of subsidisation, according to which the wealth obtained by certain members of a community is redistributed to those members in need. Social solidarity is thus grounded in the concept of membership of a community. As Dougan and Spaventa point out, there are two reasons which explain why social solidarity and such membership go hand in hand. Morally, social solidarity 'only derives from the existence of a common identity, forged through shared social and cultural experiences, and institutional and political bonds'.¹ Financially, public authorities must strike the right balance between the number of persons who contribute to the functioning of the welfare system and the number of persons who benefit from it. If the latter were to outnumber the former significantly, national welfare systems would collapse. Understood as a criterion limiting the personal scope of social solidarity, the concept of membership guarantees the financial stability of national welfare systems.

In the EU, the Court of Justice (the 'ECJ') has striven to respect the principles underpinning national welfare systems, notably social solidarity, whilst ensuring that Member States comply with the substantive law of the European Union, in particular with the Treaty provisions on the fundamental freedoms and EU citizenship.² To that effect, the focus of the ECJ's case law is to reconcile the requirement of membership with free movement law. Thus, the host Member State may limit the award of social benefits to EU citizens who have established sufficient connections with the society of that State. Stated differently, in order for nationals of the host Member State to be required to show a certain degree of financial solidarity with nationals of other Member States,³ there must be a 'genuine or real link' between the EU citizen claiming benefits and the society

1 Dougan, M.; Spaventa, E. *Wish You Weren't Here... New Models of Social Solidarity in the European Union*. In Dougan, M.; Spaventa, E. (eds.). *Social Welfare and EU law*. Oxford: Hart Publishing, 2005, p. 181 *et seq.*

2 Lenaerts, K.; Heremans, T. *Contours of a European Social Union in the Case-Law of the European Court of Justice*. *European Constitutional Law Review*. 2006, 2: 101.

3 See e. g. Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 44.

which is paying for them.⁴ It would be contrary to the principle of equal treatment for the host Member State to deny social benefits to EU citizens who, in the same way as a Member State's own nationals, have forged strong bonds with the society of that State.

In relation to economically active EU citizens, the ECJ has consistently held that they are to be treated like nationals of the host Member State from day one and thus, they have immediate access to the welfare system of that State.⁵ The integration of economically active EU citizens into the socio-economic fabric of the host Member State is an objective actively pursued by the Treaties. Indeed, as I have explained elsewhere, it is clear that the internal market project, with its goal of efficient allocation of production factors, can only succeed if 'human production factors' are given adequate possibilities to integrate into the society of the host Member State.⁶ In addition, since economically active citizens contribute to the welfare system of the host Member State (duties), they should also be entitled to social benefits (rights).⁷ By contrast, in relation to economically inactive citizens, both the EU legislator and the ECJ believe that integration into the society of the host Member State is not immediate, but progressive.⁸ There is a strong correlation between the degree of integration and social welfare entitlements: the more integrated an EU citizen is, the more social benefits he or she is entitled to. In order for an EU citizen to be regarded as integrated into the society of the host Member State, it may be legitimate for the latter to impose residence requirements. But are there other ways to establish a 'genuine or real link' with the society of the host Member State?

The purpose of the present contribution is to explore these issues in light of the case law of the ECJ. It is divided into three Sections. Section I looks at the US example, where the right to travel is not constrained by financial considerations. The aim of this section is to explain why, on both sides of the Atlantic, a different answer is given to the same question, namely can the award of social benefits be made subject to complying with residence requirements? Section II is devoted to determining how the ECJ has interpreted the concept of 'residence' as a condition for welfare entitlements. In Section III, the exportability of social benefits is examined. Hence, this section explores whether residence requirements may be relied upon by the home Member State against its own

4 O'Brien, C. Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity. *European Law Review*. 2008, 33: 643 *et seq* (who argues that '[t]he real link [...] provides not an alternative to, but an adaptation of, national solidarity, enabling it to weather the free movement storm, by enshrining the premise that migrants are not in an automatically comparable situation to nationals and must somehow earn equal treatment').

5 In relation to workers, see Article 7(2) Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [1968] OJ L 257/2, English special edition: Series I Chapter 1968(II) P. 0475, which states that workers 'shall enjoy the same social and tax advantages as national workers'. In addition, the ECJ has interpreted the concept of social advantage broadly, so as to even include benefits not directly linked to employment. See e.g. Case 261/83 *Castelli* [1984] ECR 3199 and Case C-237/94 *O'Flynn v. Adjudication Officer* [1996] ECR I-2617.

6 Lenaerts, K.; Heremans, T., *supra* note 2, p. 103.

7 Van der Mei, A. P. *Free Movement of Persons within the European Community*. Oxford: Hart Publishing, 2003, p. 5–6.

8 Barnard, C. EU citizenship and the principle of solidarity. In Dougan, M.; Spaventa, E. (eds.), *supra* note 5, p. 158 *et seq*.

nationals with a view to denying them social benefits. An affirmative answer to that question would mean that, as a result of exercising free movement rights, EU citizens might eventually lose the strong links that once existed between them and their home Member State. Finally, a brief but concise conclusion supports the contention that, in spite of the ruling of the ECJ in *Förster*,⁹ the ‘real or genuine link’ approach remains good law.

1. Lessons from Comparative Law: The United States

In the United States, the right to travel is a right of the rich as much as it is of the poor.¹⁰ Indigents may travel to the State of their choice in search of a new beginning. In light of the case law of the United States Supreme Court (the US Supreme Court),¹¹ States have virtually no means of protecting themselves from ‘welfare migration’ (also known as ‘social tourism’). By ruling that durational residence requirements for welfare benefits are unconstitutional,¹² the US Supreme Court has held that no State may insulate itself from the ‘migrating poor’.¹³ The rationale behind the US right to travel reflects the ideal that the States and the federal government must join efforts to tackle the problems affecting the Union as a whole, such as social exclusion. As Justice Cardozo

9 Case C-158/07 *Förster* [2008] ECR I-8507.

10 The right to travel is not to be found in an express provision of the US Constitution. The reason of such a constitutional silence was explained by the US Supreme Court in *United States v. Guest*, 383 U.S. 745, 758 (1966). In that case, it held that ‘[a]lthough the Articles of Confederation provided that “the people of each State shall have free ingress and regress to and from any other State,” that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution’. As to the main components of the right to travel, in *Saenz v. Roe*, 526 U.S. 489, 500 (1999), the US Supreme Court ruled that ‘[t]he “right to travel” discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State’.

11 See *Edwards v. California*, 314 U.S. 160 (1941); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Saenz v. Roe*, 526 U.S. 489 (1999).

12 The US Supreme Court has distinguished between ‘residence requirements’ and ‘durational residence requirements’. Notwithstanding other constitutional provisions (such as the Dormant Commerce Clause, the Privilege and Immunities Clause, and the Equal Protection Clause), the third component of the right to travel does not oppose measures discriminating against out-of-state visitors. But it bans unequal treatment among *bona fide* residents on the ground of the length of time residing in the host State. See *Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 n.3 (1986) (‘[w]e have always carefully distinguished between bona fide residence requirements, which seek to differentiate between residents and non-residents, and residence requirements, such as durational, fixed date, and fixed point residence requirements, which treat established residents differently based on the time they migrated into the State’). Thus, the right to travel does not oppose, in principle, a *bona fide* residence requirement which ‘simply requires that the person *does* establish residence before demanding the services that are restricted to residents’. See *Martinez v. Bynum*, 461 U.S. 321, 328 (1983).

13 States may justify restrictions on the right to travel by invoking a compelling interest. However, State measures are very difficult to justify since they have to pass muster under the ‘strict scrutiny’ review. See *Saenz v. Roe*, 526 U.S. 489, 504 (1999).

eloquently articulated it in *Baldwin v. Seelig*,¹⁴ ‘[the US Constitution] was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division’.

However, European indigents are not entitled to move as freely as their American counterparts.¹⁵ True, gone are the days when free movement was limited to the factors of production (goods, capital and economically active persons): the right to move and to reside within the territory of the Member States, which Article 20 TFEU bestows upon all citizens of the Union, whilst not unconditional, is subject only ‘to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.’¹⁶

In this regard, the Citizens’ Rights Directive (the CRD)¹⁷ gives concrete expression to the right to free movement of economically inactive citizens. As mentioned in the introduction, the CRD follows an ‘incremental assimilation’ approach,¹⁸ whereby the longer economically inactive migrants reside in the host Member State, the more integrated they are deemed to be, and the greater the range of social benefits they receive on terms of equal treatment with nationals.¹⁹ Thus, the CRD establishes a correlation between the time an economically inactive citizen spends residing in the host Member State and the social benefits to which he or she is entitled. Arguably, the residence requirements set out in the CRD are a concrete manifestation of the concept of a ‘genuine or real link’ adopted by the ECJ.²⁰

By limiting access to social benefits, both the Treaty provisions on EU citizenship and the CRD must be construed so as to strike the right balance between the protection of the financial interests of the host Member State and the promotion of social cohesion through free movement.²¹ In contrast to the US, where the right to travel trumps State financial considerations, the Treaty provisions on EU citizenship and the relevant

14 *Baldwin v. Seelig*, 294 U.S. 511, 523, (1935).

15 For an excellent comparative study, see van der Mei, A. P. Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law. *Arizona Journal of International & Comparative Law*. 2002, 19: 803.

16 See Article 21(1) TFEU. See also Case C-456/02 *Trojani* [2004] ECR I-7573, para. 32.

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

18 In this regard, AG Trstenjak uses the terms ‘level-based approach’. See Opinion of AG Trstenjak in Case C-325/09 *Dias* (pending), delivered on 17 February 2011, para. 77. See also Barnard, C., *supra* note 8, p. 166.

19 In relation to expulsion measures, the ruling of the ECJ in Case C-145/09 *Tsakouridis*, judgment of 23 November 2010, not yet reported, shows that the ECJ has endorsed the ‘incremental assimilation’ approach. In that case, it held that ‘[the] system of protection against expulsion measures [set out in the CRD] is based on the degree of integration of [EU citizens and their family members] in the host Member State, so that the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be.’ *Ibid.*, para. 24.

20 See e. g. Case C-224/98 *D’Hoop* [2002] ECR I-6191, para. 38, Case C-138/02 *Collins* [2004] ECR I-2703, para. 69; Case C-258/04 *Ioannidis* [2005] ECR I-8275, para. 30; Case C-209/03 *Bidar* [2005] ECR I-2119, paras 55 and 56.

21 See Dougan, M.; Spaventa, E., *supra* note 1, p. 185, 202.

secondary EU legislation must be interpreted with a view to preserving the said balance. For van der Mei, the difference between the US and EU approaches to the interaction between free movement and social benefits may be explained by the three following factors. First, the constitutional basis of the US right to travel containing the prohibition to discriminate against new residents dates back to 1868, whilst the provisions on EU citizenship were only incorporated in the Treaty in 1993. Therefore, until fairly recently, the ECJ did not have the constitutional tools of the US Supreme Court to determine the scope and content of the right to move of economically inactive citizens. Unlike the US right to travel which was never seen as subordinate to economic migration,²² in the EU the full extent of the non-economic aspects of free movement are yet to be explored. Second, whilst the US government and American States share responsibility for welfare,²³ social protection in the EU is seen as a matter which remains primarily within the powers of the Member States. Unlike the Treaties, the US Constitution grants Congress general tax-and-spend powers, which enable the federal government to adopt important redistributive policies. For example, the US government provides social assistance to the aged (65 or older), the blind, and the disabled.²⁴ Although administered by the States, federal funding is also provided to give temporary social assistance to families in need.²⁵ This is not the case for the EU which, apart from adopting coordination measures, does not enjoy general legislative competences in the field of social security.²⁶ Finally, social tourism (or welfare migration) is perceived differently in the US and the EU. Whilst the US Supreme Court believes that social tourism is no longer a problem capable of putting State welfare systems at serious risk, 'the fear of becoming a welfare magnet is still a prevalent sentiment among the Member States'.²⁷

2. Residence Requirements and Social Benefits

The CRD sets out three categories of economically inactive migrants, namely (1) migrants staying for a period of up to three months, (2) migrants staying for more than three months, and (3) migrants having acquired the right of permanent residence.²⁸ The classification contained therein is based on the financial requirements which EU citizens must meet in order to stay in the host Member State and on the derogations from the principle of equal treatment that are allowed.

22 Van der Mei, A. P., *supra* note 15, p. 811.

23 *Ibid.*, p. 851.

24 See Supplemental Security Income Program (SSI) which is paid for by the US Treasury general funds, not the Social Security taxes.

25 See the Temporary Assistance for Needy Families Program ('TANF').

26 Dougan, M.; Spaventa, E., *supra* note 1, p. 187.

27 Van der Mei, A. P., *supra* note 15, p. 851.

28 See generally Barnard, C. *The Substantive Law of the EU*, 2nd. Oxford: Oxford University Press, 2007, p. 409 *et seq.*

2.1. Short-term and medium-term residents

2.1.1. Short-term residents

As to the first category of migrants, Article 14(1) of the CRD provides that economically inactive citizens and their family members may stay in the host Member State for a period of up to three months, ‘as long as they do not become an unreasonable burden on the social assistance system of the host Member State’. In relation to the principle of equal treatment, Article 24(2) of the CRD provides that the host Member State is not ‘obliged to confer entitlement to social assistance during the first three months of residence’. In relation to job-seekers, Article 24(2) of the CRD states that the three-month period of residence may be extended as long as the EU citizens concerned can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged. Therefore, in relation to welfare entitlements, the host Member State may discriminate against short-term migrants.

2.1.2. Job-seekers

The status of job-seekers under EU law is midway between economically active and economically inactive citizens. Job-seekers fall within the scope of application of 45 TFEU (free movement of workers).²⁹

Originally, the ECJ ruled in *Lebon*³⁰ – decided in 1987 – that job-seekers’ allowances did not fall within the scope of (then) Community law. However, in *Collins* – decided 17 years later – the ECJ reconsidered its approach. By relying on the Treaty provisions on EU citizenship, it ruled that the principle of equal treatment applies to such allowances.³¹ However, access to such allowances is not unconditional. In *Collins*, the ECJ held that it is legitimate for the host Member State to subject the grant of job-seekers’ allowances to job-seekers having established a ‘real link’ with the labour market of that State.³² The ECJ acknowledged that a residence requirement is, in principle, appropriate for the purposes of ensuring a ‘real link’. Nevertheless, such a requirement must comply with the principle of proportionality, i.e. it must not go beyond what is necessary to establish a ‘real link’: the period of residence must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State; it must also be based on clear criteria known in advance; and provision must be made for access to a means of redress of a judicial nature.³³

29 *Ioannidis*, *supra* note 20, para. 21.

30 Case 316/85 *Lebon* [1987] ECR 2811, para. 26. See also Case C-278/94 *Commission v. Belgium* [1996] ECR I-4307, paras 39 and 40.

31 *Collins*, *supra* note 20, para. 63, and *Ioannidis*, *supra* note 20, para. 22.

32 *D’Hoop*, *supra* note 20, para. 38, *Collins*, *supra* note 20, para. 69, and *Ioannidis*, *supra* note 20, para. 30.

33 *Collins*, *supra* note 20, para. 72.

Arguably, an interpretation of Article 24(2) of the CRD based solely on its wording could suggest that the concept of ‘social assistance’ laid down therein includes ‘benefit[s] of a financial nature intended to facilitate access to employment in the labour market of [the host] Member State’.³⁴ Contrary to *Collins*, such a reading would imply that, regardless of the existence of a ‘real link’ between job-seekers and the employment market of the host Member State, the former would not be entitled to job-seekers’ allowances in spite of the fact that they ‘can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged’ but have not become permanent residents. However, bearing in mind that the findings of the ECJ in *Collins* are grounded in primary law, it appears that such a reading of Article 24(2) of the CRD is incompatible with the Treaty provisions on the free movement of workers as interpreted by the ECJ. That is why in *Vatsouras*,³⁵ the referring court called into question the compatibility of Article 24(2) of the CRD with Article 18 TFEU, read in conjunction with Article 45 TFEU. The question in *Vatsouras* was thus whether it was possible to reconcile the ‘real link’ approach put forward in *Collins* with Article 24(2) of the CRD. The ECJ replied in the affirmative. At the outset, the ECJ confirmed its previous findings in *Collins*, according to which ‘nationals of the Member States seeking employment in another Member State who have established real links with the labour market of that State can rely on Article [45(2) TFEU] in order to receive a benefit of a financial nature intended to facilitate access to the labour market’.³⁶ The ECJ then proceeded to interpret Article 24(2) of the CRD in light of Article 45(2) TFEU, since it considered that a literal interpretation of Article 24(2) of the CRD was over inclusive and consequently, the concept of ‘social assistance’, understood in its natural and ordinary meaning, needed to be narrowed down. Hence, benefits of a financial nature intended to facilitate access to employment in the labour market of the host Member State fall outside the scope of that provision.³⁷ This includes not only job-seekers’ allowances, but also any financial benefit whose purpose is ‘to promote integration into the labour market’.³⁸ Thus, in relation to job-seekers’ allowances, Article 24(2) of the CRD does not apply. It is for the national court to determine, in light of *Collins*, whether a job-seeker has established sufficient connections with the society of the host Member State.

2.1.3. Medium-term residents

As to the second category, Article 7(1) (b) of the CRD provides that economically inactive citizens may move to another Member State and stay there for more than three months, provided that they ‘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’.

34 *Ibid.*, para. 63.

35 Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585.

36 *Ibid.*, para. 40.

37 *Ibid.*, para. 45.

38 Opinion of AG Ruiz-Jarabo Colomer in *Vatsouras*, *supra* note 35, para. 57.

2.1.4. Students

Ever since *Gravier*³⁹, the ECJ has consistently held that EU law covers access to vocational training, understood as both higher and university education. Accordingly, even if the Member States remain competent to regulate access to higher and university education, their policy choices are limited by the substantive law of the Union.⁴⁰

At the outset, *Lair* and *Brown*⁴¹ made clear that assistance covering the maintenance costs of students did not fall within the scope of (then) Community law. These cases were decided in 1988, i.e. before the adoption of the Treaty of Maastricht which, in addition to introducing the Treaty provisions on EU citizenship, also entrusted the EU with ‘the task of contributing to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of those States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity’.⁴² However, 17 years later, in *Bidar*,⁴³ the ECJ relied on those Treaty amendments to reconsider its approach. It held that ‘assistance, whether in the form of subsidised loans or of grants, provided to students lawfully resident in the host Member State to cover their maintenance costs falls within the scope of application of the Treaty’.⁴⁴

Just as in *Collins*, this did not mean, however, that maintenance aid or student loans were to be granted to all students of other Member States who lawfully reside in the host Member State but are not economically active. The ECJ held that it was legitimate for the host Member State ‘to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance

39 Case 293/83 *Gravier* [1985] ECR 593.

40 It is worth noting that in the US, States are allowed to discriminate against out-of-state citizens for tuition purposes. The US Supreme Court has reasoned that there is no appreciable ‘chilling effect’ on the right to travel of out-of-state citizens. See *Starns v. Malkerson*, 326 F. Supp. 234 (D.Minn. 1970), aff’d per curiam, 401 U.S. 985 (1971). In addition, in *Saenz v. Roe*, 526 U.S. 489, 504-505 (1999), writing for the US Supreme Court, Justice Stevens introduced a distinction between ‘portable’ and ‘non portable benefits’. Since non portable benefits are consumed within the territory of the host State, they primarily benefit *bona fide* residents. Imposing durational resident requirements in order for new incoming residents to obtain non portable benefits will be contrary to the right to travel. By contrast, there is a ‘danger that the recognition of [some readily portable benefit, such as a divorce or a college education,] will encourage citizens of other States to establish residency for just long enough to acquire [such benefit], that will be enjoyed after they return to their original domicile’. Stated differently, portable benefits may be enjoyed by persons who do not seek to establish themselves in the host State. Hence, durational residence requirements operate as a means of identifying *bona fide* residents. However, in his dissent, Chief Justice Rehnquist criticised Justice Stevens’ distinction. For example, he argued that, just as any welfare benefit, ‘tuition subsidies’ are consumed within the host State. But ‘the recipient takes the benefits of a college education with him wherever he goes’. So, how is one supposed to qualify ‘tuition subsidies’? See *Saenz v. Roe*, 526 U.S. 489, 519-520 (1999).

41 Case 39/86 *Lair* [1988] ECR 3161 and Case 197/86 *Brown* [1988] ECR 3205.

42 See Article 165 TFEU (ex Article 149 EC) et seq.

43 *Bidar*, supra note 20.

44 *Ibid.*, para. 48.

which may be granted by that State'.⁴⁵ Accordingly, the host Member State may limit the grant of such assistance to students who have demonstrated a certain degree of integration into the society of that State.⁴⁶ 'The existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time'.⁴⁷ To this effect, the ECJ ruled that a requirement for a three-year period of residence was compatible with EU law.⁴⁸

Bidar left open the question whether an economically inactive student may be entitled to maintenance aid or student loans, in spite of the fact that he or she has not yet completed a residence period of five years in the host Member State (i.e. has not become a permanent resident), in so far as other factors demonstrate that he or she is sufficiently integrated into the society of that State. The wording of Article 24(2) of the CRD suggests a reply in the negative. That provision states that the host Member State is not obliged to grant maintenance aid or student loans to students who have not yet acquired the right of permanent residence and who are not workers, self-employed persons, or persons who retain such status or members of their families.

In *Förster*,⁴⁹ the ECJ was confronted with that very question. The CRD was not applicable to the facts in *Förster*, but had it been, there is no reason to believe that the ECJ would have reached a different outcome. As a matter of fact, the ECJ relied on Article 24(2) of the CRD to support its reasoning.⁵⁰ AG Mazák⁵¹ urged the ECJ to take factors other than a five-year period of residence into account, 'since it can reasonably be assumed that a number of students may have established a substantial degree of integration into society well before the expiry of that period'.⁵² In his view, this would be the case for students who prior to completing the five-year period of residence in the host Member State, had also pursued occupational activities in that State in addition to their studies, but, having subsequently ceased all economic activity, no longer qualify as workers under EU law. AG Mazák conceded that, in light of *Bidar*, Member States are allowed to some extent to apply general conditions which require no further individual assessment. For example, this would be the case for the three years' residence requirement at issue in *Bidar*. However, he pointed out that the ruling of the ECJ in the latter case also suggests that national measures cannot reach a level of generality which would systematically deny maintenance grants to students without assessing their actual degree of integration into the society of the host Member State. For the Advocate-General, Article 24(2) of the CRD must be read in accordance with the principles of non-discrimination and proportionality. Consequently, '[a] period of five years

45 *Bidar*, *supra* note 20, para. 56.

46 *Ibid.*, para. 57.

47 *Ibid.*, para. 59.

48 *Ibid.*, para. 60.

49 *Förster*, *supra* note 9.

50 *Ibid.*, para. 55.

51 Opinion of AG Mazák in *Förster*, *supra* note 9, para. 132.

52 *Ibid.*, paras 130 *et seq.*

of continuous residence in the host Member State marks the outer limit within which it may still be possible to argue that a student pursuing studies in another Member State has not established a sufficient degree of integration into the society of that State to qualify for equal treatment, as provided for by Article [18 TFEU], in respect of social benefits such as student maintenance grants'.⁵³ AG Mazák concluded that, where a student has lived for three years in the host Member State and is already substantially integrated into the society of that State, it would be disproportionate to deny him or her access to social assistance on the ground that he or she has not yet completed a period of residence of five years.⁵⁴ However, the ECJ took a different view. It ruled that students' access to social assistance may be conditioned upon completing a five-year period of residence in the host Member State.⁵⁵ The ECJ reasoned that a straightforward application of such a residence requirement would enhance legal certainty and transparency in the context of the award of maintenance grants to students. Stated simply, if the host Member State so decides, maintenance grants are limited to economically inactive students who have acquired the right of permanent residence in that State.

It follows from *Förster* that it is for the host Member State to decide whether factors other than 'the blanket requirement of five years' residence'⁵⁶ are of some relevance for the award of maintenance grants.

As AG Ruiz-Jarabo Colomer pointed out in *Vatsouras*, '[i]n *Förster*, the [ECJ] found that the restriction imposed by [the CRD] on students was compatible with Article [18 TFEU] and Article [21 TFEU], but made no finding in relation to the validity of Article 24(2) of [the CRD], although it did make such a finding in relation to the Dutch legislation which preceded that provision. Thus, the [ECJ] ruled indirectly on the lawfulness of the restriction applying to students',⁵⁷ endorsing the clear legislative choices embedded in Article 24(2) of the CRD. Indeed, *Förster* can be read as an indication of judicial deference to the EU legislator when it comes to determining the point at which an economically inactive student becomes sufficiently integrated into the society of the host Member State. As a matter of principle, the 'genuine or real' link approach set out in *Bidat* remains good law in the context of economically inactive students claiming maintenance grants.⁵⁸ In practice, however, it is applied by the ECJ in a way which is consistent with the concrete expression given to that principle in Article 24(2) of the CRD.

In so doing, the ECJ ruled out the obligation of a case-by-case examination of the personal situation of economically inactive students. Although one may argue that

53 Opinion of AG Mazák in *Förster*, *supra* note 9, para. 132.

54 *Ibid.*, para. 134.

55 *Förster*, *supra* note 9, para. 60.

56 O'Leary, S. Case comment: Equal treatment and EU citizens: A new chapter on cross-border educational mobility and access to student financial assistance. *European Law Review*. 2009, 34: 612, 621. See also Golynger, O. Case note on *Förster*. *Common Market Law Review*. 2009, 46: 2021; De La Rosa, S. La citoyenneté européenne à la mesure des intérêts nationaux. A propos de l'arrêt *Förster* (aff. C-158/07 du 18 novembre 2008). *Cahiers de droit européen*. 2009: 549.

57 Opinion of AG Ruiz-Jarabo Colomer in *Vatsouras*, *supra* note 35, para. 46.

58 *Bidat*, *supra* note 20, para. 57.

abstract and general rules occasionally give rise to individual injustices, the ‘over-personalisation’ of claims may also have negative repercussions for the welfare systems of the Member States. As O’Brien observes, ‘[l]itigant-led policy not only compromises the coherence of the system as a whole, but also diverts resources, so that the information, education and finance-rich, articulate claimants with access to sound legal advice and representation are more able to launch a claim than the rest of potential welfare claimants, out of whose collective “pot” the litigant’s pay-off is sourced.’⁵⁹ Perhaps, the fact that Article 24(2) of the CRD lays down such an unambiguous rule implies that the EU legislator sought to avoid the problems caused by the ‘over-personalisation’ of claims brought by economically inactive students, preferring instead a solution which favours legal certainty and transparency, and, thus, in a sense, quality.

Moreover, it is worth recalling that, whilst the rationale of the ECJ in *Förster* is based on the Treaty provisions on EU citizenship, in *Collins* the ECJ relied on the free movement of workers. This is by no means irrelevant but explains why the approach of the ECJ in those two cases differs. Since job-seekers are considered to be workers for the purposes of granting job-seekers’ allowances, the link between the host Member State and the job-seeker is of an economic, albeit prospective, nature. The economic nature of such a link facilitates the integration of job-seekers as it diminishes the financial concerns of the host Member State. Social solidarity is more easily offered to EU citizens who will contribute to financing the welfare system of the host Member State than to those who will not. The more integrated into the labour market of the host Member State an EU citizen is, the higher his or her chances of finding a job, and the sooner he or she will start contributing to financing the welfare system of that State. In addition, unlike economically inactive students whose higher education does not connect them to the labour market of the Member State in which they have studied, job-seekers’ allowances are geographically linked to the labour market of the host Member State.⁶⁰ From the standpoint of the nature of the connections with the host Member State, the situation of job-seekers cannot be compared to that of economically inactive students.

2.1.5. Common features

It follows from the foregoing that for the two first categories of migrants the concept of ‘burden’ or ‘unreasonable burden’ on the social assistance system of the host Member State determines the point at which an EU citizen may no longer be a lawful resident in the host Member State. Accordingly, as the ECJ ruled in *Trojani*, EU law allows the host Member State to adopt expulsion measures against an EU citizen who is not a permanent resident and has become an unreasonable financial burden.⁶¹ However, merely

59 O’Brien, C., *supra* note 4, p. 661.

60 *Bidar*, *supra* note 20, para. 58 (‘a Member State cannot, however, require the students concerned to establish a link with its employment market. Since the knowledge acquired by a student in the course of his higher education does not in general assign him to a particular geographical employment market, the situation of a student who applies for assistance to cover his maintenance costs is not comparable to that of an applicant for a tide over allowance granted to young persons seeking their first job or for a job-seeker’s allowance’).

61 *Trojani*, *supra* note 16, para. 36.

having recourse to the social assistance system of the host Member State is not tantamount to becoming such a burden. In accordance with Article 14(3) of the CRD, which codifies the ruling of the ECJ in *Grzelczyk*, ‘[a]n 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’.⁶² For example, a temporary lack of ‘sufficient resources’⁶³ does not imply that the EU citizen concerned has become a burden. On the contrary, Member States must show a degree of solidarity in respect of EU citizens who encounter temporary difficulties.⁶⁴

In addition, the CRD provides that whether an EU citizen has become a burden will depend on a concrete assessment undertaken by national authorities, in which they pay due attention to the duration of residence of the person concerned, his or her personal circumstances and the amount of aid granted to him or her.⁶⁵ This means that expulsion measures can never be adopted against a group of socially marginalised citizens, but if need be national authorities must take individualised decisions relating to each member of such a group.⁶⁶ Still, the regime set out in the CRD may discourage an economically inactive citizen from requesting social assistance. Indeed, as Dougan and Spaventa observe,⁶⁷ an economically inactive citizen, who is entitled to social assistance, may be caught on the horns of a dilemma: either to request social assistance and face the risk of enabling the host Member State to consider that he or she has become an unreasonable financial burden, or else to forgo his or her right to social assistance in order to remain ‘under the radar’ of the national authorities.

2.2. Permanent residents

In accordance with Article 16 of the CRD, once an EU citizen has legally resided for a continuous period of five years in the host Member State, he or she acquires a right of permanent residence and consequently, may stay in that State, regardless of whether he or she has sufficient resources for him- or herself and his or her family. An EU citizen who is a permanent resident in the host Member State may become a financial burden, even an unreasonable one, on the social assistance system of that State, without running the risk of expulsion.

62 *Grzelczyk*, *supra* note 3, para. 43. See also *Trojani*, *supra* note 16, para. 45.

63 Article 8(4) of the CRD defines ‘sufficient resources’ as follows: ‘Member States may not lay down a fixed amount which they regard as “sufficient resources”, but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.’

64 *Grzelczyk*, *supra* note 3, para. 44.

65 See Recital 16 of the CRD.

66 See e. g. Lhernould, J. P. L’*éloignement des Roms et la directive 2004/38 relative au droit de séjour des citoyens de l’UE. Droit social.* 2010, 11: 1024.

67 Dougan, M.; Spaventa, E. Educating Rudy and the (Non-) English Patient: A Double Bill on Residency Rights under Article 18 EC. *European Law Review.* 2003, 28: 697.

2.2.1. The concept of ‘a continuous period of five years’

In *Lassal*,⁶⁸ the ECJ was called upon to interpret the notion of ‘a continuous period of five years’ as provided for by Article 16(1) of the CRD. The case at hand involved Ms. Lassal, a French national, who resided legally in the UK from September 1999 to February 2005, then went to France for a period of 10 months, and finally returned to the UK in December 2005. From January 2006 to November 2006, she received a job-seekers’ allowance. After that, she applied for income support on the basis that she was pregnant. However, her application was refused on the ground that she had no right to reside in the UK. Noting that Ms. Lassal had completed the period of five years before 30 April 2006 – the date for transposition of the CRD –, the referring court asked, in essence, whether that period of time counted for the purposes of Article 16(1) of the CRD. If so, then the referring court also asked whether the ten-month period Ms. Lassal had spent in France prevented her from acquiring a right of permanent residence. By relying on its previous ruling in *Metock*,⁶⁹ the ECJ found that an interpretation of Article 16(1) of the CRD that only took into account continuous periods of five years commencing after 30 April 2006 would deprive that directive of its effectiveness. As AG Trstenjak pointed out,⁷⁰ such a reading of Article 16 of the CRD would run counter to the ‘integration-based reasoning’ which underpins the CRD. Although the right of permanent residence was acquired only on 30 April 2006, the degree of integration required by that provision had nothing to do with the question whether the continuous period of five years was completed before or after that date. The ECJ also observed that it was not applying the CRD retroactively, but ‘simply [giving] present effect to situations which arose before the date of transposition of that directive’.⁷¹ Hence, the continuous period of legal residence in the UK completed by Ms. Lassal from September 1999 to February 2005 had to be taken into account for the purposes of Article 16(1) of the CRD. As to the second question, the ECJ noted that Article 16(4) of the CRD, which provides that the right of permanent residence may ‘be lost only through absence from the host Member State for a period exceeding two consecutive years’, did not expressly cover absences taking place before 30 April 2006. However, in order to ensure the effectiveness of that provision, Article 16(4) of the CRD had to be interpreted with a view to promoting social cohesion and to strengthening the sense of EU citizenship. This meant that, in a situation such as that in the main proceedings, a temporary absence of less than two years could not deprive an EU citizen of her right of permanent residence, without compromising the objectives of the CRD. Additionally, drawing on the *travaux préparatoires* for the CRD, the ECJ reasoned that the rationale behind Article 16(4) is that

68 Case C-162/09 *Lassal*, judgment of 7 October 2010, not yet reported.

69 Case C-127/08 *Metock and Others* [2008] ECR I-6241. In that case, the ECJ held that the CRD cannot be interpreted in such a way that EU citizens would derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals (*Ibid.*, paras 82 and 59). It also ruled that the provisions of the CRD cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (*Ibid.*, para. 84).

70 Opinion of AG Trstenjak in *Lassal*, *supra* note 68, para. 80.

71 *Lassal*, *supra* note 68, para. 38.

the link with the host Member State is loosened after absences of more than two consecutive years from that State.⁷² In order to determine the status of that link, the question whether absences took place before or after 30 April 2006 was entirely irrelevant. For Ms. Lassal, the ruling of the ECJ was good news. Given that since 30 April 2006 she had acquired the right of permanent residence in the UK, she enjoyed the right to equal treatment as regards social benefits falling within the scope of EU law.

2.2.2. Legal residence

In order to acquire the right of permanent residence in the host Member State, an EU citizen must not only reside in that State for a continuous period of five years, but his or her stay must also be legal. The question is then whether the concept of ‘legal residence’ set out in Article 16(1) of the CRD means ‘residence in compliance with the conditions laid down’ in the CRD as stated in Recital 17 thereof, or whether it also includes residence in compliance with provisions of national law. The ECJ has not yet ruled on that issue. Yet, two Advocates-General have addressed it. In *McCarthy*, AG Kokott supported a definition of ‘legal residence’ which would be based not only on the CRD but also on national law.⁷³ By contrast, in *Dias*,⁷⁴ AG Trstenjak urged the ECJ not to depart from Recital 17 of the CRD. There are four points on which the two Advocates-General differ. First, AG Kokott plays down the importance of Recital 17, as she focuses on the context and objectives of the CRD, according to which provisions of the CRD granting rights to EU citizens must be interpreted broadly.⁷⁵ However, AG Trstenjak stresses that Recital 17 was deliberately added during the legislative procedure, thus clearly revealing that the EU legislator intended to create a right of permanent residence based only on EU law.⁷⁶ Second, AG Kokott argues that the CRD aims to promote social cohesion and integration in the host Member State. It then follows that, in determining the degree of integration, the origin of the norms on which the right of residence is based is of secondary importance.⁷⁷ For AG Trstenjak a more nuanced reading of the social objectives of the CRD is to be made: by adopting the CRD, the EU legislator sought to strike the right balance between, on the one hand, social cohesion through free movement and, on the other hand, the financial interests of the host Member State. If national law were also taken into account for the purposes of determining the legality of residence under Article 16(1) of the CRD, the right of permanent residence would be granted in situations not foreseen by the EU legislator. Hence, the balance between financial and social interests set out in the CRD would be disturbed.⁷⁸ Third, AG Kokott relies on Article 37 of the CRD providing that nothing in that Directive can be interpreted as adversely affecting

72 *Lassal*, *supra* note 68, para. 55.

73 Opinion of AG Kokott in Case C-434/09 *McCarthy* (pending), delivered on 25 November 2010, not yet reported.

74 AG Trstenjak in Case C-325/09 *Dias* (pending), delivered on 17 February 2011, not yet reported.

75 Opinion of AG Kokott in *McCarthy*, *supra* note 73, para. 51.

76 Opinion of AG Trstenjak in *Dias*, *supra* note 74, para. 76.

77 Opinion of AG Kokott in *McCarthy*, *supra* note 73, para. 52.

78 Opinion of AG Trstenjak in *Dias*, *supra* note 74, paras 79–80.

more favourable provisions of national law. In her view, this means that national law, which permits economically inactive citizens to stay legally in the host Member State under more favourable conditions than those laid down in the CRD, should be taken into account for the purposes of Article 16(1) of the CRD.⁷⁹ By contrast, AG Trstenjak states that Article 37 of the CRD is of no relevance for the definition of the term ‘legal residence’ contained in Article 16(1) thereof. Since Member States enjoy a wide margin of discretion to adopt conditions of legal residence which are more favourable than those laid down in the CRD, the same should apply when deciding the legal consequences they wish to attach to the compliance with such conditions (e.g. the coming into existence or not of a right of permanent residence).⁸⁰ Finally, AG Kokott refers to *Martínez Sala* and *Trojani* to argue that in order to establish a right of residence, the ECJ has found provisions of national law to be of some relevance.⁸¹ AG Trstenjak raises three objections against such a reading of the case law. She posits that, in those two cases, the ECJ held that there was no right of residence under Article 20 TFEU, taking national law into consideration only in order to establish the existence of discrimination on grounds of nationality (Article 18 TFEU) in relation to national provisions on social assistance. In addition, the ruling of the ECJ in *Trojani* made clear that it remains open to the host Member State to remove an EU citizen who no longer fulfils the conditions set out in the CRD, provided that it complies with the limits imposed by EU law.⁸²

3. The Exportability of Social Benefits

3.1. The exportability of unemployment benefits

In accordance with Article 7 of Regulation No. 883/2004, which has replaced Regulation No. 1408/71 since 1 May 2010, all cash benefits are exportable, unless otherwise provided for by that Regulation.⁸³ For example, Article 70 of Regulation No. 883/2004 provides that special non contributory cash benefits are not exportable.⁸⁴ As to the exportability of social benefits (other than sickness benefits), it is worth noting that ‘Article 7 cannot be regarded as a tremendous change’ in comparison with the regime established

79 Opinion of AG Kokott in *McCarthy*, *supra* note 73, para. 53.

80 Opinion of AG Trstenjak in *Dias*, *supra* note 74, para. 82.

81 Opinion of AG Kokott in *McCarthy*, *supra* note 73, para. 53.

82 Opinion of AG Trstenjak in *Dias*, *supra* note 74, paras 86–88.

83 Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ [2004] L 166/1. In accordance with its Article 91, Regulation No. 883/2004 was not applicable until the date of entry into force of the implementing legislation. To this effect, see Article 97 of Regulation (EC) No. 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems, OJ [2009] L 284/1, which entered into force 1 May 2010.

84 See Article 70 of Regulation No. 883/2004.

by Regulation No. 1408/71.⁸⁵ This means that the case law of the ECJ under Regulation No. 1408/71 serves to interpret the unaffected provisions of Regulation No. 883/2004.

In relation to unemployed persons, Article 63 of Regulation No. 883/2004 states that Article 7 only applies ‘in the cases provided for by Articles 64 and 65 and within the limits prescribed therein’. Article 64 of Regulation No. 883/2004 provides that a person who is entitled to unemployment benefits may go to another Member State in order to seek work there without losing such benefits for a period of three months, with the possibility of extension to six months.⁸⁶ Article 65 of Regulation No. 883/2004 provides for entitlement to unemployment benefits for unemployed persons who, during their last employment, resided in a Member State other than the State in which they are insured for social security purposes. Where secondary EU legislation is not applicable, the ECJ has held that, since national measures which limit the exportability of social benefits operate as restrictions on the fundamental freedoms or, as the case may be, on EU citizenship, such measures must be justified. For example, in *De Cuyper*,⁸⁷ Mr. De Cuyper, a Belgian national, was receiving unemployment benefits from the Belgian Employment Office (ONEM) when he decided to move to France. He continued to receive unemployment benefits, until that change in his place of residence was discovered by the ONEM which refused him further benefits. The ONEM based its decision on a Royal Decree which provided that in order to be eligible for benefits the unemployed person must have his habitual residence in Belgium and actually reside there. After noting that Regulation No. 1408/71 was not applicable to the situation of Mr. Cuyper, the ECJ tested the compatibility of the contested Belgian legislation with Article 20 TFEU. It agreed with Belgium that the contested Royal Decree pursued a legitimate objective, namely ‘allowing ONEM inspectors to check whether the situation of a recipient of the unemployment allowance has undergone changes which may have an effect on the benefit granted’.⁸⁸ For example, those changes could relate to his family circumstances or to the existence of undeclared sources of income. Although Mr. De Cuyper was exempted from registering as a job-seeker and from accepting any suitable employment, the ECJ pointed out that ‘the obtaining of [those exemptions did] not mean that [he was] exempt from the requirement to remain available to the employment services inasmuch as [...] his employment and family situation [could] be monitored’.⁸⁹ As to the principle of proportionality, the ECJ rejected the suggestion that less restrictive measures (such as

85 See generally Jorens, Y.; Van Overmeiren, F. General Principles of Coordination in Regulation 883/2004. *European Journal of Social Security*. 2009, 11: 47, 69. For an overview of the relevant case law, see Paskalia, V. Co-ordination of Social Security in the European Union: An Overview of recent case law. *Common Market Law Review*. 2009, 46: 1177 *et seq.*

86 Article 64 of Regulation No. 883/2004 also lists the conditions that unemployed persons must meet in order to retain entitlement to benefits. For example, before his departure, the unemployed person must have been registered as a person seeking work and have remained available to the employment services of the competent Member State for at least four weeks after becoming unemployed. Likewise, he or she must register with the authorities of the host Member State, be subject to the control procedure organised there and adhere to the conditions laid down under the legislation of that Member State.

87 Case C-406/04 *De Cuyper* [2006] ECR I-6947.

88 *Ibid.*, para. 41.

89 *Ibid.*, para. 31.

the production of documents or certificates) could ensure the same level of effectiveness in the monitoring of the employment and family situation of unemployed persons.⁹⁰ Hence, the ECJ ruled that a national measure such as the contested Royal Decree complied with Article 20 TFEU. Two years later, the ECJ clarified its approach in *Petersen*.⁹¹ Mr. Petersen, a German national, obtained an advance unemployment benefit provided for by Austrian law in favour of unemployed persons who have applied for an incapacity pension. In order to obtain that benefit, such persons are not required to be capable of working, willing to work and available for work. That benefit was withdrawn by Austria as a result of Mr. Petersen's decision to move to Germany. Like *De Cuyper*, *Petersen* also involved the exportability of unemployment benefits in situations not covered by secondary EU legislation. However, in contrast to *De Cuyper*, the Austrian legislation at issue in *Petersen* was not examined under the Treaty provision on EU citizenship but under the free movement of workers. In this regard, the ECJ recalled that, in accordance with settled case law,⁹² migrant workers are guaranteed certain rights linked to the status of 'worker' even when they are no longer in an employment relationship. Since the benefit claimed by Mr. Petersen flowed from an employment relationship within the meaning of Article 45 TFEU,⁹³ the ECJ ruled that he was to be regarded as a 'worker'. Next, the ECJ held that the contested Austrian legislation was indirectly discriminatory, given that, in the event of unemployment or incapacity, workers from other Member States tend to go back to their countries of origin, whilst national workers stay.⁹⁴ As to justification, the ECJ acknowledged that the risk of seriously undermining the financial balance of a social security system may constitute an overriding reason in the general interest. However, in the situation of Mr. Petersen, such an overriding reason could not be relied upon by Austria. The fact that Austria originally granted an advance unemployment benefit to Mr. Petersen demonstrated its capacity to bear the economic costs of that benefit.⁹⁵ All the more so, given that the benefit in question was of limited duration. Most importantly, in contrast to *De Cuyper*, the ECJ stressed that the Austrian employment service did not undertake any checks. It added that even if such checks had been provided for, a less restrictive alternative measure was available: applicants could be obliged to go to Austria for the purposes of undergoing such checks.⁹⁶

90 The ECJ considered that the effectiveness of monitoring arrangements 'is dependent to a large extent on the fact that it is unexpected and carried out on the spot'. *Ibid.*, paras 44–46.

91 Case C-228/07 *Petersen* [2008] ECR I-6989.

92 *Ibid.*, para. 48 (quoting Case 39/86 *Lair* [1988] ECR 3161, para. 36; Case C-85/96 *Martinez Sala* [1998] ECR I-2691, para. 32; Case C-35/97 *Commission v. France* [1998] ECR I-5325, para. 41; Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, para. 34; and *Collins*, *supra* note 20, para. 27).

93 The ECJ held that the payment of the benefits claimed by Mr. Petersen 'is dependent on the prior existence of an employment relationship which has come to an end and is intrinsically linked to the recipients' objective status as workers'. *Ibid.*, paras 48–49. But was it not the case also in *De Cuyper*? See AG Ruiz-Jarabo Colomer in *Petersen*, *supra* note 91, para. 72 (who noted that the ruling of the ECJ in *De Cuyper* 'is ambiguous in that regard').

94 *Ibid.*, para. 55.

95 *Ibid.*, paras 57–58.

96 *Ibid.*, paras 61–62.

In light of the foregoing, I would like to make two observations. First, the fact that in *De Cuyper* the ECJ applied the Treaty provisions on EU citizenship, whereas in *Petersen* it relied on the free movement of workers does not seem to be a decisive factor explaining why the outcome in those two cases differs. In relation to benefits falling outside the scope of application of Regulation No. 883/2004, residence requirements are obstacles to the free movement of both workers and economically inactive citizens. Second, it seems that it is the imposition of residence requirements as the only means of guaranteeing the effectiveness of monitoring arrangements which may explain why the legislation at issue in *De Cuyper* complied with the principle of proportionality, whereas that in *Petersen* did not.

3.2. The exportability of non contributory social benefits

As already mentioned, Article 70 of Regulation No. 883/2004 provides that special non contributory cash benefits may not be exported to other Member States. However, that is not necessarily the case for non contributory social benefits that fall outside the scope of application of Regulation No. 833/2004. For example, Regulation No. 883/2004 does not apply to ‘benefits in relation to which a Member State assumes the liability for damages to persons and provides for compensation, such as those for victims of war and military action or their consequences; victims of crime, assassination or terrorist acts; victims of damage occasioned by agents of the Member State in the course of their duties; or victims who have suffered a disadvantage for political or religious reasons or for reasons of descent’.⁹⁷ It is thus for the Member States to establish the conditions under which those benefits are granted, provided that the exercise of such a competence complies with EU law.⁹⁸ In particular, the imposition of residence requirements must comply with the Treaty provisions on EU citizenship. Two cases illustrate this point, namely *Tas-Hagen* and *Nerkowska*.⁹⁹

In both cases, the question was whether a Member State could condition the award of benefits granted to war victims upon residing in that State.¹⁰⁰ The ECJ began by observing that those benefits did not fall within the scope *ratione materiae* of EU law, but within the competence of the Member States.¹⁰¹ However, it stressed that ‘Member

97 Article 3(5) (b) of Regulation No. 883/2004.

98 See e. g. Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, para. 22.

99 *Tas-Hagen*, *supra* note 98, and Case C-499/06 *Nerkowska* [2008] ECR I-3993. See also Case C-221/07 *Zablocka-Weyhermüller* [2008] ECR I-9029.

100 In *Tas-Hagen*, *supra* note 98, the compensatory benefit was granted to victims of the civil war that took place in the former Dutch East Indies. Mr. Tas and Ms. Tas-Hagen, who were born in the Dutch East Indies and then acquired the Dutch nationality, applied for that benefit. Although they were recognised as war victims, the compensatory benefit was refused by Dutch authorities on the sole ground that they resided in Spain and not the Netherlands at the time when they submitted their application. In *Nerkowska*, *supra* note 98, the compensatory benefit was granted to victims of war and post-war repression. Ms. Nerkowska, a Polish national who was deported to the former USSR, applied for that benefit. Although recognised as a victim of post-war repression, Polish authorities decided to suspend the payment of that benefit on the ground that she was not residing in Poland. Indeed, she had been living in Germany since 1985.

101 *Tas-Hagen*, *supra* note 98, para. 21; *Nerkowska*, *supra* note 98, para. 23.

States must exercise that competence in accordance with [...] the Treaty provisions concerning the freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States'.¹⁰² Next, the ECJ found that the residence requirement was a restriction on Article 21 TFEU as it was likely to deter nationals from exercising their right to move to another Member State.¹⁰³ In *Tas-Hagen* and *Nerkowska*, the Dutch and Polish governments, respectively, tried to justify their legislation on the ground that they enjoyed discretion to limit the obligation of solidarity with war victims to those who had links with their population. In their view, the residence requirement was an expression of the extent to which such victims are integrated into the society of the home Member State. The ECJ concurred with them in that the requirement for a connection with the society of the Member State concerned constitutes an objective consideration of public interest. It also agreed with the fact that Member States enjoy a wide margin of appreciation in deciding the criteria to be used to assess the degree of connection to their society which is required.¹⁰⁴ However, neither the contested Dutch legislation, nor that of Poland complied with the principle of proportionality. In *Tas-Hagen*, the ECJ found that the residence requirement laid down by Dutch law was applied solely on the date on which the application for the benefit was submitted. This was clearly excessive as 'it was liable [...] to lead to different results for persons resident abroad whose degree of integration into the society of the Member State granting the benefit is in all respects comparable'.¹⁰⁵ In *Nerkowska*, the ECJ ruled that requiring the applicant to remain in Poland throughout the period of payment of the benefit went beyond what was necessary to achieve the objective pursued. Indeed, Ms. Nerkowska had lived in Poland for more than 20 years (first as a student and then as a worker) before moving to Germany. Moreover, in *Nerkowska*, the Polish government also argued that only residence requirements were capable of verifying that the recipient of benefits continued to satisfy the conditions for their grant. Although the ECJ recognised that effective monitoring was a legitimate objective, it held that the contested legislation was disproportionate as less restrictive measures were possible, such as requiring Ms. Nerkowska to go to Poland for the purposes of undergoing medical or administrative checks.¹⁰⁶

Some scholars argue that the ruling of the ECJ in *Nerkowska* is at odds with its previous rulings in *Collins* and *Bidar*.¹⁰⁷ As explained in the previous paragraphs, in those cases the ECJ held that in order for job-seekers and students of other Member States to have access to the welfare system of the host Member State, they must demonstrate that there is a 'genuine link' between them and the society of that State, which can be demonstrated by completing a period of residence there. However, in *Nerkowska*,

102 *Tas-Hagen*, *supra* note 98, para. 22; *Nerkowska*, *supra* note 98, para. 24.

103 *Tas-Hagen*, *supra* note 98, para. 31; *Nerkowska*, *supra* note 98, para. 32.

104 *Tas-Hagen*, *supra* note 98, paras 35–36; *Nerkowska*, *supra* note 98, paras 37–38.

105 *Tas-Hagen*, *supra* note 98, paras 38–39.

106 *Nerkowska*, *supra* note 98, paras 44–45.

107 See e. g. Cygan, A. Citizenship and Fundamental Rights. *International & Comparative Law Quarterly*. 2009, 58: 1002, 1006.

the fact that Ms. Nerkowska had not lived in Poland for 15 years when she applied for a non contributory social benefit was not a valid ground for denying her that benefit. A consistent reading of those judgments is possible. In *Collins* and *Bidar*, the existence of a link with the host Member State depended to a large extent on the completion of a residence requirement, whereas *Nerkowska* concerned the question whether the link with the home State had been broken. The rationale underpinning that distinction is twofold. First, requiring a home Member State to show solidarity with its own nationals does not awaken the same political sensitivities as imposing on a host Member State the obligation to grant social assistance to persons considered to be newcomers. After all, nationality can constitute *prima facie* evidence of integration.¹⁰⁸ Second, the ECJ aims to strengthen EU citizenship rights by diminishing the adverse effects that might result from exercising such rights. In light of *Nerkowska*, EU citizens can leave their home State without fearing that the strong bonds they share with the society of that State will be loosened.¹⁰⁹

The ruling of the ECJ in *Gottwald* seems to confirm this distinction.¹¹⁰ That case involved a question similar to that raised in *Collins* and *Bidar* (integration into the society of the host Member State) but in relation to a social benefit granted to disabled persons which was not covered by EU law. Mr. Gottwald, a German national resident in Hamburg who suffered from total paraplegia, was driving on the Austrian toll motorway network when he was stopped and fined by the Austrian police, on the ground that he had not paid the time-dependent toll by purchase of a toll disc to be affixed to his vehicle. Mr. Gottwald challenged that decision on the ground that it was discriminatory, since a toll disc was made available free of charge to disabled persons who are resident or ordinarily resident in Austria. The ECJ agreed with Mr. Gottwald that the contested measure created unequal treatment: residence requirements are liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners.¹¹¹ However, it found such unequal treatment to be justified. In recalling its previous rulings in *Tas-Hagen* and *Nerkowska*, the ECJ held that the requirement relating to residence or ordinary residence may be regarded as the manifestation of a certain degree of integration of the recipients of the free toll disc into Austrian society, which constitutes an objective consideration of public interest.¹¹² In contrast to *Tas-Hagen* and *Nerkowska*, the ECJ moreover found the contested Austrian measure to be proportionate. The residence requirement was suitable because it sought to distinguish disabled persons who make regular journeys in Austria from those who used the Austrian road network occasionally or temporarily. Whilst the contested measure may facilitate the integration of the former category of disabled persons into the Austrian society, this is not the case for disabled persons who travel to Austria only

108 Lenaerts, K.; Heremans, T., *supra* note 2, p. 107.

109 *Tas-Hagen*, *supra* note 98, para 30.

110 Case C-103/08 *Gottwald* [2009] ECR I-9117.

111 *Ibid.*, para. 28.

112 *Ibid.*, paras 31–32.

occasionally.¹¹³ In addition, the contested measure did not go beyond what was necessary as the conditions of residence and ordinary residence were broadly interpreted by the Austrian authorities. For example, disabled persons who, while not having their residence or ordinary residence in Austria, regularly travel in that country for professional or personal reasons also have the right to receive the road toll disc free of charge.¹¹⁴

Conclusions

In accordance with the Treaty provisions on EU citizenship, nationals of the host Member State must show a certain degree of financial solidarity with the nationals of other Member States who have established a ‘genuine or real link’ with the society of that State.

In order for the host Member State to determine the existence of such a link, the national authorities of that State must, in principle, engage in a case-by-case assessment of the personal circumstances of the EU citizen claiming social benefits. Compliance with residence requirements is an important factor which may determine the extent to which a person has become integrated into the society of the host Member State; but it is by no means the only one. Other factors, such as the fact that the person claiming social benefits has previously worked in the host Member State or is a national of that State, may be of relevance. Stated simply, the establishment of a ‘real or genuine link’ cannot be grounded in a single, monolithic criterion.¹¹⁵

However, *Förster* is an important exception to the individual application of the ‘genuine or real link’ test. Although *Förster* does not overrule *Bidar* as a matter of principle, it exempts the host Member State from examining the personal situation of economically inactive students who apply for maintenance grants or student loans but have not yet completed a five-year period of residence. In so doing, not only did the ECJ decide to enhance legal certainty by adopting a clear-cut rule, but it also deferred to the legislative choices embedded in the CRD.

In *Vatsouras*, the ECJ sought to confirm its previous ruling in *Collins*, whilst at the same time upholding the validity of Article 24(2) of the CRD. That result could only be achieved by ruling that job-seekers’ allowances do not fall within the scope of that provision. This means that, where there is a ‘genuine or real’ link between the labour market of the host Member State and job-seekers coming from other Member States, compliance with the principle of equal treatment may require that State to grant job-seekers’ allowances.

In addition, whilst the ECJ’s rationale in *Förster* is based on the Treaty provisions on EU citizenship, in *Collins* the ECJ relied on the rules governing free movement of workers. This is by no means irrelevant but explains why the approach of the ECJ in those two cases differed. Since job-seekers are considered to be workers for the purposes

113 *Gottwald*, *supra* note 110, para. 36.

114 *Ibid.*, para. 39.

115 Lenaerts, K.; Heremans, T., *supra* note 2, p. 114.

of granting job-seekers' allowances, the link between the host Member State and the job-seeker is of an economic, albeit prospective, nature. However, that is clearly not the case for the link between the host Member State and economically inactive students.

Furthermore, in accordance with the CRD, EU citizens who have completed a continuous five-year period of residence in the host Member State become permanent residents. This means that, within the scope of application of EU law, they are entitled to the same social benefits as nationals. Thus, for permanent residents, the principle of equal treatment applies in full. Hence, cases like *Lassal*, *Dias* and *McCarthy* show that the interpretation of Article 16(1) of the CRD is of paramount importance, since that provision draws the line between unrestricted access to the social welfare system of the host Member State and access which may not go beyond becoming a financial burden on that system.

Finally, it is possible to read *Collins*, *Bidar*, and *Nerkowska* consistently, on the ground that residence requirements do not carry the same weight for the establishment of links with the society of the host Member State as for the dissolution of the existing links with the society of the home Member State. That distinction encourages free movement of EU citizens: they should be able to exercise their right to free movement without having to fear that the strong ties they maintain with the society of their home Member State will be loosened.

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EUROPOS SAJUNGOS PILIETYBĖ, NACIONALINĖS SOCIALINĖS APSAUGOS SISTEMOS IR SOCIALINIS SOLIDARUMAS

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Santrauka. Šio straipsnio tikslas – analizuoti, kaip Europos Sąjungos Teisingumo Teismas (toliau – ETT) siekia gerbti principus, kuriais grindžiamos nacionalinės socialinės apsaugos sistemos (ypač socialinio solidarumo principą), kartu užtikrinant, kad valstybės narės laikytųsi Europos Sąjungos (toliau – ES) teisės, visų pirma Sutarties nuostatų dėl pagrindinių laisvių ir ES pilietybės. Teigiama, kad, siekdamas suderinti šiuos du interesus, ETT laikėsi pozicijos, kad priimančiosios valstybės narės piliečiai turi parodyti tam tikrą finansinį solidarumą su kitų valstybių narių piliečiais, kurie užmezgė „tikrą ar realų ryšį“ su šios valstybės visuomene. Siekiant nustatyti tokio ryšio egzistavimą, priimančiosios valstybės narės valdžios institucijos kiekvienu konkrečiu atveju turi vertinti ES piliečio, siekiančio socialinių išmokų, situaciją. Tačiau, Förster byla yra svarbi išimtis individualiai taikant „tikro ar realaus ryšio“ testą. Nors Förster bylos sprendimas iš esmės nepanaikina Bidar byloje suformuluotų nuostatų, tačiau jis atleidžia priimančiąją valstybę narę nuo pareigos nagrinėti ekonomiškai neaktyvių studentų, kurie kreipiasi dėl išlaikymo paramos ar paskolų, tačiau šalyje dar nėra išgyvenę penkerių metų laikotarpio, situaciją. Be to, gyvenamosios vietos reikalavimo laikymasis yra svarbus veiksnys, kuris gali nustatyti, kiek asmuo integravosi priimančiosios valstybės narės visuomenėje, tačiau jokių būdu tai nėra vienintelis kriterijus. Kiti veiksniai, pavyzdžiui, tai, kad asmuo, prašantis socialinių išmokų, anksčiau dirbo priimančiojoje valstybėje narėje ar yra tos valstybės pilietis, taip pat gali būti svarbūs. Galiausiai straipsnio autorius palaiko teiginį, kad įmanoma skaityti Collins, Bidar, ir Nerkowska bylas nuosekliai, remiantis tuo, kad gyvenamosios vietos reikalavimas nėra tokios pat svarbos užmezgant ryšius su priimančiosios valstybės narės visuomene bei nutraukiant ryšius su buveinės valstybės narės visuomene. Šis skirtumas skatina laisvą ES piliečių judėjimą: jie turėtų galėti pasinaudoti savo laisvo judėjimo teise be baimės, kad bus nutraukti glaudūs ryšiai su savo buveinės valstybės narės visuomene.

Reikšminiai žodžiai: ES pilietybė, laisvas judėjimas, socialinis solidarumas, nacionalinės socialinės apsaugos sistemos, tikras arba realus ryšys, integracija, socialinės išmokos.

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